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A TREATISE

ON

CRIMES

AND

MISDEMEANORS.

BY SIR WILLIAM OLDNALL RUSSELL, KNT.,

LATE CHIEF JUSTICE OF BENGAL.

IN TWO VOLUMES.

VOL. II.

Third Edition.

BY CHARLES SPRENGEL GREAVES, ESQ.,

OF LINCOLN'S INN AND THE INNER TEMPLE,

BARRISTER-AT-LAW,

AND A MAGISTRATE FOR THE COUNTY OF STAFFORD.

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Yeoveley, Reg. *v.*	8 A. & Ell. 806	663, 807
Yewin's case	2 Campb. 638	931, 936
Young, Rex *v.*	3 T. R. 98	280, 288, 336, 309, 774
———	2 T. R. 733	678

A

TREATISE

ON

Crimes and Misdemeanors.

BOOK THE FOURTH.

CHAPTER THE NINTH.

OF LARCENY.

We may now consider of the offence called *larceny*, a word formed by contraction, or rather, as it has been said, by abuse, from latrociny, *latrocinium*, and used to signify the violation of the property of another by theft, where the property is not taken from the house, curtilage, &c. or the person of the owner, under such circumstances of aggravation as have been noticed in the preceding chapters of this book. Formerly there was a distinction of this offence into grand larceny and petit larceny, the offence being grand larceny when the value of the property taken was above twelve-pence, and petit larceny, when the value was only twelve-pence, or under that sum. (*a*) But the late statute 7 & 8 Geo. 4, c. 29, s. 2, enacts, "that the distinction between grand larceny and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act; and every Court whose power as to the trial of larceny was before the commencement of this act limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

By sec. 3, "every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases

Punishments for simple larceny.

(*a*) Stat. West. 1, (3 Edw. 1,) c. 15. This statute made regulations as to such offenders as were to be mainpernable, and mentions larceny as of two kinds, namely, *grand* and *petit*—grand larceny, when the thing stolen was above the value of twelve-pence; and petit larceny, when of the value of twelve-pence, or under.

hereinafter otherwise provided for) be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment." The fourth section contains a general enactment with regard to the place and mode of imprisonment for all indictable offences punishable under the act, by which the Court is empowered to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the Court in its discretion shall seem meet. (*a*)

Punishment of principals in the second degree and accessories.

This statute also contains (s. 61) general provisions for the punishment of principals in the second degree and accessories. It enacts, "that in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years." (*b*)

The offence and punishment of receivers of stolen property will be mentioned in a subsequent chapter.

Definition of larceny.

The definition of the offence of larceny is thus given by an ancient writer. "Furtum est, secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur." (*c*) In subsequent definitions, the taking of the property has been stated to be "felonious;" (*d*) which expression has been rendered as signifying a taking *animo furandi*, or, as the civil law expresses it, *lucri causâ*. (*e*) In a late work of great learning and research, larceny is defined at large to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." (*f*) And in a case of recent occurrence, which was reserved for the consideration of the twelve Judges, the learned Judge who delivered their opinion said, that the true meaning of larceny is, "the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker." (*g*)

(*a*) But by the 1 Vict. c. 90, s. 5, no offender "shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

(*b*) For the proceedings for the trial of accessories, see the 7 Geo. 4, c. 64, ss. 9, 10, and 11, vol. 1, p. 39, *et seq.*

(*c*) Bract. Lib. iii., c. 32, p. 150. So Glanvil, in words nearly similar, says, "Furtum est tractatio rei alienæ fraudulenta, animo furandi, invito illo cujus res illa fuerit." Glanv. lib. x. c. 13. And see Brit. c. 15, p. 22. Flet. lib. i, c. 38, p. 54. 3 Inst. 107.

(*d*) 3 Inst. 107. 1 Hale, 503. 1 Hawk. P. C. c. 33. 4 Blac. Com. 229.

(*e*) 4 Black. Com. 232. 2 East, P. C. c. 16, s. 2, p. 553, citing Just. Inst. lib. iv., tit. 1, s. 1, which, it is observed, seems to go further than the common law in the following definition—furtum est contractatio fraudulosa lucri faciendi causâ, vel ipsius rei, vel etiam usus ejus possessionisve.

(*f*) 2 East, P. C. c. 16, s. 2, p. 553.

(*g*) By Grose, J., in Hammond's case, 2 Leach, 1089.

Of the taking *lucri causâ.*

With respect to a taking, *lucri causâ* it is stated that upon the debate in a case which underwent great discussion one of the learned Judges defined larceny as being "a wrongful taking of goods with intent to spoil the owner of them, *causâ lucri*;" but if this motive be a necessary ingredient, it appears that it is not confined to the acquisition of pecuniary advantage, or to the taking of the thing stolen for the sake of its worth. Thus a taking with intent to destroy is sufficient to constitute larceny, if it be done to effect an object of supposed advantage to the party committing the offence, or to a third person. The prisoner forced open a stable door, took out a horse, led it about a mile to an old coal pit, and there backed it down and killed it, his object being that the horse might not contribute to furnish evidence against one Howarth, who was under a charge for stealing it: he had no intention of deriving any pecuniary benefit from taking the horse. Thomson, C. B., saved the point, whether a taking with this intent constituted larceny: and, upon conference, six Judges against five held it not essential that the taking should be *lucri causâ*: they thought a taking, *fraudulenter*, with intent wholly to deprive the owner of the property, sufficient; but some of the six also thought that the object of protecting Howarth might be deemed a benefit or *lucrum*. (*h*)

It has also been decided, that clandestinely taking a master's corn, though to give the master's horses, is felony: especially if by so feeding them the servant's labour is likely to be diminished. The prisoners had the care of one of their master's teams: the master allowed what beans he thought fit, but they, by means of a false key, took from the granary additional quantities. They were indicted for stealing two bushels, and the jury found that they took them to give their master's horses. A case was reserved upon the question whether this was felony; and, after consideration, eight Judges out of eleven held that it was, and that the purpose to which the prisoners intended to apply the beans did not vary the case; and further, as it was alleged that the additional beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of his horses, but the men's labour was lessened, it appeared that the *lucri causâ* to give themselves ease, was an ingredient in the case. (*i*)

The term *lucri causâ* implies that it should be to gain some advantage to the party committing the offence; if, therefore, a person from idle impertinent curiosity, either personal or political, opens another person's letter, that is not larceny, even if it were done to prevent the letter from arriving at its destination. A parcel containing letters was sent by a coach of which the prisoner was the proprietor, the prisoner, instead of delivering the parcel, opened it, read the letters, and disposed of them as he thought proper; and it was held, that this was a trespass and breach of contract, but no felony, although it was done to gratify some idle curiosity, or perhaps to prevent the letters from arriving. (*j*)

(*h*) Rex *v.* Cabbage, East. T. 1815 MS. Bayley, J., and Russ. & Ry. 292.

(*i*) Rex *v.* Morfit and another, East. T. 1816, MS. Bayley, J., and Russ. & Ry. 307.

(*j*) Reg. *v.* Godfrey, 8 C. & P. 563, Lord Abinger, C. B.

Larceny by persons employed in mines.

Upon an indictment for stealing one hundred pounds weight of copper ore the property of S. Davey and others, it appeared that Davey and others were the adventurers in a mine, and the prisoners and two others were tributers in their mine, but not adventurers. The prosecutors were tributers also in the mine, but not adventurers. Tributers (generally in companies of four) take from the adventurers a certain number of yards in the mine, called a pitch, from which they dig out ore, and throw it into a heap or pile in some level, whence they convey it along the level to a shaft, and so up to the surface, there it is taken by the adventurers, and the tributers do not interfere further. The tributers are paid according to their agreement, so much in the pound on the selling price of the ore; where it is very good, they receive a smaller sum than where it is inferior, because the same quantity of labour, (which is what they contribute) produces a more valuable commodity in the one case than in the other. The prosecutors' pitch contained better ore than the prisoners'. The prosecutors received 2*s.* 4*d.* in the pound from the adventurers, the prisoners, 5*s.* 6*d.* The prisoners had taken a large quantity of ore from the prosecutors' pile and added it to their own. It was objected that by taking ore out of one pile and putting it in another, the prisoners did not steal from the adventurers, for both piles remained in the possession of the adventurers, if the tributers were but servants; and if the tributers were tenants in common, still, as both piles were intended to come, and ultimately would come into the hands of the adventurers, there could be no stealing from them. For the prosecutors it was answered that the adventurers were cheated, for they would have to pay 5*s.* 6*d.* in the pound on the ore removed to the prisoners' pile, whereas, if it had remained in the prosecutors' pile, they would pay only 2*s.* 4*d.* in the pound; and besides, that the unauthorized removal of the ore from the prosecutors' pile, with a fraudulent intention to appropriate it to their own benefit, was a larceny the moment it was removed, which could not be cured by returning it in any way to the adventurers; and the very learned Judge (*k*) who tried the case, thought a larceny was proved; but upon a case reserved, the Judges held the conviction wrong. (*l*)

But now by the 2 & 3 Vict. c. 58, s. 10, "For the prosecution and punishment of frauds in mines by idle and dishonest workmen removing or concealing ore for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in or proprietors of such mines, or the honest and industrious workmen therein," it is enacted, "that if any person or persons employed in or about any mine within the county of Cornwall shall take, remove, or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud the proprietor or proprietors of, or adventurer or adventurers in such mine, or any one or more of them respectively, or any workman or miner employed therein, then and in every such case respectively, such person or persons so offending shall be deemed, and taken to be guilty of felony, and being convic-

(*k*) Patteson, J., who differed from the other judges on the case reserved.

(*l*) Rex *v.* Webb, R. & M. C. C. R. 431. Qu. whether the better course would not have been to have laid the property in the other company of tributers, as it might have been held that they had such a special property in the ore as would have supported an indictment in their name? C. S. G.

ted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

It will be attempted to notice the principal points which have been decided concerning the offence of larceny, in an inquiry, I. As to the taking and carrying away of personal goods necessary to constitute this offence; II. As to the personal goods in respect of which it may be committed; III. As to the ownership of the goods; and, IV. As to the indictment, trial, and punishment.

SECTION I.

Of the taking and carrying away of the personal goods of another necessary to constitute the offence of Larceny.

Of the actual taking and trespass.

THERE must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away. (*l*) But the taking need not be by the very hand of the party accused: so that if a thief fraudulently procure a person innocent of any felonious intent to take the goods for him, (as if he should procure an infant within the age of discretion to steal the goods) his offence will be the same as if he had taken the goods himself; and it should be so charged. (*m*)

Any removal of the goods with the felonious intent, is a sufficient carrying away.

It appears to be well settled, that the felony lies in the very first act of removing the property: and therefore, that the least removing of the thing taken from the place where it was before, with an intent to steal it, is a sufficient asportation, though it be not quite carried away. (*n*) Thus, where a guest who had taken the sheets from his bed, with an intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, it was holden that he was guilty of larceny. (*o*) And a like decision was made, where a person who had taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close; (*p*) and also, where a person intending to steal plate took it out of a trunk wherein it had been deposited, and laid it on the floor, but was surprised before he could carry it away. (*q*) And in a more modern case it was holden by all the judges, that the removal of a parcel from the head to the tail of a waggon, with an intent to steal it, was a sufficient asportation to constitute larceny. (*r*) But where a parcel was not removed, its position only being altered on the spot where it lay, the judges came to a different conclusion.

But there must be an entire

(*l*) Kel. 24. 1 Hawk. P. C. c. 33, s. 1. Bac. Ab. tit, *Felony* (C). 2 East, P. C. c. 16, s. 3, p. 554.

(*m*) 1 Hale, 514. 2 East, P. C. c. 16, s. 3, p. 555. So in the crime of murder, if A. procure B., an idiot or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. *Ante*, Vol. 1, p. 484.

(*n*) 3 Inst, 108. 1 Hawk. P. C. c. 33, s. 25. Bac. Ab. tit. *Felony* (D). 4 Black. Com. 231. 2 East, P. C. c. 16, s. 4, p. 555.

(*o*) 3 Inst. 108. 1 Hale, 507, 508.

(*p*) 3 Inst. 109.

(*q*) Simson's case, Kel. 31.

(*r*) Coslet's case, 1 Leach, 236.

possession of the goods by the thief, though but for an instant.

The indictment against the prisoner was for stealing a wrapper and four pieces of linen cloth; and the facts proved were, that the pieces of linen cloth were packed up in the wrapper in the common form of a long square, and laid lengthways in a waggon; that the prisoner set the package on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but that he was discovered and apprehended before he had taken anything out of it; and all the judges agreed, upon this case being saved for their consideration, that it did not amount to larceny, though the intention of the prisoner to steal was manifest. They held, that some removal of the goods from the place where they were was necessary; and the party accused must, for the instant at least, have the entire and absolute possession of them. (*s*) But if every part of the thing is removed from the space that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient. Thus, where the prisoner had lifted up a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot; and it did not appear that the bag was entirely removed from the space which it at first occupied in the boot; but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied: the judges held, upon a case reserved, that there was a complete asportavit. (*t*) And by the same rule, drawing a sword partly out of the scabbard, will constitute a complete asportavit. If a party direct the ostler of an inn to bring out a horse, which he points out as his own, and the ostler leads out the horse for him to mount, this is a sufficient taking, if he intended to steal the horse. The prisoner went into the stable of an inn, and pointing to a mare, said to the ostler, "that is my horse, saddle him;" the ostler did so, and the prisoner tried to mount the mare in the inn-yard, but from the noise made by some music the mare would not stand still: the prisoner then directed the ostler to lead the mare out of the yard for him to mount; the ostler led the mare out, but before the prisoner had time to mount her, a person who knew the mare came up and the prisoner was secured; it was held that if the prisoner caused the mare to be led out of the stable intending to steal her, that was a sufficient taking to constitute a felony. (*tt*)

And there must be a severance.

In a case where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them towards the door, as far as the string would permit, and was then stopped; this was holden not to be a felony, because there was no severance. (*u*) And in a more ancient case, where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, on the ground

(*s*) Cherry's case, Oxford Lent Ass, 1781, and East. T. 1781. 2 East, P. C. c. 16, s. 4, p. 556. 1 Leach, 236, 237, note (*a*).

(*t*) Rex *v.* Walsh, East. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 14.

(*tt*) Rex *v.* Pitman, 2 C. & P. 423, Garrow, B.

(*u*) Anon. *cor.* Eyre, B., 2 East, P. C. c. 16, s. 4, p. 556. So where the prisoner drew the end of a piece of lace through a hole in a window and shook the card on which the remainder of the lace was wrapped, but not so as to remove it from its place, it was held not to be larceny. Newman's case, Talf. Dick. Q. S. 216.

that as the purse still hung to the pocket of the owner by means of the strings and keys, it was in law still in his possession. (*x*)

Where there has been a sufficient taking, the offence will not be purged by returning the goods.

But where there has once been a sufficient taking of the goods by the thief, the offence is completed, and will not be purged by a returning of the goods, as has been already shewn in the case of a taking by robbery. (*y*)

Upon an indictment for larceny by a servant in stealing his master's plate, it appeared that, after the plate was missed, but before complaint made to a magistrate, the prisoner replaced it: the plate had been pawned by the prisoner, who had redeemed it. The prisoner had also on previous occasions pawned plate and redeemed it. Hullock, B. (Holroyd, J. being present) left it to the jury to say, whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time, and then return it; for that in the latter case it was no larceny. (*z*) But where a servant was indicted for stealing a silver sauce-pan, which had been pledged at a pawnbroker's, and the counsel for the prisoner asked the jury to consider whether he took it feloniously, or intending at the time he pawned it to redeem it as soon as he could; Gurney, B., in summing up, observed, "You will say whether the prisoner stole this property or not. I confess, I think, that if this doctrine of an intention to redeem property is to prevail, Courts of Justice will be of very little use. A more glorious doctrine for thieves, it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined." (*a*)

Of the *animus furandi.*

One of the most material considerations respecting the taking and carrying away of goods necessary to constitute larceny is, whether the fact were done *animo furandi*—"cum animo dico, quia sine animo furandi non committitur." (*b*) The ordinary discovery of such felonious intent is where the party commits the fact clandestinely, or, upon its being laid to his charge, denies it: but this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi.* It is useful to refer to those points which have already come under consideration: but new cases will continually occur, in which the felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline to acquittal than conviction. (*c*)

(*x*) Wilkinson's case, 1 Hale, 508. And see also as to the possession of the property by the thief, in cases of robbery, Lapier's case, *ante*, vol. 1, p. 871, and Farrel's case, ibid. 870.

(*y*) *Ante*, vol. 1, p. 871. And see 2 East, P. C. c. 16, s. 5, p. 557.

(*z*) Rex *v.* Wright, O. B. 1828, Carr. Supp. 278, 9 C. & P. 554, note. "This decision has given rise to much discussion in various cases, and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances, where it has clearly appeared that the party only intended to raise money on the property for a temporary purpose, and, at the time of pledging the article, had a reasonable and fair expectation of being able shortly, by the receipt of money, to take it out of pawn, juries, under the advice of the judge, have acted upon the doctrine and acquitted. But in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and convicted." Reporter's note, 9 C. & P. 554.

(*a*) Reg. *v.* Phetheon, 9 C. & P. 552.

(*b*) *Ante*, p. 2.

(*c*) 1 Hale, 509. 4 Blac. Com. 232.

Cases where the taking is only a trespass.

It is clear that the taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another openly before him or other persons, otherwise than by apparent robbery, this carries with it an evidence only of a trespass, because done openly in the presence of the owner or of other persons who are known to the owner. (*d*) And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned. (*e*) Again, if a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them either returns them to the place were they were, or acquaints the owner with his having taken them, this is no felony, but at most a trespass. (*f*) And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbour's horse which is depasturing on the common, rides about upon it to find his cattle, and, when he has done with it turns it again upon the common. (*g*) But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it was taken.

Phillips and Strong's case. The prisoners took two horses from a stable, rode them to a place at a considerable distance, and there left them, proceeding on their journey on foot; and the jury having found that the horses were taken by the prisoners only in order to ride them, and afterwards leave them, it was holden to be trespass, and not larceny.

In a case where two men were indicted for stealing a mare and a gelding, it appeared that the prisoners went to the stables of the prosecutor (who was an innkeeper at a place called Petty France), in the night-time, opened them and took out the mare and the gelding, and rode on them to Lechlade, a place above thirty miles off, where they took them to different inns, and left them in the care of the ostlers, directing the ostlers to clean and feed them, and saying that they should return in three hours: and it appeared also that in the course of the same day the prisoners were taken at a distance of fourteen miles from Lechlade, walking towards Farringdon, in Berkshire, in a direction from Lechlade. Upon these facts, the jury, having been directed to consider whether the prisoners, when they took the mare and gelding, intended to make any further use of them than to ride them for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out, found the prisoners guilty; but they added that they were of opinion, that the prisoners meant merely to ride the horses to Lechlade, and to leave them there; and had no intention to return for them, or to make any further use of them. At a conference of the judges this finding was considered; when one of them (*h*) thought that the case amounted to felony, because there was no intention to return the horses to the owner, but, for ought the prisoners concerned themselves, to deprive him of them: and another of the judges appears to have entertained doubts upon the case. (*i*) But the rest of the judges held it to be only a trespass, and no felony, as there was no intention in the prisoners to change the property, or make it their own, but only to use for the particular purpose of saving their labour in travelling. They agreed, however, that it was a question for the jury; and that, if the jury had found the prisoners

(*d*) 1 Hale, 509.
(*e*) 2 East. P. C. c. 16, s. 98, p. 661.
(*f*) 1 Hale, 509 4 Black. Com. 232.
(*g*) 1 Hale, 509.
(*h*) Grose, J.
(*i*) Lord Alvanley. It appears that his lordship, who had been recently called to the bench of C. B., not having been present when the case was first under consideration, declined giving any express opinion. 2 East, P. C. c. 16, s. 98, p. 663, note (*a*).

guilty generally upon this evidence, the verdict could not have been questioned. (*j*)

Where the prisoner took away a horse and other property all together, and after going some distance turned the horse loose and proceeded on foot to a place where he was stopped attempting to sell some of the other property; it was left to the jury to say, whether the prisoner had any intention of stealing the horse, for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be in point of law guilty of stealing the horse. (*k*)

Clandestinely taking away articles in order to induce the owner, a girl, to fetch them, and thereby to give the party an opportunity to solicit her to commit fornication with him is not a felonious taking. The prisoner took from the house in the night a young girl's bonnet, and some other articles of her dress, and carried them to a hay-mow where he had twice had connection with her; and the jury thought that he only took them in order that she might again go to the mow, and that he might have another opportunity of soliciting her to repeat the connection. Upon a case reserved the Judges thought the taking with such an intent was not felonious, and the prisoner was pardoned. (*l*)

The taking may be by mistake, without any *animus furandi*.

A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and, by mistake, without knowing or taking heed of the difference, shear them, it is no felony. But if B. knew them to be the sheep of another person, and tried to conceal that fact; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them; this would be evidence of felony. (*m*) And a like conclusion may be drawn, where a party having possession of another's property, appears desirous of concealing it, or of preventing the inspection of the owner, or of any person who may make the discovery; or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. On the other hand, a mode of conduct of a different description in these several respects will be evidence to rebut any felonious intent. (*n*)

The *animus furandi* may also be negatived by a claim of right.

The circumstance of the goods being taken on a claim of right may also negative any *animus furandi*. In one instance, indeed, a man may be guilty of felony in taking his own goods; namely, where, having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. (*o*) But regularly a man cannot commit felony of goods wherein he has a property. Thus, if A. take away the trees of B., and cut them into boards; or, if A. take the cloth of B. and make it into a doublet; B. may take the boards or the cloth, and it will not be felony. (*p*)

(*j*) Rex *v.* Phillips and Strong, *cor.* Lawrence, J., Gloucester Spr. Ass. 1801, and East. T. and Trin. T. 1801. 2 East, P. C. c. 16, s. 98, p. 662, 663.

(*k*) Rex *v.* Crump, 1 C. & P. 658, Garrow, B.

(*l*) Rex *v.* Dickinson, Mich. T. 1820, MS. Bayley, J., and Russ. & Ry. 420.

(*m*) 1 Hale, 506, 507.

(*n*) 2 East, P. C. c. 16, s. 97, p. 661.

(*o*) 1 Hale, 513. 2 East, P. C. c. 16, s. 95, p. 659. 3 Inst. 110.

(*p*) 1 Hale, 513.

So if A. take the hay or corn of B., and mingle it with his own heap or cock, or take B.'s cloth, and embroider it; B. may retake the whole heap of corn or cock of hay (at least so much of them as cannot be easily distinguished from his own), and the garment with the embroidery; and such retaking will be no felony. (*q*) If goods be taken on a claim of right or property in them, it will be no felony; at the same time it is matter of evidence whether they were *bonâ fide* so taken, or whether they were not taken from the person actually possessing them, with a thievish and felonious intent. And therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them would be a felony. (*r*)

Where a keeper found snares, which had been set by the prisoner, with game in them, and took the game and snares for the use of the lord of the manor, and the prisoner demanded them with menaces, and the keeper thereon gave them up; it was left to the jury to say, whether the prisoner acted under a *bonâ fide* impression that he was only getting back the possession of his own property, for although he might be liable for a trespass, yet, if he demanded them under a *bonâ fide* belief that he was entitled to them as his property, he would not be guilty of larceny. (*s*)

If the owner of land upon which a horse has strayed take the horse *damage feasant*, or if the lord of a manor seize a horse as an estray, though perchance he has no title so to do, yet as the act is not done *felleo animo*, it will not be felony. (*t*) But any act of this kind is open to proof of a felonious intention; so that if new marks are given to the horse to disguise him, or his old marks are altered, these will be considered as presumptive circumstances of a thievish intent. (*u*)

In a case where, after a seizure of uncustomed goods, some persons broke at night into the house where they were deposited, with a design to retake them for the benefit of the former owner, it was holden that any presumption of a felonious intent to steal, as laid in the indictment, (which was for a burglary) was rebutted by the fact which the jury found, namely, that the prisoners intended to retake the goods on the behalf of their former owner. (*v*)

Of taking corn by gleaning.

The following observations on the subject of a felonious taking of corn by *gleaning*, are made in a modern work in which much useful matter is collected:—"An idea very universally prevails among the lower classes of the community, that they have a right to glean, that is, to take from off the land the corn that remains thereon after the harvest has been gotten in; than which notion nothing can be more erroneous. By custom, indeed, such a right may possibly in some particular places exist; and the laudable kindness of tenants generally induces them to permit the poor to collect the corn they have left upon the land, and to appropriate it to their own use. As a right, however, it has no more existence than a right to take the tenant's furniture from out of his messuage,

(*q*) 1 Hale, 513. 2 East, P. C. c. 16, s. 95, p. 659.

(*r*) 3 Burn's J. D. & W. 414, citing 1 Hale, 507. 1 Hawk. c. 33, s. 8. Farre's case, Kel. 43.

(*s*) Rex *v.* Hall, MS. C. S. G., and 3 C. & P. 409, Vaughan, B. See this case, *ante*, vol. 1, p. 872, and see Rex *v.* Holloway, 5 C. & P. 524.

(*t*) 1 Hale, 506, 509.

(*u*) 2 East, P. C. c. 16, s. 95, p. 659.

(*v*) Rex *v.* Knight and Roffey, 2 East, P. C. c. 15, s. 22, p. 510, and c. 16, s. 95, p. 659.

and the pillage in the one case is as much felony as the plunder would be in the other: for the act is not simply a trespass, but a felony; and the compiler well remembers a conviction at the Old Bailey, on an indictment found for the exercise of this supposed right. The parties were tried before Mr. Justice Rooke, (if he mistake not) about six years ago." (*w*)

But upon this it is submitted, that though the right to take corn by gleaning has no existence, except possibly by custom in some particular places, (*x*) such a taking will not necessarily amount to a felony. Undoubtedly it will be an act open, like other acts of trespass which have been mentioned, to proof of a felonious intention, upon which it is peculiarly the province of the jury to determine; but it can hardly be contended, that such taking will amount to larceny, if it should appear to have been merely a taking of the corn left on the ground after the crop had been carried, and to have been done openly, under a claim of right not altogether without colour, though not capable of being established by proof, or to have been done under an apparent sanction, arising from former similar acts of the same individual, or of others in the neighbourhood, having been allowed by the occupier of the land.

Where there is any doubt as to the right, the court will direct an acquittal.

It has been observed, with respect to cases where goods have been taken on a claim of right, that if there be any fair pretence of property or right of the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal; as it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy. (*y*) The master of a Prussian vessel, captured by a British ship, and carried into the port of Weymouth, was held not to be guilty of larceny in taking goods from the vessel under the particular circumstances; there being no evidence that he took them for the purpose of converting them to his own private use. (*z*)

Where the taking is by finding, it will not amount to larceny, even though there be the *animus furandi*. But this doctrine must be understood with great limitation.

There is one case in which it has been holden, that the taking will not amount to a larceny, though it be accompanied with the *animus furandi;* namely, where the taking is by a *finding* of the property. Thus, it is laid down in the books, that if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny, for the first taking was lawful. (*a*) And again; if A. find the purse of B. in the highway, and take it and carry it away, with all the circumstances that usually prove the *animus furandi*, as denying it, or secreting it, yet it is not felony. (*b*) But though, where the particular circumstances of any case furnish a presumption of an intended dereliction of treasure trove, or waif, or stray, on the part of the owner, no larceny can be committed by taking them before seizure by the lord; yet, in other cases the doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence. (*c*) It will not avail, therefore, where a man's goods being in a place in

(*w*) Woodf. Landlord and Tenant, Chap. IX., p. 242 (ed. 1814).

(*x*) Steel *v.* Houghton & Wife, 1 Hen. Black. 51. Rex *v.* Price, 4 Burr. 1925.

(*y*) 2 East, P. C. c. 16, s. 95, p. 659.

(*z*) Rex *v.* Van-Muyen, Russ. & Ry. 118.

(*a*) 3 Inst. 108. 1 Hawk. P. C. c. 33, s. 2. Bac. Ab. tit. *Felony* (C).

(*b*) 1 Hale, 506.

(*c*) 1 Hale, 506. 2 East, P. C. c. 16, s. 99, p. 664.

which ordinarily and lawfully they are or may be placed, a person takes them *animo furandi.* (*d*) If therefore, a man's horse be going in his ground, or upon his common, and a person takes it *animo furandi*, it is no finding, but felony. (*e*) So if the horse stray into a neighbour's ground or common, it is felony in him that so takes him (*f*) And where a prisoner found a horse straying on a public road, and a doubt was suggested, whether a person appropriating a horse to his own use, under such circumstances, could be guilty of a felony; Mr. B. Hullock, said, "I will not say it would not be felony; I think it would." (*g*) So where upon an indictment for stealing a ewe and a lamb, it appeared that the prosecutor's flock of sheep had strayed through a gap into a road, and had all been recovered except the ewe and lamb mentioned in the indictment, which were afterwards seen grazing in a green lane, along which the prisoner was seen driving some sheep, and the prisoner some days afterwards sold the ewe and the lamb about ten miles from the place; Cresswell, J., told the jury that if a person find an animal straying in a road, and take it with intent to dispose of it to his own use, it is a larceny; and that in this case the question for their consideration was whether the prisoner so took the ewe and the lamb, or whether they got mixed with the sheep he was driving, and he took them away by mistake. (*gg*) And, even if the place where the goods are found is not one in which ordinarily they would be deposited, circumstances may shew the taking to have been felonious. Thus, if a man should hide a purse of money in a corn-mow, and his servant finding it should take part of it, the taking will be felony, if it appear by circumstances that the servant knew that his master laid it there; but in such a case it would be required that the circumstances should be pregnant, otherwise it might reasonably be interpreted to be a bare finding, on account of the place being so unusual for such a deposit. (*h*)

Cases of hackney coachmen taking articles left in their coaches. Lamb's case.

The following cases also further shew that the taking *animo furandi* of goods which have been *found* by the party may amount to larceny. A gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use. This was holden to be felony, on the ground that the coachman must have known where he took up the gentleman and his trunk, and where he set him down; and that he ought therefore to have restored it to him. (*i*)

Wynne's case.

In a late case, where the prisoner was indicted for stealing a box, containing a quantity of wearing apparel and two bonds, it appeared that he was a hackney coachman, and that he took up the prosecutor with several trunks and packages, amongst which was the box in question, at an hotel in the Adelphi, and set him down in Orchard Street, Portman Square, where all the articles were taken out of the coach by the prisoner and the prosecutor's servant, except this box, which was corded, and had been deposited under the seat of the coach. The prisoner received his fare and drove away, after

(*d*) 1 Hale, 506.

(*e*) 1 Hale, 506.

(*f*) Ibid. 2 East, P. C. c. 16, s. 99, p. 664.

(*g*) Hutchinson's case, 1 Lewin, 195.

(*gg*) Reg. *v.* Cook, Gloucester Spring Ass. 1842, MS C. S. G. "If the sheep of A. stray from the flock of A. into the flock of B., and B. drives them along with his flock, or by pure mistake shears him, this is not a felony; but if he know it to be another's, and mark it with his marks, this is an evidence of a felony." 1 Hale, 507.

(*h*) 1 Hale, 507.

(*i*) Lamb's case, O. B. 1694. 2 East, P. C. c. 16, s. 99, p. 664.

which, in a few minutes, the box was missed; but the prisoner and the coach were quite gone; and it was not till several days had elapsed, and after hand bills had been dispersed and advertisements inserted in the public prints, offering a reward to any person who should bring home the box, that the prisoner was apprehended. The box was then found at the house of a Jew, to which the prisoner said he had taken it: but it was uncorded, the hasps of it were forced off, and it contained only a part of the property which was in it when it was lost, the two bonds and several of the articles mentioned in the indictment, having been taken away. The case was left to the jury, to consider whether they were satisfied that the prisoner had uncorded the box, not merely from a natural, though idle curiosity, but with an intention to embezzle some part of its contents; and they were of opinion that he uncorded the box and destroyed the papers with an intent to embezzle the goods found in the box. They accordingly found him guilty; and the case being reserved for the consideration of the twelve judges, a majority of them were of opinion that the conviction was proper. (*j*)

Sears's case.

Another case of a larceny by a hackney coachman of a parcel left in his coach may be here mentioned, though the circumstances of it appear to have left but little room for the defence that the prisoner obtained the goods by *finding*. The prisoner was indicted for stealing a parcel of calico, and other articles the property of Sarah Dixon. The prosecutrix hired him to drive her from her house to a linendraper's shop, where she purchased the articles named in the indictment; which were tied up in a parcel, and put into the coach. The prisoner then drove the prosecutrix back to her house; and, on getting out of the coach, she ordered him to give the parcel to her servant; but this he neglected to do. The prosecutrix went into the parlour of her house; but returned very shortly to the street-door and paid the coachman his fare; upon which he drove away. Upon the loss of the things being discovered, they were advertised, and a reward offered to any person who should restore them; but without effect. A few days afterwards the prosecutrix met the prisoner; but he denied all knowledge of her person, or of the things, or of his ever having had such a fare, and said that he had only driven the coach two days. The parcel, however, was traced to the prisoner's possession, and it appeared that it had been opened, and three yards taken off from the piece of calico. The prisoner in his defence acknowledged that he had driven the prosecutrix from her house to the linendraper's and back again; but he denied that she ever desired him to deliver the parcel to her servant. Upon this evidence the prisoner was convicted. (*k*)

Cases of bank-notes, &c. found by the prisoners, and converted to their own use.

The doctrine as to a felonious taking of goods, which have been *found* by the party, was further confirmed in two more recent cases. In the first of these cases it appeared that a pocket-book containing bank-notes had been found by the prisoner in the highway, and afterwards converted by him to his own use. Upon which Lawrence, J., observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the

(*j*) Wynne's case, O. B. 1786, *cor.* Eyre, B., and East. T. 1786. 1 Leach, 413, 2 East, P. C. c. 16, s. 99, p. 664.

(*k*) Sears's case, *cor.* Ashhurst, J., Old Bailey. 1789. 1 Leach, 415, note (*b*).

property, converts it to his own use, such conversion will constitute a felonious taking. (*l*) And in the subsequent case the two prisoners (father and son) were convicted of stealing a bill of exchange, upon evidence of their having found and converted it to their own use, by endeavouring to negociate it. Gibbs, J., stated to the jury, that it was the duty of every man who found the property of another to use all diligence to find the owner, and not to conceal the property, (which was actually stealing it,) and appropriate it to his own use. (*m*) And in a recent case, a very learned judge said, "Suppose a person finds a cheque in the street, and, in the first instance, takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it." (*n*)

Where upon an indictment for stealing a hat, it appeared that the prosecutor, having his hat knocked off by some one, the prisoner, who had his own hat on his head, picked up the prosecutor's hat, and carried it home; Park, J. A. J., said, in summing up, "If a person picks up a thing, when he knows that he can immediately find the owner, and instead of restoring it to the owner, he converts it to his own use, this is felony." (*o*)

Money found in the house of a master by a servant.

If a servant find money in his master's house, it is his duty to inquire of his master whether it is his money, and, if instead of doing so, he converts the money to his own use, he is guilty of larceny. Upon an indictment for stealing four 5*l.* notes in the dwelling-house of her master, it appeared that the prisoner when asked by her master what she had done with the money, at first said, she had not seen it, but afterwards said, she found the notes in the passage of the house; and it was contended that, if that statement was true, the prisoner was not guilty of felony, as their being in the passage, would not necessarily lead to the conclusion that the notes were her master's property, and she might have supposed that they were dropped by some person, who had come to the house. Park, J. A. J., "It is suggested that this is not a felony, because, the prisoner might have found the notes in the passage. What passage? Why the passage of her master's house. What, if I drop a ring, is my servant to take it away?" After referring to the case before Mr. J. Lawrence, (*p*) the learned judge proceeded, "In the present case, there was no necessity for the prisoner to keep the property till it was advertised; for, as she found it in her master's passage, she should have ascertained whether it was her master's; at least she should have asked him that question." (*q*)

(*l*) Anon. *cor.* Lawrence, J., Stafford Sum. Ass. 1804, MS.

(*m*) Rex *v.* James, and Barnabas Walters, *cor.* Gibbs, J., Warwick Sum. Ass. 1812.

(*n*) Per Parke, B., Merry *v.* Green, 7 M. & W. 623.

(*o*) Rex *v.* Pope, 6 C. & P. 346.

(*p*) *Ante*, note (*l*).

(*q*) Reg. *v.* Kerr, 8 C. & P. 176, Park, J. A. J. In the first report of the Criminal Law Commissioners it is said, "The intention of a person taking property by finding will be felonious or not according as his conduct in omitting to use due diligence to discover the owner, or in concealing the property, or in other circumstances shews that in the taking he had or had not a design to deprive the owner altogether of his property." But this position seems open to considerable doubt, as it entirely omits any reference to the question upon which cases of this kind seem in some instances to have been decided, namely, whether at the time the chattel was found the prisoner knew or had the means of ascertaining to whom it belonged. The case of Merry *v.* Green, *infra*, is a strong authority to shew that the conduct of the party at the time of the finding, however strongly indicative of a fraudulent and felonious intent is not alone sufficient to make the conversion of the property to his own use a felony. C. S. G.

Conversion of a large sum of money, with a felonious intent, which was found in a bureau delivered to a carpenter to be repaired.

A singular case occurred at no very distant period, of a conversion, with a felonious intent, of a large sum of money found in a bureau, which had been delivered to a carpenter, for the purpose of being repaired. The point arose in the Court of Chancery upon the following facts. Ann Cartwright died possessed of the bureau, in a secret part of which she had concealed nine hundred guineas *in specie*. After her death, Richard Cartwright, her personal representative, lent the bureau to his brother Henry; who took it to the East Indies and brought it back, without the contents of it being discovered. It was then sold to a person named Dick for three guineas, who delivered it to one Green a carpenter, for the purpose of repairing it. Green employed a person named Hillingworth who found out the money. Hillingworth received only a guinea for his trouble; but, in consequence of his discovery, the whole sum of nine hundred guineas was secreted by Green, by Green's wife, and by one E. Sharpe, and converted to their own use. On these suggestions, Cartwright, the personal representative of the original owner of the bureau, filed a bill of discovery against Green and his wife, and Mrs. Sharpe; in which bill Dick joined, but did not claim any of the money on his own account; and the defendants demurred to the bill on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that he should not trust himself to say anything upon them until he had seen all the cases, and consulted some of the judges. Some time afterwards his Lordship delivered his opinion, and said—"I have looked into the books, and have talked with some of the Judges and others; and I have not found in any one person a doubt that this is a felony. To constitute felony, there must, of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt that this bureau being delivered to Green, for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; but not being entrusted with it for the purpose of opening it, that is felony, according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." (*r*)

Where money found in the secret drawer of a bureau,

Where a person purchased at a public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use, and at the time of

(*r*) Cartwright *v.* Green, 8 Ves. 405. 2 Leach, 952.

was appropriated to his own use by the purchaser of the bureau, held that if the purchaser knew that the bureau and not its contents were sold to him, it was larceny; *secus*, if he had reasonable ground for believing that he bought both the bureau and its contents.

the sale no person knew that the bureau contained anything whatever, it was held that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use: but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was not larceny. To trespass for false imprisonment, the defendants pleaded that the plaintiff stole a purse containing money, the property of one Tunnicliffe, and that they gave him in charge to a peace officer to be taken before a magistrate to be examined concerning the premises. (*s*) At the trial it appeared that at a sale by public auction, in October, the plaintiff purchased at the sum of 1*l.* 6*s.* an old secretary or bureau, the property of Tunnicliffe: the plaintiff kept the bureau in his house, and on the 18th of November following, Garland, a carpenter's apprentice, while doing some repairs at the bureau, remarked to the plaintiff that he thought there were some secret drawers in it, and touching a spring he pulled out a drawer, which contained some writings; the plaintiff then discovered another drawer, in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank-notes. Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse, and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came in possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the money to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate on a charge of felony, when he was discharged, the magistrate doubting whether a charge of felony could be supported. A witness stated that after the bureau was sold some one of the bystanders observed that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said, "so much the better for the buyer; I have sold it with its contents." The auctioneer, however, stated that there was one drawer which would not open, and that what he said was, "that is of no consequence, I have sold the secretary, but not its contents." It did not appear that any person knew that the bureau contained anything whatever. Tindal, C. J., told the jury that as the property had been delivered to the plaintiff, as the purchaser, he thought there had been no felonious taking, and left to them the question of damages only, reserving leave for the defendant to move to enter a nonsuit; and after argument, and time taken to consider, the following luminous judgment was delivered by Parke, B., "My Lord Chief Justice thought in this case that, even assuming the facts, of which evidence was given by the defendants to be true, the taking of the purse and abstracting its contents was not a larceny, and that is the question which he reserved for the opinion of the Court, giving leave to move to enter a nonsuit. After hearing the argument,

(*s*) The replication was *de injuriâ*.

we have come to the conclusion that, if the defendants' case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff, which ought to have been left to the jury, and which, if believed by them, would have given a colourable right to him to the contents of the secretary, as well as to the secretary itself; *viz.*, the declaration of the auctioneer, that he sold all that the piece of furniture contained, with the article itself; and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial, and not a nonsuit. But if we assume, as the defendants' case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary, if there happened to be anything in it; and, indeed, without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny. It was contended, that there was a delivery of the secretary, and the money in it to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us, that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this. The old rule that, "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," (*s*) has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. (*t*) Under this head, fall the cases where the finder of a pocket-book with bank-notes in it, with a name on them, converts them *animo furandi;* or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain; or a tailor who finds and applies to his own use, a pocket-book, in a coat sent to him to repair by a customer whom he must know: all these have been held to be cases of larceny, and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but, if the finder from the circumstances of the case must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass, and it seems also from *Wynne's case*, (*u*) that if, under the

If the finder knows the owner, or from any mark on the chattel, or the circumstances under which it is found, the owner can be reasonably ascertained, the fraudulent conversion is a larceny.

(*s*) 3 Inst. 108.

(*t*) *Ante*, p. 13 and 14.

(*u*) *Ante*, p. 13. This position is at variance with the following case, and with 2 East, P. C., p. 665, and does not seem fairly deducible from Wynne's case, as there the prisoner must have known the box was put in the coach, and as he assisted in taking out the luggage, *his* leaving it behind was evidence of an intention at that time to convert it to his own use. There was no *evidence* of his intending to restore it, but a statement after he was in custody that he had been the same day to the prosecutor's for that purpose, of the truth of which nothing is stated in the report. C. S. G.

like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny. We, therefore, think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury, whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colour of right to the property." (*v*)

Intention at the time of the finding.

It should seem that in cases of this kind the jury, before they convict, ought to be satisfied that the prisoner intended at the time when he found the article to convert it to his own use, for if at the time he found the article he took it with the intention of discovering the owner and restoring it to him, and it afterwards came into his mind to convert it to his own use, and he did so, it should seem that it would not be larceny. A coat was left lying on a stone seat by a road side, and was soon afterwards found in the prisoner's possession: Bayley, B., told the jury that in order to the prisoner's being found guilty of larceny they must be of opinion that at the time the prisoner took the coat he did so *animo furandi*; that he might have taken it very honestly, intending, if it was inquired after, to restore it to the owner, or he might have taken it intending to make it his own. (*w*)

In cases of this nature, where the taking was by *finding*, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which shew that the party made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which shew that he endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found. (*ww*)

The felonious intent may be negatived as to one of the parties where it appears that his object was to effect the apprehension of the others, though he had concerted the commission of the felony, with a view to a reward.

Where there is clearly the *animus furandi* in some of the parties concerned in a felonious taking, it may be negatived as to another party, if it appear that such other party had a different object in view from that of obtaining any share of the stolen property. J. Donally was indicted for a burglary in the house of a Mr. Poole, and G. Vaughan as accessory before and after the fact to the "said felony and burglary." It appeared that Donally, at the instigation of Vaughan, who was in the employment of the Police office at Bow-street, had concerted, with three other men, to rob the house of Mr. Poole, and that it was agreed that Vaughan and another officer should lie in wait to apprehend the three other men, and that the reward for their conviction should be divided amongst them. It further appeared, that Vaughan had told Mr. Poole that his house would be robbed that night, desiring him to mark a piece of cloth, and leave it on the counter, to take care to fasten the latch of the door, and to make no resistance, as he should not lose anything; to which Poole consented, and left the house with Vaughan and the other officer to watch; which they did in a passage on the opposite side of the street. Mr. Poole's house was robbed by Donally and the three other men; and the three men who accompanied Donally were almost immediately apprehended by Vaughan and Barrett, and had been tried at a former sessions at the Old Bailey

(*v*) Merry *v.* Green, 7 M. & W. 623.
(*w*) Milburne's case, 1 Lew. 251.
(*ww*) 2 East, P. C. c. 16, s. 99, p. 665.

for burglary; but were convicted only of stealing in the dwelling-house to the amount of 40*s.* in consequence of Mr. Poole's evidence as to it being possible, at the time the robbery was committed, to see a person's face by the light of the day. Upon the present indictment against Donally and Vaughan, the jury acquitted Donally of the burglary, but found him guilty of stealing in the dwelling-house to the value laid in the indictment of 5*l.*, and Vaughan as accessory before and after the commission of the said felony and stealing in the dwelling-house. Upon this finding it was objected, that this could not be larceny in Donally, because not done *animo furandi;* and further it was objected on behalf of Vaughan, that as the indictment was against him as accessory to a burglary committed by Donally, and as the jury had acquitted the principal of the burglary, the charge against the accessory must necessarily fail. The learned Judge also doubted, with respect to Vaughan, whether he could be said to incite or procure Donally to commit an offence where he engaged him to take the part of apparently joining in it, for the purpose of apprehending the offenders. The case was reserved for the consideration of the Judges, and argued before them in Michaelmas Term, 1816. All the learned Judges were present, and ten of them, namely Gibbs, C. J., Macdonald, C. B., Graham, B., Wood, B., Bayley, J., Dallas, J., Richards, B., Park, J., Abbot, J., and Burrough, J., held the conviction wrong. They were of opinion, that as Donally was not present to aid or assist, (though the other offenders thought he was) but to detect, and as he had no intent that the felony should be successful, he had not the felonious intention necessary to make him a principal, although he acted from a bad motive, *viz.*, the reward. But several of the Judges seemed to think that he was liable to be indicted as an accessory before the fact. Lord Ellenborough, and Holroyd, J., thought the conviction right; that although there was a clear intention that the felony should be discovered, yet there was another intention not inconsistent with the former, *viz.*, that the felony should at all events be committed: and the presence of Donally did in fact aid and assist and countenance the commission of the felony. (*x*)

The taking of the goods must be *invito domino.*

Besides the *animus furandi*, it is necessary that the taking of the goods should also be without the consent of the owner, *invito domino.* This is of the very essence of the crime of larceny, (*y*) as it has been already shewn to be essential in one of a similar nature, namely, in robbery. (*z*)

Egginton's case. Some thieves having planned with the servant of the owner to steal some goods, the owner, knowing of the plot, directed his servant to carry on the business, with a view to the

This material ingredient in the offence of larceny underwent great consideration in a modern case, where the following circumstances were given in evidence against the prisoners, upon an indictment for a burglary and larceny. It appeared that the prisoners, intending to rob a manufactory at Soho, near Birmingham, of which Mr. Boulton was the principal proprietor, applied to a man named Phillips, who was employed as servant and watchman to the manufactory, to assist them in the robbery. Phillips assented to their proposal; but immediately afterwards gave information to Mr. Boulton, and told him what was intended, and the manner and time the prisoners were to come: that they were to go into the counting-house, and that he

(*x*) Rex *v.* Donally and Vaughan, Mich. T. 1816. Russ. & Ry. 310. S. C. 2 Marsh. Rep. 571. From this decision it became unnecessary to give any opinion upon the objection taken on behalf of the prisoner Vaughan.

(*y*) Fost. 123.

(*z*) *Ante*, Vol. 1, p. 874.

detection of the thieves, which the servant accordingly did; and it was holden to be larceny by the majority of the judges; but one of them doubted, on the ground of the owner's assent and partial encouragement to the felony by means of his servant.

was to open the door into the front yard for them. Mr. Boulton told him to carry on the business, and that he would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house every thing but 150 guineas and some silver ingots, which he marked, in order to furnish evidence against the prisoners; and laid in wait to take them, when they should have accomplished their purpose. On the 23rd of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; and from thence they and Phillips went through a door, which was left open, up a staircase in the centre building, leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked: and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard, where all (except one who escaped), were taken by the persons placed to watch them. On this case two points were made for the prisoners; one, which has been noticed in a former chapter, that the offence did not amount to burglary, and which was decided in favour of the prisoners; (*a*) the other that no felony was proved, as the whole was done with the knowledge and assent of Mr. Boulton, and that the acts of Phillips were his acts. The prisoners having been convicted, the case was argued before the twelve Judges, a majority of whom held that the prisoners were guilty of the larceny; for that, although Mr. Boulton had permitted, or suffered, the meditated offence to be committed, he had not done anything originally to induce it; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had: and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. They thought also that there was no distinguishing between the degrees of facility a thief might have given to him; that Mr. Boulton never meant that the prisoners should take away his property, and the circumstance of the design originating with the prisoners, and Mr. Boulton's taking no step to facilitate or induce the offence, until after it had been thought of, and resolved on by them, formed, in the opinion of some of the Judges, a very considerable ingredient in the case, and differed it greatly from what it might have been, if he had employed his servant to suggest the perpetration of the offence originally to the prisoners. But Lawrence, J., before whom the prisoners were tried, doubted whether it could be said to be done *invito domino*, when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete

(*a*) *Ante*, Vol. 1, Chap. on *Breaking, &c., within the Curtilage*, p. 863.

felony; though he did not mean that they should carry them away. (*b*)

Cases where the taking is by the delivery, or consent of the owner, or of some person having authority to deliver the goods.

Upon some of the doctrines relating to the felonious *taking*, &c. which have been already mentioned, points of considerable difficulty will sometimes occur: but by far the most nice and intricate questions arise upon the class of cases which are now to be considered, namely, those in which it appears that the goods were taken *by the delivery or consent of the owner, or of some one having authority to deliver them.* The material ingredients in the definition of larceny, already spoken of, must still be kept in mind; particularly that of the *animus furandi*, and the doctrine that the goods must be taken *invito domino.*

Delivery where there is no change of property, or of legal possession.

It may, in the first place, be observed, with respect to these cases where the goods are obtained by delivery, that if it appear that, although there is a delivery by the owner in fact, yet there is clearly *no change of property nor of legal possession*, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made.

Cases where there is a bare charge, or custody, or a special use only of the goods.

Thus, if a person, to whom goods are delivered, has only the bare charge, or custody, of them, and the legal possession remains in the owner, such person may commit larceny, by a fraudulent conversion of the goods to his own use. (*c*) A doctrine which directly applies to the case of servants entrusted with the care of goods in the possession of their masters, as will be shewn more fully, when larcenies by servants are treated of in a subsequent chapter. And larceny may be committed also in a like manner by a person who has a bare special use of goods. Thus, a man may be guilty of larceny in taking a piece of plate, set before him to drink in a tavern; for he has only a liberty to use, not a possession by delivery. (*d*) So larceny may be committed by a person who is employed for hire to drive cattle to a fair or market, as in such case the owner parts only with the custody and not with the possession. (*e*) So if a weaver, or silk-throwster, deliver yarn, or silk, to be wrought by journeymen, in his house, and they carry it away with intent to steal it, this is felony; the entire property remaining there in the owner, and the possession of the workmen being the possession of the owner. (*f*) But it would not be felony if the yarn had been delivered to a weaver out of the house, who, having thus the lawful possession of it, had afterwards embezzled it; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep for his use. (*g*)

So also where a horse was delivered by the prosecutor to the prisoner to be agisted at a certain sum per week, and in the second week the prisoner sold the horse as his own, it was held, upon a case reserved, that inasmuch as the prosecutor had parted with the possession, it did not amount to larceny. (*h*) So where a drover of cattle was employed to drive eight oxen to London, and his instruc-

(*b*) Rex *v.* Egginton and others, 2 Leach, 913. 2 East, P. C. c. 16, s. 101, p. 666.

(*c*) 1 Hale, 505, 506. 1 Hawk. P. C. c. 33, s. 6. 2 East, P. C. c. 16, s. 109, p. 682.

(*d*) 1 Hale, 506.

(*e*) Rex *v.* M'Namee, R. & M. C. C. R. 368. See this case more fully stated, *post*, tit. *Larceny by Servants.*

(*f*) Anon. Old Bailey, 1664. Kel. 35. 2 East, P. C. c. 16, s. 109, p. 682.

(*g*) 2 East, P. C. c. 16, s. 109, p. 682, 683. 1 Hawk. P. C. c. 33, s. 2.

(*h*) Rex *v.* Smith, R. & M. C. C. R. 473.

tions were, that if he could sell them on the road he might; ar those he did not sell on the road, he was to take to a particular sale man in Smithfield, who was to sell them; and the drover sold two c the road, and instead of taking the others to the salesman, drov them to Smithfield, and sold them there, and converted the money t his own use; it was held that this was not larceny. (*i*)

Where the delivery is made for a certain special purpose.

It is stated that, in general, where the delivery of goods is mad for a certain special and particular purpose, the possession is sti supposed to reside, unparted with, in the first proprietor. (*j*) An that if a watchmaker steal a watch, delivered to him to clean; or i a person steals clothes, delivered for the purpose of being washed or goods in a chest, delivered, with the key, for safe custody; o guineas, delivered for the purpose of being changed into half-guineas; or a watch, delivered for the purpose of being pawned; in all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony. (*k*) But, unless in these cases the privity of contract, under which the goods were delivered, appeared, by some means, to have been determined (of which more will be said hereafter), it seems difficult to see how they are distinguishable, some of them at least, from the cases of a goldsmith, to whom plate is delivered to work or to weigh; a tailor, to whom cloth is delivered that he may make clothes with it; and a friend, who is entrusted with property to keep for the owner's use; in which cases an embezzlement, or conversion of the goods, by the party to whom they are delivered, has been said not to amount to felony. (*l*) In these latter cases, as well as in the former, the delivery of the goods is made only for a special purpose; yet it seems that the possession of them has not been considered as remaining with the owner, but as having passed to the party by a lawful delivery without fraud, and, therefore, not the subject of a subsequent felonious conversion. The distinction, indeed, between a bare charge, or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle that, in the former case, the legal possession should be considered as remaining in the owner; and, in the latter, as having passed to the bailee; and that, therefore, in the former case larceny may be committed of them by the person to whom they have been delivered, and that in the latter it may not, unless there be a determination of the privity of contract: but it is in the application of this doctrine to particular cases, that the distinctions seem to become obscure. (*m*)

Campbell's case. A landlady sends her servant to a lodger with a bank-note, requesting him to change it,

In a case where the prisoner was a lodger, and his landlady, wanting change for a bank-note, sent it, by her servant, to the prisoner up stairs, begging that he would give her change for it; when the prisoner, after examining his purse, said that he had not gold enough about him for the purpose, but that he would go immediately to his bankers, and get the note changed; upon which he left the house, with the bank-note in his hand, and never returned; the prisoner

(*i*) Reg. *v.* Goodbody, 8 C. & P. 665, Littledale, J., and Parke, B. See this case more fully, *post*, tit. *Larceny by Servants.*

(*j*) 1 Hawk. P. C. c. 33, s. 9.

(*k*) 1 Hawk. P. C. c. 33, s. 10, and the various cases there cited.

(*l*) 1 Hawk, P. C. c. 33, s. 2. 2 East, P. C. c. 16, s. 113, p. 693.

(*m*) See more upon the cases which relate to a delivery and privity of contract determined in a subsequent part of this chapter. And upon those which relate to a bare *charge* of the goods or a *possession* of them delivered over, *post*, sec. 3, in which the *special property* sufficient to constitute an *ownership* of the goods taken is considered; and also, *post*, Chap. *On Larceny by Servants.*

appears to have been convicted without any question having been made as to the offence amounting to larceny. (*m*) But, in this case it probably might have been considered that the landlady did not intend to part with the note without first receiving the change; and if so, that the servant delivered the note to the prisoner without the authority of her mistress, and, therefore, that no legal possession of it ever passed to the prisoner; and that in taking it he was guilty of a trespass. (*n*)

and he goes away with it. Held to be larceny.

If the owner of goods employ a person, not in his service, to take them to a customer and shew them him and bring them back again, without authorizing him to sell them to the customer, or leave them with him, and he sell them instead of taking them to the customer, he is guilty of larceny; but in such case, if he was either authorized to sell them to the customer, or to leave them with him, he is not guilty of larceny. The prosecutor desired the prisoner to take his horse and cart and shew some pigs to a lady; and to return in a quarter of an hour. He told the prisoner what was to be the price of each of the pigs, if the lady should take a fancy to them, but he was not to sell them, only to see if they were the right size for the lady; he was not trusted to sell them and receive the money; he was to bring the pigs back in a quarter of an hour whether she liked them or not; the prisoner sold the pigs, and did not take them to the lady: it was urged that the prisoner could not be convicted of larceny unless he was not in the situation of a bailee, or he intended from the beginning to steal the pigs. Alderson, B. told the jury "The first question is whether the prisoner had a felonious intent from the commencement of the transaction: and the second whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is whether they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily; if they were, then if the felonious intent came upon him at that time, it would come upon him at the time when he had only the custody and not the possession, and in that case he would be guilty of stealing them." (*o*)

If the owner of goods employ a person to take them and show them to another, without giving him any authority to sell, and he convert them to his own use, it is larceny.

It has been suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, do not extend to all cases where the thing, so delivered for a special purpose, is intended to remain in the presence of the owner. And it is well advanced, in support of the observation, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or

Delivery, where the owner remains present.

(*m*) Campbell's case, 2 Leach, 564. There was a question raised in the case as to the offence amounting to a stealing in the dwelling-house (within the statute 12 Ann. c. 7), which was noticed, *ante*, p. 856.

(*n*) By Scarlett, arguendo, in Walsh's case, 2 Leach, 1079.

(*o*) Reg. v. Harvey, 9 C. & P. 353, Alderson, B

tions were, that if he could sell them on the road he might; and those he did not sell on the road, he was to take to a particular salesman in Smithfield, who was to sell them; and the drover sold two on the road, and instead of taking the others to the salesman, drove them to Smithfield, and sold them there, and converted the money to his own use; it was held that this was not larceny. (*i*)

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It has been suggested as worthy of consideration whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, do not extend to all cases where the thing, so delivered for a special purpose, is intended to remain in the presence of the owner. And it is well advanced, in support of the observation, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the party in whose hands it is so, in fact, placed; and that, the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or

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(*o*) Reg. *v.* Harvey, 9 C. & P. 353, Alderson, B

charge, and not the legal possession of it. (*p*) And though the case of a person going into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, running away with them; and also that of a person going into a market, and obtaining a horse for the purpose of trying its paces, and then riding away with it, have been considered as felonies, on the ground of a preconcerted design to steal the chattels; (*q*) yet they appear also to be sustainable on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing present.* (*r*)

Upon the same principle also, of there being but a bare charge or special use, it has been holden that if the clerk to a banker or merchant have the care of money, or if he have access to it for special and particular purposes, and be sent to the bag or drawer for money, for the purpose of paying a bill, or if he be sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings such money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had no care of the money, or access whatsoever to the bag or drawer. (*s*)

Delivery where the owner parts with the *property* in the goods taken.

It may further be observed, as clearing the ground of inquiry concerning these cases of a delivery of the goods by the owner, that it is a settled and well established principle, that if the owner part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured. (*t*)

The following are some of the cases in which it has been holden that the owner had parted with the *property* in the goods, by his delivery of them to the prisoner.

Harvey's case. The prisoner rode away with a horse from a fair, *after it was sold to him*, without paying the purchase-money.

Upon an indictment for horse-stealing it appeared that the prosecutor was at a fair, having a horse there, in the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, "I hear you have a horse to sell; I think he will suit my purpose; and if you will let me have him a bargain I will buy him." The prisoner and the prosecutor then walked together into the fair, towards the horse, and, upon a view of him, the prosecutor said to the prisoner, "You shall have the horse for eight pounds;" and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor, that he would return immediately and pay him. The prosecutor replied, "Very well." The prisoner rode away with the horse, and never returned. Upon these facts, the learned Judge, by whom the prisoner was tried, directed an acquittal, on the ground that there was a complete contract of sale and delivery, and that the *property*, as well as the possession, was entirely parted with. (*u*)

Parkes's case.

In another case, the indictment against the prisoner was for steal-

(*p*) 2 East, P. C. c. 16, s. 110, p. 683.

(*q*) 1 Hawk. P. C. c. 33, s. 14, 15. Kel. 82. 2 East, P. C. c. 16, s. 106, p. 677.

(*r*) Chissers's case, T. Raym. 275, 276. 2 East, P. C. c. 16, s. 110, p. 683, 684: in which last cited authority see also the argument in support of this doctrine.

(*s*) Murray's case, O. B. 1784. 1 Hawk. P. C. c. 33, s. 7. 2 East, P. C. c. 16, s. 109, p. 683. 1 Leach, 344.

(*t*) 2 East, P. C. c. 16, s. 102, p. 668. s. 103, p. 669, s. 113, p. 693.

(*u*) Harvey's case, Chelmsford Sum. Ass. 1787, *cor.* Gould, J. 1 Leach, 467. 2 East, P. C. c. 16, s. 103, p. 669.

ing a piece of silk of the value of ten pounds, the goods of Thomas Wilson. Mr. Wilson was a silk manufacturer, in the neighbourhood of Cheapside; and it was proved that the prisoner had called at his warehouse, and, after looking at several pieces of silk, had selected the one in question, agreed for the price of it, and said that his name was John Williams, that he lived at No. 6, Arabella-row, in Pimlico, and that if Mr. Wilson would send it there at six o'clock in the afternoon, with a bill and receipt, he would pay him for it. Mr. Wilson, accordingly, entered the piece of silk in his day-book, to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his shopman with it to the place, and at the hour appointed. The shopman met the prisoner near Arabella-row, and accompanied him to No. 6, where he went with him into a room, and delivered to him the bill of parcels, which he examined; and after saying it was right, gave the shopman two bills of 10*l.* each, drawn by Frith and Co. at Bradford, on Taylor and Co. in London. The amount of the silk was only 12*l.* 10*s.*; and the shopman stated that he had not sufficient cash about him to pay the difference between that sum and the amount of the two bills; upon which the prisoner said that it was immaterial, that he should want more goods, and that he would call on the ensuing day at his master's, to look out other goods, and take the change. Upon this the shopman left the goods, and returned home with the bills. The prisoner never came again to Mr. Wilson's warehouse, the bills, upon being presented at Taylor and Co.'s, turned out to be mere fabrications; and, on inquiry at No. 6, Arabella-row, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Mr. Wilson's shopman had left the house. It was also proved that, within a month after the goods had been so obtained by the prisoner, the entry that had been made in the day-book was copied into the journal, and from thence posted regularly into the ledger, in the usual way where goods were not paid for immediately: and that the prisoner still stood debited in the ledger for the amount. It was objected, upon these facts, by the counsel for the prisoner, that there was a sale of the goods to him, and such a delivery as would *change the property*. Upon which the learned Judge, by whom the prisoner was tried, left it to the jury to consider whether there was not, in the mind of the prisoner, at the very beginning of this transaction, an intention and premeditated plan to obtain the goods without paying for them; and also whether this was a sale by Mr. Wilson, and a delivery of the goods, with intent to part with the *property*, he having received bad bills in payment for them, through the medium of his shopman. The jury were of opinion that the prisoner, from first to last, intended to defraud Mr. Wilson; and that it was not Mr. Wilson's intention to give him credit: and they found him guilty. But the case being afterwards submitted to the consideration of the Judges, they were of opinion that the conviction was *wrong;* for that Mr. Wilson had *parted with the property* as well as the possession, upon receiving that which was accepted by his servant as payment, although the bills turned out afterwards to be of no value. (*v*)

The prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him some, to be paid for on delivery; and, upon the goods being sent accordingly, gave the servant, who brought them, bills, which were mere fabrications, and of no value; and it was holden not to be larceny, on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit.

Upon an indictment against Nicholson, Jones, and Chappel, for Nicholson's

(*v*) Parkes's case, O. B. 1794. 2 East, P. C. c. 16, s. 103, p. 671, *cor.* Macdonald, C. B. 2 Leach, 614. See Rex *v.* Small, 8 C. & P. 46. *Post*, 40.

case. The prosecutor having been inveigled by sharpers to bet with them, and suffered by them to win in the first instance, was afterwards stripped of a large sum by losing a bet; and the whole transaction was found by the jury to have been a preconcerted scheme to get the prosecutor's money: but it was holden not to be a felonious taking, as the prosecutor parted with the *property* in his money, under an idea that it had been fairly won.

stealing a bank post bill for twenty pounds, another for fifteen pounds and also seven guineas, the property of William Cartwright, the following were the material facts given in evidence. Nicholson introduced himself to the prosecutor, who was a pensioner in the Charter-house, by coming to his apartments at that place, and pretending to inquire as to the rules of the charity. He had not before that time any sort of acquaintance with the prosecutor, but he succeeded in getting him to enter into conversation, and to produce the rules of the charity from his desk, which gave Nicholson an opportunity of seeing that the prosecutor had some money. Nicholson then proposed to the prosecutor that they should take a walk together, which they did, and went to a public-house, where they were joined by the prisoner Chappel. Some liquor was called for, when the other prisoner, Jones, came into the room, and said that he had just come from Coventry, for the purpose of receiving a large legacy, and produced a quantity of papers, like bank notes; upon which Chappel said to him, "Aye, I see it is good, but I imagine you think nobody, in company, has got any money but yourself;" to which Jones answered, "I will lay ten pounds, that neither of you shew forty pounds in three hours." Immediately on this bet being proposed, the parties left the room; and Nicholson and Chappel both asked the prosecutor if he could show forty pounds, to which he answered, that he believed he could. Nicholson then accompanied the prosecutor to his room, at the Charter-house, where the prosecutor took out of his desk the two post bills in question, and five guineas, and afterwards took out two more guineas, upon Nicholson advising him to take a guinea or two more: and they then went together to another public-house, called The Spotted Horse, where Chappel had previously said, on their leaving the first public-house, that he should go; and where they found both Jones and Chappel in a back room. Jones put down a paper, apparently a 10*l.* note, for each who could show forty pounds, upon which the prosecutor shewed his forty pounds, in the post bills and guineas, by laying them down on the table, but did not recollect whether he took up the 10*l.* paper, which was given to him upon his being allowed to have won his wager. The prisoner, Jones, then proceeded to write four letters with chalk on the table; after which he went to the end of the room, turned his back, and said that he would bet them a guinea each that he would name another letter which should be made, and a basin put over it. Another letter was, accordingly, made, and covered with a basin, Jones named a letter, but not the right one; by which the others won a guinea each. Nicholson and Chappel then said, "He is sure to lose; we may as well make it more, as we are sure to win: we may as well ease him of his money; he has more than he knows what to do with." The prosecutor was so worked up with the hope of gain, that he at length, after various sums being proposed, staked his two post bills and the seven guineas; after which Jones named a letter, and guessed right; and then went to the table, swept off the bills and money, and went to the door of the room; the other prisoners sitting still, and the prosecutor making no objection, conceiving that he had fairly lost the money to Jones. It happened that just at this time some police officers came to the house, who, upon seeing Jones, ran hastily towards the door, seized him, and brought him back into the room;

and, upon perceiving, from the chalks upon the table, what had been going on, took the whole party into custody. Upon searching the prisoners, about eight guineas in cash were found upon them, and a great number of flash notes, but no real ones: and it was afterwards found that a lump of paper, which was put into the prosecutor's hands by Jones when the officers came in, contained the two post bills belonging to the prosecutor. The prosecutor said, upon his cross-examination, that he did not know whether the paper which was given to him by Jones, on his showing forty pounds, was a real ten pound note or not; that he intended to gamble; that, having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he did not object to Jones taking his forty-two pounds seven shillings when he lost; and that, if Jones had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake. Upon this evidence it was contended, on behalf of the prisoners, that this was a mere gaming transaction, or, at most, only a cheat, and not a felony: and the court left it to the jury to consider, whether this were a gaming transaction, or whether it were a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion, that it was a preconcerted scheme in all the prisoners to get from the prosecutor his post bills and cash; and they found them guilty. But, upon the case being submitted to the consideration of the twelve Judges, they all of them held the conviction wrong; on the ground that in this case *the property* in the post bills and cash was parted with by the prosecutor, under the idea that it had been fairly won. (*w*)

Coleman's case. The same rule will prevail though the name of another person be used to procure a delivery by the owner. So that where silver was so obtained it was holden not to be felony.

It appears from another case not to make any difference, where the credit may have been obtained by fraudulently using the name of another person, to whom in fact the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the disposing power for that purpose. Thus, where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would send the half guinea presently, and thereby obtained the silver, it was holden not to be a felony. (*x*) And it has been observed with respect to this case, that in truth it was a *loan* of the silver, upon the faith that the amount would be repaid at another time; that it was money obtained on a false pretence; and that the same determination had been made in similar cases at the Old Bailey. (*y*)

Adams's case. Where a hat was obtained under false pretences, by which the owner was induced to part with the property.

The prisoner, was indicted for stealing a hat, which was stated in one count to be the property of Robert Beer, and in another of John Paul. The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat maker, at Ilminster; that soon afterwards he called for it, when he was told it would be got ready for him in half an hour, but that he could not have it without paying for it. While he was in the shop, Beer shewed him a hat which he had made

(*w*) Rex *v.* Nicholson, Jones, and Chappel, *cor.* Macdonald, C. B., Old Bailey, 1794, 2 Leach, 610. 2 East, P. C. c. 16, s. 103, p. 669. The result would have been different if the possession only had been parted with, Rex *v.* Robson, *post*, p. 45.

(*x*) Rex *v.* Coleman, O. B. 1785, 2 East, P. C. c. 16, s. 104, p. 672. 1 Leach, 303, note (*a*).

(*y*) 2 East, P. C. c. 16, s. 104, p. 673.

for one John Paul, upon which the prisoner said, that he lived next door to him; and he then asked when Paul was to come for his hat, and was told he was to come that afternoon in half an hour or an hour. The prisoner then went away, saying, he would send his brother's wife for his own hat. Soon after he went away, he met a boy, whom (though he did not know him) he asked if he was going to Ilminster; and, upon the boy saying that he was going thither, he asked him if he knew Robert Beer, and said that John Paul had sent him to Beer's for his hat, but that as he owed Beer for a hat himself, which he had not money to pay for, he did not like to go. And he then asked the boy (to whom he had promised something for his trouble) to take the message from Paul, and bring Paul's hat to him (the prisoner). He further told the boy not to go into Beer's shop, in case Paul (whom he described by his person and a peculiarity of dress) should happen to be there. The prisoner then accompanied the boy part of the way, after which the boy proceeded alone to Beer's, delivered his message, and received the hat; which, after carrying it part of the way for the prisoner, by his desire, the prisoner received from him, and said he would take it himself to Paul. Upon the fraud being discovered shortly afterwards, the prisoner was apprehended with the hat in his possession. It was objected, on the part of the prisoner, that these facts did not establish a case of larceny: and that the indictment should have been upon the statute for obtaining goods by false pretences. And the jury having found the prisoner guilty, the question was reserved for the opinion of the Judges, who decided that the offence did not amount to a felony; the owner having parted with his property in the hat. (z)

The correct distinction is that if the owner parts with the possession only, meaning to retain the right of property, the offence is larceny; but if the owner part not only with the possession, but the right of property, it is not larceny.

The correct distinction in cases of this description seems to be that if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with, not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences. One Davenport was indicted for stealing two silver cream ewers; he had formerly been servant to a gentleman, who dealt with the prosecutor, and after he left his service he called at the prosecutor's shop, and said his master (meaning the gentleman whose service he had left) wanted a silver cream ewer, desired the prosecutor to give it to him, and to put it down to his master's account: the prosecutor gave him two ewers in order that his master might select that, which he liked best; he took both and sold them: the prosecutor stated that he did not charge his customer with these ewers, nor did he intend to charge him with either, until he had ascertained which he would have chosen; it was held that as the prosecutor had parted with the possession only and not the right of property, the offence was larceny; but if he had sent but one ewer, and charged the customer with it, it would have been otherwise. (a) So where a prisoner went to a shop and said that Mrs. Downing wanted some shawls to

(z) Adams's case, *cor.* Chambre, J., Taunton Spring Ass. 1812, MS. And it seems that the judges thought the second count out of the question, as Paul never had possession of the hat.

(a) Rex *v.* Davenport, Newcastle Spring Ass. 1826, Bayley, J. Archb. Peel's Acts, 4.

look at, and the prosecutor gave her five shawls, and she pawned two of them the same evening and the others were found in her lodgings, it was admitted by the learned Judge, who tried the case, that as the property in the shawls would continue in the prosecutor until the selection was made, it was larceny if Mrs. Downing did not send for them. (*b*)

If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawner, on receiving a parcel from the pawner, which he supposes contains valuables, which he has just seen in the pawner's possession, the receipt of the pledges by the pawner is not larceny. Upon an indictment for stealing a diamond brooch and various other articles, one Burgess, who was in the employ of the prosecutor, a pawnbroker, and who had a general authority to manage his business, stated that the prisoner came to his master's shop, and produced duplicates of property previously pledged, to the amount of 34*l.* which was the property laid in the indictment, and desired it to be brought up and a light, as he had some diamonds to seal; he then produced a small packet of diamonds, which he desired Burgess to look at, and to advance the most he could upon them. Burgess looked at them and agreed to advance 160*l.* on them, and at the request of the prisoner handed them over to him to seal up, which the prisoner did in his presence, and then returned a packet, which Burgess believed to be the one containing the diamonds, it resembling it in every respect. Burgess put it in his pocket, and then handed over to the prisoner the property laid in the indictment, and 124*l.* in money for the diamonds, which he supposed he had got. The packet so deposited when afterwards opened was found to contain coloured stones of the value of 4*l.* Burgess stated also that he had no authority from his master to lend money, except upon pledges of an equivalent value; and that when he delivered the money, and also the property stated in the indictment, he supposed he had an equivalent for them in the diamonds in his pocket; and that when he delivered the goods in the indictment he parted with them entirely, thinking the diamonds left with him were of sufficient value to cover the value of them and the cash advanced; and that before he parted with them he had received the parcel containing, as he supposed, the diamonds, and that he had before examined the genuine diamonds, and might then have detained them, but as the prisoner said they might go through the hands of a second person and be changed, he handed the genuine diamonds back to the prisoner for the special purpose only of being sealed. Mr. Serjeant Arabin was inclined to think that as the property was parted with by Burgess absolutely under the impression that the prisoner had returned him the parcel containing the diamonds, the prisoner's offence did not amount to felony; and, upon a case reserved, the Judges were unanimous that the case was not larceny, because the servant, who had a general authority from the master, parted with the property and ownership, not merely with the possession. (*c*)

If a pawnbroker's servant, having a general authority, deliver up a pledge on receiving a parcel he believes to contain valuables, this is not larceny.

But if a servant has only authority to deliver property to one person,

If a servant have only

(*b*) Rex *v.* Savage, 5 C. & P. 143, and MS. C. S. G. Patteson, J. Mrs. Downing being too ill to attend, the prisoner was acquitted, because it was assumed that Mrs. Downing did send her, and that she received the shawls properly, and that it afterwards entered into her mind to convert them to her own use, and at that time she had the possession of them.

(*c*) Rex *v.* Jackson, R. & M. C. C. R. 119.

authority to deliver to one person, and another obtains the delivery to himself by fraud, it is larceny.

and another person obtains it from such servant by falsely representing himself as the person to whom the property is to be delivered, it is larceny. Upon an indictment for stealing three chests of tea, the property of S. T. and his partners, it appeared that Messrs. T. & Co. were carriers, and that on the 8th of November, 1825, three chests of tea arrived at their warehouse, directed "J. Creighton, Tewkesbury." About a month before this the prisoner, calling himself Langston, had called several times at the office inquiring for teas, and asking if any had arrived for him. The last time he had called was about a week before the time in question, and he desired the porter of Messrs. T. & Co., when any came to take it to his (prisoner's) house. When the tea in question arrived it was taken by the porter to the prisoner's house, but he was from home, and the tea was taken back to the warehouse. On the Wednesday following the prisoner went to the porter's house and asked him if he had any tea for him; he told him he did not know, that he had three chests marked "J. Creighton," and said he did not know whether they were for the prisoner or not, as he did not know a person of the name of Creighton. The prisoner said they were his, and that he had an invoice which specified the same; that they had spelt his name wrong by putting a C. instead of an L., but he did not produce any invoice. The carriage amounted to 18*s.* 9*d.*, for which, and the porterage, the prisoner paid 1*l.*; the porter, by the prisoner's desire, fetched the goods and delivered them to the prisoner at his own house. On the Saturday following, J. Creighton applied to Messrs. T. and Co.'s office for the goods in question, which were afterwards found in the prisoner's possession. The jury found the prisoner guilty, and said they were of opinion that when the prisoner inquired at the waggon office for teas, he intended to obtain property not his own, and when he obtained the goods in question he knew they were not his property, and intended to steal them; and upon a case reserved the Judges held that the conviction was right on the ground that the ownership of the goods was not parted with, the carrier's servant having no authority to part with the ownership to the prisoner, and the taking was, therefore, larceny. (*d*)

Walsh's case. Held under the particular circumstances that as there was no fraud used to induce the prosecutor to deliver a check, there was no larceny of the check, although the prisoner intended to misapply the proceeds before he received the check, and did misapply them accordingly. And as

In a case by which a great deal of interest was excited, the prisoner was charged in the first count of the indictment with stealing twenty-two bank-notes, of the value of a thousand pounds each, and one bank-note of the value of two hundred pounds, the property of Sir Thomas Plumer; and, in several additional counts, with stealing a written instrument, which, in some of them, was called "a bill of exchange" for the payment of 22,200*l.*, and in others, "a warrant for payment of money." The following facts were proved in support of the charge. The prosecutor, Sir Thomas Plumer, having contracted, in July, 1811, for the purchase of a large estate, shortly afterwards consulted the prisoner, who was a stock-broker of eminence, and who had long been employed in that capacity by the prosecutor, as to the most advantageous time to sell out stock, so as to be prepared with the purchase-money about the ensuing Michaelmas. The price of stock was then very low, and the prisoner advised that the sale might be delayed as long as possible, which recommendation was adopted by the prosecutor, who requested the prisoner to apprize him from

(*d*) Rex *v.* Longstreeth, R. & M. C. C. R. 137.

to a charge of stealing the notes which were the proceeds of the check, held under the particular circumstances that the property in the notes never was vested in the prosecutor.

time to time of the variations that might occur in the state of the market. The prosecutor was not called upon to prepare the purchase-money by the time which was first mentioned, as the title to the estate was not then completed; but in the month of October, having reason to believe that the deeds would be ready on or before the ensuing Christmas-day, he communicated that circumstance to the prisoner, and consulted him as to the expediency of disposing of the stock immediately, or letting it remain until the money should be wanted; when the prisoner again advised him to delay the sale. On the 25th of November, the prisoner stated to the prosecutor that he then apprehended a fall in the price of stock, and apprized him that the transfer-books at the Bank would shut on the 3rd December; and soon afterwards he became extremely urgent with the prosecutor to dispose of his stock immediately, writing to him, and frequently calling upon him for the purpose of giving such advice, and stating, as the reason for his importunity a probable fall in the price of stock. The prosecutor was influenced by these representations, and also by the concurrent opinion of a commercial gentleman whom he consulted on the subject; and, on Thursday, the 28th November, gave the prisoner a power to sell out a quantity of stock, which, on the ensuing morning, he contracted to sell for the sum of 21,700*l.* The prosecutor went on the next morning into the city, with the intention of finishing the business; but the prisoner stated that some previous notice must be given to the purchaser to be ready with the money, in consequence of which the prosecutor appointed Wednesday, the 4th December, for making the transfer. On that day the prosecutor attended and transferred the stock, and expressly ordered the prisoner immediately to invest the proceeds in Exchequer bills, and lodge them on his account at his bankers, Messrs. Gosling and Co. in Fleet-street; but the prisoner told him that it was then too late to procure Exchequer bills to such an amount; which the prosecutor supposed to be true (though in fact it was not), and therefore left him to receive the 21,700*l.* of the purchaser, desiring that he would pay it into his banker's the same day, which he promised to do, saying at the same time, that he would call on the prosecutor the next morning, and get his check for such sum as he might choose to have laid out in Exchequer bills. The prisoner accordingly received the 21,700*l.*, paid it into his own bankers, Robarts and Co.'s; and on the same day paid into Gosling and Co.'s his own check on Robarts and Co. for 21,500*l.* on the prosecutor's account. On the following morning, Thursday, the 5th December, he called on the prosecutor, and received from him *a check*, (the instrument mentioned in the indictment) on Gosling and Co.'s, for 22,200*l.* The prosecutor directed him to go to Gosling's and get the money for it, telling him that it was for the precise and express purpose, and for no other purpose whatever, of laying it out in Exchequer bills; which the prisoner positively promised he would do, and either pay the bills into Gosling and Co.'s, or bring them to the prosecutor by four o'clock on the same day. Nothing was said as to what was to be done with the money in case Exchequer bills could not be purchased. The prisoner then went to Gosling and Co.'s with the check, and there received for it 22,200*l.* in twenty-two bank-notes of 1,000*l.* each, and one bank-note of 200*l.*; and on the same day he purchased with *part of that* money 6,500*l.* Exchequer bills, which he lodged at Gos-

ling and Co.'s on the prosecutor's account, and took a receipt for them. At about half-past four o'clock on the same day, the prisoner called on the prosecutor, and produced the receipt for the Exchequer bills, and stated that he had paid the remainder of the money into Gosling and Co.'s, as he had contracted with Coutts and Co. for Exchequer bills to the amount of 15,000*l.*, but that one of the partners of the house of Coutts and Co. was at that time absent from London, had the bills locked up in a drawer, and would not return to deliver them until the following Saturday, the 7th December, on which day the prisoner said, he would call again for the prosecutor's check for that amount, and lodge the Exchequer bills for which he had so contracted at Gosling and Co.'s on the prosecutor's account. The prosecutor did not examine the papers delivered to him by the prisoner, during the time the prisoner was with him; but, upon looking at them after he was gone away, he was surprised to find that there was only a receipt for the Exchequer bills, and no receipt for the residue of the money. This circumstance caused suspicion, and an inquiry was almost immediately made, when it was ascertained that the prisoner had, on the afternoon of that same day, set out for Falmouth in the mail coach, in which he had previously secured a place in a fictitious name; and that he had left a note, addressed to the prosecutor, with his clerk, dated on Saturday, the 7th December, and stating that the business respecting Coutts' Exchequer bills could not be finished until the following Monday. This note he had desired might not be delivered till the Saturday. It appeared also that, for some time before he absconded, the prisoner had been labouring under great pecuniary embarrassments, and had meditated an emigration to America; and that about the 29th of November he had applied to an American broker to procure for him American stock to the amount of 11,000*l.*, and stock nearly to that amount was accordingly bought for him, and paid for by him, on the Thursday, the 5th of December, with eleven of the same bank-notes of 1,000*l.* each, which he had received for the prosecutor's check: and it further appeared, that several others of the 1,000*l.* notes so received for the prosecutor's check, had been paid away by him to different persons on his own account. It was proved also, that on the same day, Thursday, the 5th December, he paid to a dealer in foreign coin, 300*l.* for doubloons, which he had contracted for three days before, and which were delivered to him on that day. And further, that he left his country-house at Hackney early on the same morning, in a stage coach, and brought with him a travelling portmanteau of linen and a drab great coat, which he had contrived to pack up without the knowledge of his family; that he provided himself with some stockings, night caps, and gloves, at a hosier's in Threadneedle-street, to whom he said that he was going out of town for a few days; and that, after having procured the foreign coin and American securities, he absconded by means of the Falmouth mail. When the route which he had taken was discovered, he was speedily pursued and apprehended at Falmouth, as he was about to get on board a packet for Lisbon, to which place he acknowledged that he intended to go in the first instance, and afterwards take an opportunity of getting to America. On being told the charge made against him, he delivered up the 11,000*l.* American bank shares, and the bag of doubloons.

The question left to the jury was, whether the prisoner, before he received the check, had formed the design of converting the money which should be received by means of it to his own use, or whether that design arose in his mind after he was in possession of it. They were directed to find the prisoner guilty, if they were of opinion that the former was the fact. The jury were of that opinion, and returned a verdict of guilty. Judgment was then respited, and the case reserved, in order that the opinion of the judges might be taken upon several objections made by the prisoner's counsel.

As to the counts which charged the stealing of a bill of exchange or warrant (*i. e.* the check) it was objected that the check was one entire thing, and could not be said to be stolen, as part of the produce, viz., 6,500*l.*, was applied to the prosecutor's use, therefore there could not be a taking of the check with a felonious intent.

As to the same counts, it was also objected, that under the 2 Geo. 2, c. 25, it was necessary that the instrument stolen should be of value in the hands of the party from whom it was stolen; that the check was of no value to the prosecutor in his own hands; but that if it had been lost by the prosecutor, and got into the hands of a third person, and had been stolen from that third person, it would be within the act, as being then an instrument of value in that third person's hands, otherwise not.

It was also objected that the prosecutor had parted in this case with both the property and possession of the bill of exchange or warrant, and without fraud or misrepresentation; and this case was said to be the same as that of a voluntary deposit of money with a banker, who had previously determined to apply it to his own use.

That the identical notes paid to the prisoner were notes on which the prosecutor had no specific claim, and never were vested in him.

That bank notes were not expected in return for the check, but another and a different thing, viz., exchequer bills.

And that if the prosecutor had delivered the twenty-three notes themselves to the prisoner, he undertaking to buy exchequer bills with them, it would have been only a breach of contract, which he was to fulfil by returning exchequer bills, and that he was to be considered as debtor to the prosecutor for the deficiency.

In Hilary Term, 1st of February, 1812, this case was argued in the Exchequer Chamber before all the judges (except Lawrence, J.,) by Scarlett for the prisoner, and Gurney for the crown. And again on the 14th of February, 1812, before all the judges (except Lawrence, J., and Chambre, J.,) when all the judges present were of opinion that it was not a felony, and that the conviction was wrong upon several grounds. First, because there was no fraud or contrivance to induce Sir Thomas Plumer to give the check; secondly, because the check could not be called his goods and chattels, and was of no value in his hands; (*e*) thirdly, because he had never had possession of the notes received at the bankers, so that they could not be called his notes; and fourthly, because the bankers were discharged of the money by paying it on the

(*e*) See Rex *v.* Mucklow, R. & M. C. C. R. 160, where a similar point was raised, but not decided.

check, so that they were not defrauded, and it could not be said the money was stolen from them. (*f*)

A cheque in the hands of the drawers may be the subject of larceny.

But where, on an indictment for stealing a cheque, it appeared that the prisoner was employed occasionally as clerk to the prosecutors, and came two or three times a-week to keep their books, for which they paid him; when not with them he endeavoured to do business for himself; one of the prosecutors delivered to the prisoner, who was then employed by him as clerk, a cheque drawn by the firm on their bankers, Sir C. Scott and Co., payable to Messrs. Caldecott or bearer, who were creditors of the prosecutors, and desired the prisoner to deliver it to Messrs. Caldecott, but he did not deliver it; and on the same day cash was paid for it by the Messrs. Scott at their counter to some stranger, and afterwards the prisoner admitted that he had appropriated the cheque to his own use; the prisoner was found guilty; but the question whether the cheque in the hands of the drawers was of any value, and could be the subject of larceny, was reserved for the opinion of the judges in consequence of the opinion in the preceding case, that the cheque was of no value in the drawer's hands; and the judges affirmed the conviction. (*g*)

So where, upon an indictment for stealing a cheque, it appeared that the prosecutor gave the cheque, which was drawn by himself upon J. M. and Sons, payable to G. Mumford or bearer, to his female servant under cover, which was sealed up, and that he had told the prisoner, who was also his servant, that he would receive the packet containing the cheque from her, and that he was to deliver it to Mr. G. Mumford, of Downham, to whom the packet was directed, and the packet so containing the cheque was delivered to the prisoner, and he did not deliver the cheque to Mr. Mumford, but received the amount of it from the persons, on whom it was drawn, and never accounted to Mr. Mumford or the prosecutor for that sum or any part of it; upon a case reserved, upon the questions whether the cheque was a valuable security or an instrument within the 7 & 8 Geo. 4, c. 29, s. 5; and whether, under the circumstances, it could be made the subject of larceny; the judges held unanimously that the case was governed by the preceding one, and the conviction was affirmed. (*h*)

Atkinson's case. The prisoner wrote a letter in the name of another, to a third person, requesting a loan of money, and obtained the money by such means: held that the *property* in the money passed by the delivery

The principle that cases of this description, where the property in fact passes by the delivery of the owner, will fall within the same rule, though the credit may have been obtained by fraudulently using the name of another person, (*i*) was further acted upon in the following case. The prisoner was indicted for stealing two bank notes, the property of William Dunn. The facts were, that the prisoner employed one Dale, to whom he was previously unknown, to carry a letter to the prosecutor, and told him to say to the prosecutor that he had brought the letter from Mr. Broad. He also told Dale to bring the answer to him in the next street, where he would wait for him. Dale carried the letter to the prosecutor, to whom it was directed. It was written in the name of a

(*f*) Walsh's case, Hil. T. 1812. Russ. & Ry. 215. 2 Leach, 1054, 1062. 4 Taunt. 258, 284.

(*g*) Rex *v.* Metcalf, R. & M. C. C. R. 433, Littledale, J., *dubitante.* It was also held that the cheque might be described as a valuable security in the indictment, and that it was unnecessary to state that M. and Sons, the drawees, were bankers.

(*h*) Reg. *v.* Heath, 2 Moo. C. C. R. 33.

(*i*) *Ante*, p. 27.

Mr. Broad, who was a friend of the prosecutor's, solicited the loan of three pounds for a few days, and desired that the money might be enclosed back in the letter immediately. The prosecutor, upon the receipt of this letter, sent the bank notes in question, enclosed in a letter directed to Broad, which he delivered to Dale, who delivered it to the prisoner as he was first ordered. The letter sent by the prisoner to the prosecutor was altogether an imposition. It was objected on behalf of the prisoner at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And the prisoner having been convicted, the case was submitted to the consideration of the judges, who (with the exception of Buller, J., who was absent) held that it was no felony, as it appeared *that the property was intended to pass by the delivery of the owner.* (j)

of the owner, and therefore that the offence did not amount to felony.

The cases which have been thus cited abundantly establish the proposition first laid down, that where the *property* in the goods taken has been *parted with* by the owner, there can be no larceny.

But if the owner has not parted with the *property* in the goods, but only with the *possession* of them, the question of larceny still remains open, and will depend upon the fact, whether, at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them, nothing was done to determine the privity of contract, under which the taker had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion.

Delivery, where the owner *does not part with the property*, but only with the possession of the goods.

Upon the subject therefore of larceny, where the owner or person authorized to dispose of the goods has parted with the *possession* of them by delivery to the party accused, the inquiry seems to resolve itself into two heads: first, Whether the delivery were obtained fraudulently with intent to steal the goods; and if the delivery were not so obtained, then, secondly, Whether the lawful possession has been determined, and whether there has been any new and felonious taking.

I. The cases in which it has appeared that the delivery of the goods was obtained fraudulently, and with intent to steal them, consist principally of transactions usually described by the term *swindling*, and which have been in most instances carried on by the common arts adopted on such occasions. In a few, however, the more aggravated proceeding has been adopted of getting fraudulent possession of the goods by act of law.

Delivery where it has been obtained fraudulently, with intent to steal the goods.

The prisoners S. Greatrix and J. Sharpless were convicted of larceny, in stealing six pair of silk stockings, the property of Owen Hudson; but, a doubt arising as to the propriety of the conviction, the judgment was respited, and the question referred to the consideration of the judges on the following case: Greatrix, in the cha-

Sharpless and Greatrix's case. A hosier by the desire of the prisoner took a

(j) Rex v. James William Atkinson, cor. Le Blanc, J., O. B. 1799, and Mich. T. 1799. 2 East, P. C. c. 16, s. 104, p. 673, where it is also said that the judges considered this case as within the statute 33 Hen. 8, c. 1, (now repealed) against false tokens, which particularly speaks of counterfeit letters.

variety of silk stockings to his lodgings where the prisoner pretended to purchase some of them, and set them apart from the rest, and then, having sent the hosier to fetch some more articles, decamped with the stockings: this was holden to be larceny.

racter of servant to Sharpless, left a note at the shop of Mr. Hudson, who was a hosier in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings at the Red-lamp in Queen-square. Mr. Hudson in consequence took a variety of silk stockings according to the direction. Greatrix opened the door to him, and introduced him into a parlour, where Sharpless was sitting in a dressing-gown, his hair just dressed, and an unusual quantity of powder all over his face. Mr. Hudson unfolded his wares, and Sharpless looked out six pair of silk stockings, the price of which Mr. Hudson told him was fourteen shillings a pair; and he then desired Mr. Hudson to fetch some silk pieces for breeches, and some black silk stockings with French clocks. Mr. Hudson hung the six pair of stockings, which Sharpless had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During Mr. Hudson's absence, Sharpless and Greatrix decamped with the six pair of stockings, which were proved to have been afterwards pawned by Sharpless. The judges were of opinion, that the conviction was right, for the whole of the prisoners' conduct manifested an original and preconcerted design to obtain a tortious possession of the property; and the verdict of the jury imported, that in their belief the evil intention preceded the leaving of the goods. The judges thought also that, even independently of the preconcerted design and evil intention, there did not appear to be a sufficient delivery to change the possession of the property. (*k*)

Prevailing on a tradesman to take goods to a place on pretence that he shall then be paid for them, and inducing him to leave them there in the care of a third person, and then getting them from him without paying for them, is larceny, if the intent *ab initio* was to get the goods without paying for them.

Prevailing upon a tradesman to take goods proposed to be bought to a given place under pretence that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that third person without paying the price, is larceny, if *ab initio* the intention was to get the goods from the tradesmen and not to pay for them. Upon an indictment for stealing trinkets and fancy articles, the property of A. Berens, it appeared that the prisoner called at the shop of Berens, to whom he was a perfect stranger, and said to him, "I am come to take a choice of fancy articles; I am going into the country; I will pay you cash if you will deliver the goods, and you must serve me as low as you can." He then wrote on a card his name, and the address, "Coach Office, Swan Inn, Lad-lane;" and another card falsely describing where he lodged. He then selected the articles in the indictment, and desired that they should be taken the next day at five in the afternoon to the coach office. An invoice of the goods was made out by Berens in the presence of the prisoner; and

(*k*) Rex *v.* Sharpless and Greatrix, O. B. 1772. 1 Leach, 92. 2 East, P. C. c. 16, s. 105, p. 675. In the debate on Semple's case, (2 East, P. C. c. 16, s. 112, p. 692, 693,) a case was mentioned as having been determined very recently by the Judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels by a servant; and the prisoner contriving to send the servant back, under some pretence, kept the goods; and it was ruled to be felony, although they were delivered with the bill of parcels; such delivery being made under an expectation by the owner of being paid the money; for the jury found that it was a pretence to purchase with intent to steal. Mr. East, however, remarks upon this case, that it must be understood that the prisoner ran away with the goods, or did some other act to denote an intention of withdrawing himself from any account of them; and that no credit was intended to be given him, but that it was meant as a sale for ready money only. 2 East, P. C. ibid. note (*a*).

the next day, at five, Berens carried the goods, packed in a case, to the Swan. The prisoner met him there, and said, "I am surprised that my friend, who promised to be here, is not come." In a quarter of an hour a letter was brought by the twopenny post to the prisoner, who, after appearing to read it, said, "This is my very good friend, who will give me 200*l.*, at Tom's Coffee-house, at half-past seven." He desired Berens to meet him there at that time, and then desired the book-keeper to reserve a place for him by the Manchester coach next day, when he said he would take the case with him. Some doubt was expressed whether it was not too large for the coach; both Berens and the prisoner desired it might be taken care of; and Berens swore on his cross-examination that he considered the goods to be sold, if he got his cash, but not before. Both left the coach office. Berens went to Tom's at the time appointed, but saw no friend of the prisoner's, nor the prisoner. Half an hour after they had left the office, the prisoner returned to it, telling the book-keeper he had altered his mind, and would take the case away then. He offered him a sovereign for his trouble, hired a porter to carry the case into the street, and there hired a cart, in which he had it conveyed to a house on the other side of the river. He was found in that house in two hours, with the case unpacked, and the goods all about the room. The prisoner's counsel contended that he was entitled to a verdict of acquittal, as a complete sale of the goods had taken place. But the jury were directed to consider whether they were satisfied by the evidence that the prisoner, when he first called upon Berens, had no intention of buying and paying for the goods, but gave the order for the purpose of getting them out of Berens's possession, and afterwards clandestinely removing and converting them to his own use; and, if they were so satisfied, to find the prisoner guilty, which they did. And, upon a case reserved, the judges were clearly of opinion that there was a felonious taking, the jury having found that the prisoner's intention, *ab initio*, was to get the goods out of Berens's possession, and then clandestinely remove and convert them to his own use, and that the conviction was right. (*l*)

The plaintiff dealt in slippers; one Fuller, who likewise dealt in them, came to him and asked for fifteen dozen of slippers, saying he had an order for them; the plaintiff refused to trust him with the goods, but went with him to the place of sale, which was the warehouse of the defendants, wholesale shoe manufacturers; on arriving there Fuller said to the plaintiff, "You must not go in, or you will spoil my custom;" the plaintiff remained on the outside a quarter of an hour, when Fuller came out, having sold and delivered the slippers to the defendants in the warehouse, and, being asked by the plaintiff for the money, made an excuse, and soon afterwards ran away. The plaintiff indicted Fuller for stealing the slippers, and he was convicted. (*m*)

Taking goods without the consent of the owner before paying the price, where

Taking goods the prisoner has bargained to buy is felonious, if by the usage the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them did not intend to pay for them, but meant to get them into his possession, and dispose of them for his own benefit

(*l*) Rex *v.* Campbell, R. & M. C. C. R. 179, cited in Stephenson *v.* Hart, 4 Bing. R. 476.

(*m*) Lyons *v.* De Pass, 11 A. & E. 326.

by the usage the price ought to be first paid, is larceny, if the bargain was made with intent to obtain them without paying for them.

without paying for them. Upon an indictment for stealing four oxen, the property of the Marquis of Tavistock, it appeared that R. Baker was employed by the bailiff of the Marquis to sell the oxen at Ampthill fair for ready money. The prisoner inquired the price, and agreed for 48*l.* 10*s.* Baker asked him to mark them (which is done by clipping off some hair), he said, "No, I'll mark them by-and-by, and if you go down to the King's Arms I'll pay you for them." Baker soon went to the King's Arms, but did not find the prisoner; having dined there Baker returned into the fair to the place where he had left the beasts, but they were gone. Two witnesses severally proved that they purchased two of the oxen in the fair from the prisoner. Search was afterwards made for him in the fair and at the different inns, without success. Baker said, that the custom was to mark the beasts when they were sold; that they are not delivered until they are paid for, which is generally about dinner time, and if the prisoner had applied to him for leave to drive them away, he would have refused till he had received the price. The prisoner told him his name was Gilby, but did not mention where he lived. Garrow, B., left it to the jury to say, whether the prisoner, at the time he made the bargain, intended to pay for the oxen, or merely to get them into his possession to sell them and convert the money to his own use. The jury found the prisoner guilty, and said they thought he never at any time intended to pay for the beasts. And, upon a case reserved, the conviction was affirmed, the jury having found that the prisoner never meant to pay for the oxen. (*n*)

Wilkins's case. Where the owner of goods sent them by his servant to be delivered to A., and the prisoner fraudulently procured the delivery of them to himself, by pretending to be A., it was holden to be larceny.

The prisoner, John Wilkins, was indicted for stealing a great many pair of stockings, the property of William Wayte. The following were the facts of the case: The prosecutor, Mr. Wayte, who was a hatter and hosier near the Haymarket, delivered two parcels, containing the goods mentioned in the indictment, to his apprentice, with directions to carry them to the house of Mr. Heath, a hosier, in Milk-street, Cheapside. As the apprentice was going up Ludgate-hill, with the parcels under his arm, he was met by the prisoner at the bar, who asked him where he was going? To which the apprentice answered, "to Mr. Heath's." The prisoner, producing a small parcel, replied, "I know your master, and I owe him for those parcels; I was going for them to your shop, therefore do you give me your parcels, and take this back to your master; there is a letter inside, and it must be immediately forwarded to Mr. Brown." The apprentice accordingly consented to the proposed exchange, and delivered the two parcels to the prisoner, and the prisoner delivered his parcel to the apprentice. The prisoner, having effected this exchange, endeavoured to separate himself from the apprentice; but his manner created a slight degree of suspicion in the apprentice's mind, who, to satisfy his doubts, ran after the prisoner, and asked him if he was the Mr. Heath to whose house he was conveying the parcels? The prisoner replied, that he was Mr. Heath, and desired the apprentice to make haste home with the other parcel. The parcel which was delivered by the prisoner contained a collection of old rags of no value, and he was not the Mr. Heath he pretended to be. The jury were of opinion that the prisoner, by falsely pre-

(*n*) Rex *v.* Gilbert, R. & M. C. C. R. 185.

tending that he was going to the house of the prosecutor for Mr. Heath's parcels, had contrived to make this exchange of parcels with an intent wrongfully to obtain and convert to his own use the goods mentioned in the indictment, and therefore they found him guilty. The Court, however, being doubtful whether, under all the circumstances, the crime amounted to felony, the judgment was respited, and the case referred to the consideration of the twelve judges, who were unanimously of opinion that the conviction was right. The learned judge (Gould, J.,) who delivered their opinion, said, that it appeared to him that the prisoner's having obtained these goods fraudulently from the apprentice was just the same as if he had obtained them from the actual possession of the master. (*o*)

Getting goods delivered into a hired cart on the express condition that they should not be taken out of the cart until they were paid for, and then getting them from the cart without paying the price, is larceny, if the prisoner intended *ab initio* to defraud.

A prisoner was indicted for stealing bristles, and it appeared that the prisoner went to the counting-house of the prosecutor and represented that he lived at No. 40, Crispin-street, Spitalfields, and proposed to buy four casks of bristles, and pay *ready money on delivery*, and was told by the prosecutor's clerk that as he was a stranger he could not have them on any other terms. The prisoner said, he wanted to send two of the casks immediately to Birmingham. The invoice and the weighing order were given to the prisoner, and the delivery order was sent by a clerk of the prosecutor's to the wharf, where the bristles were then lying, which he brought back, the prisoner not having paid the money. On Monday following the prisoner came again to the counting-house between twelve and one, and the delivery order was then on the prosecutor's desk, and said he would pay the money, but had not got a check; he was told by the clerk, that if he wished to pay the money, he had no objection to give him the delivery order. The prisoner went away with the order, and the clerk followed him almost immediately to the wharf, and found the prisoner busy loading the bristles into a cart. The clerk stopped the delivery at the wharf about one o'clock; but in consequence of what was said by the prisoner, and the wharf-clerk having said that he knew the prisoner, and he had had goods delivered to him in the regular way before, no further opposition was made. The clerk told the prisoner that the reason why he would not suffer him to take the goods from the wharf was, that the reference the prisoner had given was one he could not trust; and he consented to the bristles being taken away, upon the express condition, and the engagement of the prisoner, that they should be paid for at his door in Crispin-street, before they were lodged in the house. Nobody was sent to accompany the cart, but another clerk of the prosecutor's was directed to be at the prisoner's door a little before two o'clock, which would be the time the cart would arrive, for the purpose of receiving payment before the goods were taken from the cart. That clerk went to the prisoner's house, No. 40, Crispin-street, and after waiting till half-past three, he came back without seeing the prisoner, the cart, or the goods. The carman, who drove the goods from the wharf, was directed by the prisoner to drive to Spitalfields, and when he had got part of the way he was directed by the prisoner to turn down another street, and wait at the corner of a street, where, notwithstanding the remonstrances of the carman, the bristles were put by the prisoner's directions into another cart, and driven away in a

(*o*) Wilkins's case, O. B. 1789, 1 Leach, 520. 2 East, P. C. c. 16, s. 104, p. 673. See Rex *v.* Longstreeth, R. & M. C. C. R. 137, *ante*. p. 30.

direction contrary to Spitalfields, and lodged in an empty warehouse, and the next morning the prisoner offered the bristles for sale, representing that he had taken them for a bad debt. It was objected that the clerk having permitted the prisoner to take possession of the delivery order, there was a complete transfer of the property, and that the subsequent conversion was a mere breach of contract: but the Recorder thought that it was a mere permission to enable him to remove them to his door in Spitalfields, with a full engagement on the part of the prisoner that the order was not to operate to enable him to put them within his own premises till the money was paid; and he told the jury that, if they believed there never was any *bonâ fide* intention to buy, but an intention to get the goods by fraud from the owner, they should find the prisoner guilty: which they did, and said that they thought the prisoner had no intention to buy, but to get them by fraud from the owner; and, upon a case reserved, the judges held that the conviction was right, the jury having found that the prisoner never meant to buy, but to defraud the owner. (*p*)

Obtaining goods from a servant by payment of a bad half-crown, the servant having no authority to part with the goods without payment, is larceny, if the intent was to obtain the goods without paying for them.

So where, upon an indictment for stealing three pounds weight of cheese and 2*s.* 2*d.*, it appeared that the prisoner went to the shop of a cheesemonger and ordered about three pounds of cheese to go to No. 46, Regent-square, to one Edmonds, and the prosecutor's boy was to take it directly with change for a crown piece. When the lad got near Regent-square with the cheese, the prisoner met him and said, "Oh, you have got the cheese, I forgot to order sixpenceworth of eggs; if you will give me the change and the cheese I will pay you." The lad then gave him the cheese and 2*s.* 2*d.*; he then gave the lad a crown, which turned out to be a bad one, though the lad believed it to be a good one at the time he took it; the lad went back for the eggs; the lad said, that if he had gone to Edmonds's he should have left the things there, but not the change without the money, and that he had no authority to part with these goods unless he received the crown piece. The master said, that his intention was to sell the goods, and if he received the crown he should be obliged to furnish the difference; he never expected the goods back again, and the boy had no authority to part with the change or the goods without payment. Mr. Serjt. Arabin (after consulting Parke, B., and Patteson, J.,) told the jury that if they thought that it was a preconcerted scheme to get possession of the property without giving anything for it, and that the boy had the limited authority only, they should find the prisoner guilty. (*q*)

Fraudulently obtaining a mare from a servant who had no authority to sell, in exchange for a horse of little value, is larceny.

So where, upon an indictment for stealing a mare, it appeared that the prosecutor intending to sell his mare at a fair, sent her thither by a servant, to whom he gave no authority to sell the mare, or to deal with her in any way till he had himself arrived there. At the fair the prisoner asked the servant the price of the mare, and he told him 25*l.*; the prisoner then desired him to trot her out; the prisoner then went and talked to a man on horseback and a man on foot, and then walked away. These two men then went up to the servant, and the man on foot offered the man on horseback 24*l.* for the horse he was riding, which the latter refused, saying, he would

(*p*) Rex *v.* Pratt, R. & M. C. C. R. 250.

(*q*) Rex *v.* Small, 8 C. & P. 46. *Sed vide* Parker's case, *ante*, p. 25, and Rex *v.* Jackson, *ante*, p. 29, *et quære*, whether in this case the property was not parted with. C. S. G.

not sell him at any price, upon which the man on foot stepped aside to the servant, and said, if he would chop the mare for the horse the man was riding, he would give him 24*l.* for the chop, and 5*s.* to put in his own pocket, at the same time taking from his pocket what appeared to be bank notes. The servant declined, saying, the mare was not his; but being persuaded by the man on foot, the servant accompanied the two men for about half a mile, and then agreed to the exchange of horses on the terms proposed, and as soon as the saddles were changed the man, who had been on horseback, rode away, and on the servant looking round for the man on foot he perceived that he had gone away while the saddles were changing. The horse left in exchange was worth about 4*l.* The prisoner had afterwards sold the mare for 14*l.*, saying that he had got it in a chop at the fair. It was submitted, on behalf of the prisoner, that as the servant meant to part with the entire property in the mare, and not with the possession only, it was no larceny; but it was held that there was no parting with the property in the mare, as the servant had the mere charge of her, and had no right to deal with the property in her in any way whatever. And if the prisoner was in league with the two other men, and they three, by a fraud, in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare, the prisoner ought to be found guilty. (*r*)

Hench's case. Fraudulently obtaining a chest of tea from the India House, though by means of a request note and permit, holden to be larceny

The prisoner, R. Hench, was indicted for stealing a chest and fifty-nine pounds weight of tea, which, in one count of the indictment, were stated as the property of James Layton and W. J. Thompson; and, in another count, as the property of the East India Company. The facts were, that Messrs. Layton and Co., who were tea brokers, had purchased the chest of tea in question, No. 7100, at the East India House, but had not taken it away, when the prisoner, who was in no way employed by them, went thither, and, going up to the place where the request papers were kept, selected one of them, and then proceeded, with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the India House who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and, seeing the number 7100 upon it, pointed to a chest with a corresponding number, and said, that was the chest he wanted, and then returned the paper to him, in order that he might go to the permit office and get a permit. The prisoner then went to the permit office, and shortly afterwards returned with a permit to the India House, where the same servant who had the care of the request papers received the permit from him, and asked him whose partner he was, and, upon his answering "Noton's," returned the permit to him again, and entered the name of Noton in the book. The prisoner then took away the chest of tea. Upon this evidence the jury found the prisoner guilty, when an objection was taken by his counsel, that, as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanor; and the Court reserved the point

(*r*) Reg. *v* Sheppard, 9 C. & P. 121, Coleridge, J., and see *post*, p. 49.

for the consideration of the twelve Judges. But they were clearly of opinion, that the offence amounted to felony. (s)

Aickles's case. The prisoner agreed with the prosecutor to discount a bill of exchange for him, and the bill was delivered into the prisoner's hands. The prisoner then said that if the prosecutor would come to his lodgings he would give him the cash. The prosecutor did not go himself, but sent his clerk, whom he desired not to lose sight of the prisoner till he had got the money. The prisoner contrived to get away from the clerk with the bill, and without paying the money; and this was holden to be larceny; the jury finding a preconcerted design by the prisoner to get the bill into his possession with intent to steal it.

The prisoner, J. H. Aickles, was indicted for stealing a bill of exchange of the value of a hundred pounds, the property of S. Edwards. The following facts appeared in evidence: Mr. Edwards, wishing to get his own note of hand discounted, had made application to several persons in the discounting line of business for that purpose. A few days afterwards the prisoner, a total stranger to Mr. Edwards, left an address at his lodgings while he was from home, "Mr. H., No. 21, Great Pulteney-street, from six to seven in the evening, or from eleven till twelve in the morning." In conseqence of this address, Mr. Edwards the next morning called upon the prisoner in Pulteney-street, and a conversation upon the subject of money transactions took place between them, when the prisoner told Mr. Edwards that he was in the discounting line, and would, whenever he chose, discount a bill for him at the usual premium of two and a half per cent. agency, provided it was drawn upon and accepted by a person of known credit and responsibility. About three weeks after this interview, Mr. Edwards again called upon the prisoner, but not finding him at home, he sent his clerk the next day to inquire whether he would discount a bill of one hundred pounds, accepted by Mr. Wells, of Cornhill, and to request that he would call in the city, that he might be fully satisfied of its validity. The prisoner returned with the clerk to the house of Mr. Wells, in Cornhill, where he was shewn into a room to Mr. Edwards, who asked him the terms upon which he would discount a bill for one hundred pounds, provided he approved of it. The prisoner answered, that he would do it for two and a half per cent. agency, exclusive of the legal interest for two months. Mr. Edwards immediately delivered the bill described in the indictment into the hands of the prisoner, and referred him to Mr. Wells, the acceptor of it, who was then present, to satisfy himself that it was a genuine acceptance. Mr. Wells said, that the acceptance was his handwriting. The prisoner then told Mr. Edwards, that if he would go with him to Pulteney-street, he would give him the cash, to which Mr. Edwards replied, that he could not conveniently go himself, but that his clerk should attend him, and pay him the twenty-five shillings agency, and the discount, on receiving the hundred pounds. As the prisoner and the clerk departed, Mr. Edwards whispered the clerk not to leave the prisoner without receiving the money, nor to lose sight of him, and promised to follow them in half an hour. The prisoner and the clerk accordingly proceeded together to the prisoner's lodgings in Pulteney-street. When they arrived, the prisoner shewed the clerk into the parlour, and desired him to wait while he fetched the money, saying, that it was only about three streets off, and that he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney-street, but, having lost sight of him as he turned the corner of another street, walked backwards and forwards in the street for a length of time, in hope of seeing him return. The prisoner did not come back again, and the clerk, being joined by Mr. Edwards, went again to the prisoner's lodgings, and both of them waited there three nights, in the vain expectation of

(s) Hench's case, O. B. Oct. 1810. Hil. T. 1811, M.S.

the prisoner's return. A few days afterwards he was taken, and upon his apprehension expressed his sorrow for what had happened, made several apologies for his misconduct, and promised to return the bill. It was objected by the prisoner's counsel, that these facts did not amount to felony. But the Court left the case with the jury to consider, first, Whether they thought that the prisoner had a preconcerted design to get the note into his possession with an intent to steal it; and, secondly, Whether the prosecutor intended to part with the note to the prisoner without having the money paid before he parted with it? The jury found the affirmative of the first, and the negative of the second question, and concluded that the prisoner was therefore guilty. And this conviction was holden right upon reference to all the Judges. (*t*)

Oliver's case. The prisoner offered to accommodate the prosecutor by giving him gold for bank-notes, upon which the prosecutor put down a number of bank-notes for the purpose of their being so exchanged. The prisoner took up the notes and made away with them. And this was holden to be larceny, if the jury believed that the prisoner intended to run away with the notes, and not to return with the gold.

The prisoner was indicted for stealing bank notes to the amount of thirty-five pounds, the property of William Smith, under the following circumstances. The prisoner, being in possession of a quantity of gold coin went into a room in a public-house, in the neighbourhood of Newcastle-upon-Tyne, when the prosecutor, who was a gentleman's servant, and who had about him notes belonging to his master, to a considerable amount, happened to come into the same room. Soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between him and the prosecutor; the prosecutor expressing a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, not at an advanced price, but at its legal currency. The prisoner stated, that if it would be any accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold for his notes and silver; and the exchange took place to a small amount. The prisoner then observed, that if it would be of any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor put down thirty-five pounds, in bank notes, for the purpose of receiving back their amount in gold; and the prisoner took them up, and went out of the house with them, promising to return immediately with the gold. The prisoner did not return; and the prosecutor never saw him again till he was apprehended. Upon these facts, Wood, B., held, that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes, and never to return with the gold: and that whether the prisoner had, at the time, the *animus furandi*, was the sole point upon which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said respecting the property having been parted with by the delivery, was without foundation, as the property, in truth, had never been parted with at all. The learned Judge further said, that a parting with the property in goods could only be effected by contract, which required the assent of two minds: but that in this case there was not the assent of the mind, either of the prosecutor, or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal. (*u*)

(*t*) Aickles's case, O. B. 1784. 1 Leach, 294. 2 East, P. C. c. 16, s. 106, p. 675.

(*u*) Oliver's case, cor. Wood, B., Northumberland Sum. Ass. 1811, cited by

Obtaining money by a fraudulent pretence of wanting change.

So where on an indictment for stealing a half-crown, two shillings, and six penny pieces, it appeared that the prisoner went to the shop of the prosecutor and asked his son to give him change for a half-crown, and the boy gave him two shillings and six penny pieces, and the prisoner held out the half-crown, of which the boy caught hold by the edge, but never got it into his possession, and then the prisoner ran away, having drawn the half-crown out of the boy's hand, and taking it and the change with him; Park, J. A. J., said, "If the prisoner had only been charged with stealing the half-crown I should have had great doubt, as the half-crown was his own, but he is also indicted for stealing the two shillings and the copper. He falsely pretends that he wants change for the half-crown, gets the change and runs off; I think that is a larceny." (*v*)

Where a party is trusted with a sovereign to get changed, and he goes off with it, it is not larceny if the prosecutor never expected to receive back that specific coin.

But where, upon an indictment for stealing a sovereign, it appeared that the prosecutor and the prisoner having entered a beer shop, were drinking together, and that the prosecutor, who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change, and upon her declaring her inability to do so, she placed it on the table, and the prisoner said, "I'll go and get change." The prosecutor said, "you wont come back with the change," to which the prisoner replied, "never fear," and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor, that he was not aware of the last remark of the prisoner, nor at first that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer. For the prisoner it was submitted that the prosecutor having parted with the legal possession of the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny. Coleridge, J., (having conferred with Gurney, B.) said "It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think that there was not a sufficient trespass to constitute a larceny." (*w*)

If a tenant get a receipt for his rent from his landlord on pretence of wanting to look at it, with intent to defraud him of part of his rent, it is a larceny of the receipt.

Upon an indictment for stealing a receipt, the prosecutor proved that the prisoner rented some premises of him for 25*l.* a-year, and that on the day on which he quitted there being half a year's rent due, he took a stamped receipt ready written and signed to the premises, off which the prisoner had removed all his goods. The prosecutor at the desire of the prisoner went into a room in his house, where the prisoner pulled out a bag of money, and asked the prosecutor whether he had brought a receipt, and the prosecutor said that he had, and the prisoner asked to look at it; the prosecutor gave him the receipt which the prisoner took, and put two sovereigns into the prosecutor's hand and immediately went away; and upon the prosecutor afterwards asking him for the remainder of the money he

Gurney, *arguendo* in Walsh's case. 4 Taunt. 274. 2 Leach, 1072.

(*v*) Rex *v.* Williams, MS. C. S. G., and 6 C. & P. 390. Park, J. A. J.

(*w*) Reg. *v.* Thomas, 9 C. & P. 741. See Mooer's case, *post*, p. 40.

said he had got his receipt and he should not pay it. The prosecutor stated that at the time he gave the prisoner the receipt he thought the prisoner was going to pay him the rent; that he should not have parted with the receipt unless he had been paid all the rent; but that when he put it in the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt back again, but wanted his rent to be paid. For the prisoner it was submitted that this was not a larceny. For the prosecution *Oliver's case* (*x*) was cited as in point; and it was contended that it was clear the prosecutor never intended to part with the receipt unless he was paid all the rent: the prisoner, on the contrary, never intended to pay the rent, and obtained the receipt by means of fraud: the property in the receipt, therefore, was not changed, and the case amounted to larceny. Coleridge, J., "I think it is a larceny. The prisoner had removed his goods off the premises, so that the prosecutor could not distrain; and then the prisoner induces the prosecutor to part with the receipt by asking to look at it, and it is delivered to him for that purpose. It is quite clear also, that the prosecutor never intended to give the prisoner the receipt till he was paid all the rent, and I think the payment of the two sovereigns makes no difference" (*y*)

Property obtained by means of cards, bets, &c.

So where it appeared that the prisoners decoyed the prosecutor into a public-house, and there introduced the play of cutting cards: and that one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him; and then, under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table, and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it. (*z*)

So if there is a plan to cheat a man of his property under colour of a bet, and he parts with the possession only to deposit as a stake with one of the confederates, the taking by such confederate is felonious. The prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot: he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false colour of winning a bet; and the jury so found. Upon a case reserved, the Judges (ten of them being present) held, that the conviction was right, because at the time of the taking the prosecutor parted with the possession only. (*a*)

In some of the cases of this description, the delivery of the goods

(*x*) *Supra*, note (*u*)

(*y*) Reg. *v.* Rodway, 9 C. & P. 784, and MS. C. S. G.

(*z*) Rex *v.* Horner and others, 1 Leach, 270. Cald. 295. S. C. The case was one of an application to the Court of King's Bench to bail the prisoners, on the ground that the charge against them amounted only to a *misdemeanor*. Probably it would have been considered as making an essential difference if the prosecutor had been playing himself at the time, and had parted with his money under the idea that it had been fairly won. See Rex *v.* Nicholson, *ante*, p. 27.

(*a*) Rex *v.* Robson and others, East. T. 1820. MS. Bayley, J., Russ. & Ry. 413. This differed the case from Rex *v.* Nicholson, *ante*, p. 27.

taken has been only by way of pledge, or security; but the same doctrine will apply if such delivery were obtained fraudulently, and with intent to steal. This will appear from the following case, where the fraud practised was of the kind commonly described by the term *ring dropping*.

Patch's case. The prisoner, with some accomplices, being in company with the prosecutor pretended to find a valuable ring. The prosecutor was to have a share of the pretended value of it, and was prevailed upon to deposit his watch, &c., and to take the ring until his share of the value should be paid. The accomplices of the prisoner made off with the watch, &c.; and the ring proved to be of the value only of ten shillings. It was left to the jury to say whether this was done with a preconcerted plan to obtain the watch, &c.: and the prisoner was found guilty.

The prisoner, J. Patch, was indicted for stealing a silver watch, steel chain, &c. two pieces of foreign coin, and seven shillings in money, the property of J. Bunstead. The evidence of the prosecutor was that the prisoner and two other persons, who made their escape, had joined him in the street; and that, after walking a short space with him, one of them stooped down and picked up a purse, which, upon inspection, was found to contain a ring, and a receipt for 147*l.* purporting to be the receipt of a jeweller for "a rich brilliant diamond ring." The prisoner proposed that they should go into some public-house to consider in what manner their respective portions of this prize should be divided, and they went accordingly. Various modes of distribution were then suggested; and, at length, the prisoner asked the prosecutor if he would take the ring, and deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to this proposal; and signed a written agreement, dictated by the prisoner, to the effect that when the prisoner, or either of the other two men returned the watch and money, and seventy pounds, he would re-deliver to them the purse and the ring. The prosecutor then laid the watch and money mentioned in the indictment upon the table, and received the ring. After which the prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men went off with the property. The abrupt manner in which they went away made the prosecutor conceive that he had been defrauded; but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his money and watch again. The prosecutor, however, secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings. Upon these facts it was objected, on behalf of the prisoner, that, as the prosecutor had parted voluntarily with his property, it was a fraud only, and not a felony. But the court referred it to the jury to consider whether the whole transaction was not an artful and preconcerted scheme, in the three men, feloniously to obtain the prosecutor's watch and money; and whether the prisoner and the other two men were not all in concert together to procure, by such a pretext, any man's money whom they might meet, and to embezzle it; or, in other words, to steal it. And the jury found the prisoner guilty. (*b*)

Moore's case. Where the prisoner in-

The prisoner, H. Moore, was indicted for stealing twenty guineas and four doubloons, the property of John Field. The prosecutor was walking along the street, when a stranger joined company with

(*b*) Patch's case, O. B. 1782, *cor.* Gould, J., Perryn, B., and Buller, J., 1 Leach, 238. 2 East, P. C. c. 16, s. 107, p. 678. It appears that the court proceeded upon the authority of Pear's case (*post*, p. 50). And it is stated that their opinion was founded on this, that the possession was obtained by fraud, and the property not altered; for the prosecutor was to have it again; and that, therefore, it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner. 2 East, P. C. c. 16, s. 107, p. 679.

him; and, after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. After they had proceeded about forty yards, the stranger proposed that they should go and drink a pot of porter, and see what they had picked up. The prosecutor was persuaded to comply; and they accordingly went into a private room, in an adjacent public house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed W. Smith, for 210*l.* "for one brilliant diamond cluster ring," and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room; when the ring was shewn to him; and, after praising the beauty of its lustre, he offered to settle the division of its value. The stranger lamented that he had no money about him, upon which the prisoner asked the prosecutor if he had any. The prosecutor replied that he had forty or fifty pounds at home, and the prisoner said that such a sum would just do. They all three then went to the prosecutor's lodgings at Chelsea, where the prosecutor got the money; and they then went to a public-house in the neighbourhood, where the prosecutor put down twenty guineas and four doubloons, which the stranger, in the presence of the prisoner, took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place, on the next morning at nine o'clock, and promising that he would then return to him the twenty guineas and the four doubloons, and also give him one hundred guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the other parties came. The ring was of a very trifling value. It was left with the jury to consider, upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion he was so confederated with the stranger, and aiding and assisting him, found the prisoner guilty, subject to the opinion of the Judges, whether the offence amounted to felony. The case being submitted to their consideration, and eleven of them being present, the majority (nine of them) were of opinion that the guineas and the doubloons were deposited in the nature of a pledge, and not as a loan; so that, though the *possession* was parted with, the *property* was not; (more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie,) and therefore as the prisoner had obtained them with a fraudulent intent to apply them to his own use, the offence became felony, from the *intention with which he gained the possession.* And they also held that, as the prisoner and his companion were acting in concert together, they were equally guilty. The other two Judges thought that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced upon it, and that therefore he had voluntarily parted with the *property*, as well as the possession. And they

duced the prosecutor to deliver twenty guineas and four doubloons, by way of pledge for a counterfeit jewel pretended to be found, with intent to steal the money, it was holden to be larceny.

said that when money was delivered by a man on such an occasion, it was not in his contemplation to have the same identical money back again. (*c*)

Watson's case. The prisoner induced a person to deliver bank-notes to him, by the fraud of *ring-dropping*, and upon the usual agreement that the notes should be returned, and the value of the jewel divided. Held to be larceny.

The prisoner, J. Watson, was indicted for stealing several bank-notes of the value of 100*l.*, the property of J. Smith, in his dwelling-house, against the 12 Anne, c. 7. (now repealed.) M. Smith, the prosecutor's wife, stated, that as she was going along the street the prisoner stooped down, picked up a small parcel, and said that he had got a prize: upon which she cried, "Halves," and said it was usual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the presence of another man, (who appeared to be an accomplice of the prisoner's,) and found in it a locket with a large stone, and a paper purporting to be the receipt of a jeweller for 250*l.* for a diamond locket. The prisoner said his name was Smith, that he was the captain of a ship, and that he would go to a friend's house, where his cargo was, and bring 100*l.* towards paying the witness her share. He went accordingly, was absent about fifteen minutes, and when he returned, he said that his friend was not at home. After some further proposals respecting the disposal of the locket, it was at length agreed between them, that the locket should be left in the custody of the witness, and that she should deposit 100*l.* in the prisoner's hands as a security to return him the locket the next morning; at which time she was to receive from him half the value of the locket, as mentioned in the receipt found; and she was to have the 100*l.* deposited in the prisoner's hands, as such security as aforesaid, returned back. They then went to the witness's house, where she procured bank-notes to the amount of 100*l.* and laid them on the table, and the prisoner took up the bank-notes, said that they were right, and that he would call the next morning and settle the whole. He then delivered up the locket, went off with the notes, and never returned again. The locket was only of the value of five shillings and sixpence. Upon this evidence the prisoner was convicted of the simple felony, in stealing the notes: but a case was reserved for the opinion of the Judges upon the objection that this was only a fraud, and not a felony. All the Judges held the conviction proper. (*d*)

But if in such a case the prosecutor part with the money intending to have the articles himself and sell them, it is not larceny.

But where on an indictment against Wilson and Martin for stealing a 5*l.* note and two sovereigns, the prosecutor said, "I saw Wilson on a road. Wilson pointed to the ground, and said 'there is a purse.' He picked it up. I said, 'We had better have it cried, as some one may own it.' He replied, 'Some one to whom it does not belong may say it is his, and get it from us.' We walked on, and I said, 'We had better see what the purse contains.' He replied, 'Not

(*c*) Moore's case, O. B. April Sessions, 1784. 1 Leach, 314. 2 East, P. C. c. 16, s. 107, p. 679. In Marsh's case, O. B. October Sessions, 1784, 1 Leach, 345, a similar question was reserved; and afterwards the prisoner was informed that as his case was exactly similar to that of Moore, and no ground either in law or in fact, for making any distinction between them, the Judges had declared their opinion that the taking amounted to a felonious taking; and the prisoner was sentenced to be transported for seven years.

(*d*) Watson's case, O. B. 1794. 2 Leach, 640. 2 East, P. C. c. 16, s. 107, p. 680. The case was disposed of by the Judges in Hil. T. 1795, when upon the supposition that the verdict had been taken for the capital offence of stealing in the dwelling-house, (which at first was thought to have been the case) the Judges all expressed their opinion that as the notes were in the possession of the prosecutrix, and derived no protection from the house, the case did not fall within the 12 Anne, c. 7, (now repealed. See *ante*, vol. 1, p. 856.

here, as there are men at work who will see us.' We went about twenty yards further, and Wilson opened the purse and took out what appeared to me to be a gold watch chain and two seals. He said he did not know the value of them, but there was a gentleman on the other side of the road who could probably tell us. This was the prisoner Martin. The things were shewn to him, and he said he was in the trade, and asked how we came by the articles. I said we had found them. Martin then said, it was a very prime article, and worth 14*l.*, and that we should divide it between us; and he added, that as we found it on the road it belonged to us, and no one else. Wilson said he would take the things to his master, but the other prisoner said he had no right to do so; and he also said, that if I would buy the other man's share he would give me 18*l.* for the articles, and get a good profit for himself besides. He added, that he was the brother of Mr. Dutton, the watchmaker, whom I knew. Wilson had gone on a little way, when he was called back by the other prisoner, who asked him if he would take 7*l.* for his share. This he agreed to do. I gave him a 5*l.* note and two sovereigns, and took the chain and seals: which were proved to be worth only a few shillings. For the prosecution *Moore's case,* (*e*) and *Rex* v. *Robson* (*ee*) were cited. Coleridge, J., "In *Moore's case,* nine of the judges thought that the money charged to have been stolen was given as a pledge, so that the possession of it only was parted with by the prosecutor and the property not. In this case the prosecutor intended to part with the money for good and all, and to have the articles. If the party meant to part with the property in the money, as well as the possession of it, I am of opinion that it is no larceny. Here the prosecutor meant to part with his money for ever. In *Rex* v. *Robson* the party had only the possession of the money given to him as a stakeholder. When this prosecutor parted with his 7*l.* he never intended to have it back again, but meant to sell the chain and seals for himself. The prisoners must be acquitted." (*f*)

Persons acting in concert.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods away, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. Standley, Jones, and Webster, conspired to get some money from M'Laughlin, and they pretended that he could not produce 100*l.*, upon which he produced it in notes, which Jones took to count and afterwards handed to Standley, and Standley and Webster pretended to gamble for them, Jones then beckoned M'Laughlin out of the room, and Standley and Webster immediately decamped with the money, and all the three afterwards shared it. Upon a case reserved the Judges were unanimous that this was larceny in all the three. (*g*) In another case, County and Donovan planned to rob the prosecutrix of some coats, and County got her to go with him that he might get some money to buy them of her, and she left the coats with Donovan who im-

(*e*) *Ante,* p. 48.

(*ee*) *Ante,* p. 45.

(*f*) Reg. *v.* Wilson, 8 C. & P. 111. The prisoners were afterwards tried and convicted for a conspiracy.

(*g*) Rex *v.* Standley, East. T. 1806, MS. Bayley, J., Russ. & Ry. 305.

mediately absconded with them; and, upon a case reserved, the Judges held the receipt by Donovan to be a felonious taking of the coats by both. (*h*)

Pear's case. The prisoner hired a horse on the pretence of taking a journey, and almost immediately afterwards sold it. The jury thought that it was hired with the intention of stealing it, and found the prisoner guilty of larceny. And the verdict was approved of by a majority of the judges after great discussion.

The following is a case which, upon its being submitted to the consideration of the Judges, underwent a great deal of discussion. The prisoner, J. Pear, was indicted for stealing a black mare, the property of S. Finch. It appeared in evidence, that the prosecutor was the keeper of a livery stable in the Borough, and that the prisoner on the 2nd of July 1779, hired the mare of him, for the day, to go to Sutton in Surrey, and back again; and, upon being asked where he lived, said that he lodged at No. 25 in King-street, and that he should return about eight o'clock in the evening. He did not return as he had promised; in consequence of which the prosecutor went next day to inquire for him according to the direction he had given, but could not find any such person. It turned out that the prisoner sold the mare on the afternoon of the same day on which he hired it, in Smithfield market. The learned Judge, by whom the prisoner was tried, left it to the jury to consider, whether the prisoner hired the mare with the intent of taking the journey which he mentioned, and afterwards changed that intention; and directed them that, if they were of opinion that he did so, they should acquit him, as in such case the mare must have been sold while the privity of contract subsisted: but he directed them to find the prisoner guilty in case they were of opinion that the journey was a mere pretence of the prisoner's to get the mare into his possession, and that he hired her with an intention of stealing her. The jury found the prisoner guilty, and the point was reserved for the opinion of the Judges.

The Judges, after mature deliberation, differed very considerably as to the law of this case. One of them held that it was not felony at common law; because there was no actual taking of the mare by the prisoner. Three others, though they thought that the offence would clearly have been felony by the common law, entertained considerable doubts in consequence of the statutes 33 Hen. 8, and 30 Geo. 2, relating to the offence of obtaining goods by false tokens or false pretences, which statutes made such offences punishable as misdemeanors only. But seven of the Judges were clearly of opinion that the offence was felony. (*i*) They held that the obtaining possession of the mare, and afterwards disposing of her in the manner stated was in the construction of law such a taking as would have made the prisoner liable to an action of trespass at the suit of the owner, if he had not intended to steal her; for she was delivered to the prisoner for a special purpose only, namely, to go to Sutton, which he never intended to do, but immediately sold her. That in this light the case would be similar to what was laid down by Littleton, sec. 71, who says, "if I lend to one my sheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have trespass notwithstanding the lending." That if in such a case trespass would have lain, there could be no doubt but that in this case, where the felonious intent at the time of obtaining the possession, was found by the jury, it was felony by the common law. (*j*)

(*h*) Rex *v.* County, East. T. 1816, MS. Bayley, J.

(*i*) It is stated also, that Blackstone, J., the twelfth Judge who was absent on account of illness, always held that it was felony. 2 East, P. C. c. 16, s. 112, p. 686, in the note.

(*j*) Pear's case, O. B. 1779. 1 Leach,

Charlewood's case. The prisoner obtained a horse under pretence of hiring it to take a journey, and shortly afterwards sold it. Held to be larceny, the jury finding an intent to steal the horse at the time of hiring it.

The prisoner, G. Charlewood, was indicted for stealing a bay gelding, the property of J. Houseman. The prosecutor was a livery stable keeper in Crown-street Soho; and on the 4th October 1785, the prisoner, who was a post boy, applied to him for a horse, in the name of a Mr. Eley, saying, that there was a chaise going to Barnet, and that Mr. Eley wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse; and, on going out of the stable yard, and meeting a friend of his, who asked him where he was going, he said that he was going no further than Barnet. He accordingly proceeded towards Tottenham-court Road, which leads to Barnet, and also, though in some degree circuitously, to Mr. Eley's house. This transaction took place about nine o'clock in the morning; and between three and four o'clock in the afternoon of the same day, the prisoner sold the gelding in Goodman's fields for a guinea and a half, including the bridle and saddle. The horse appeared to have been ridden very hard, and his knees were broken very badly. The purchaser almost immediately disposed of his bargain for fifteen shillings. On putting this case to the jury, it was stated by the Court, that the Judges in Pear's case, under circumstances similar to the present, had determined, that if a jury be satisfied, by the facts proved, that a person, at the time he obtained another's property, meant to convert it to his own use, it is felony. That there was, however, a distinction to be observed in the present case, though so nice a one as possibly not to be obvious to common understandings. It was this; that if it appeared to them, that the prisoner at the time he hired the horse, for the purpose of going to Barnet, really intended to go there, but that, finding himself in possession of the horse, he afterwards formed the intention of converting it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. The jury found the prisoner guilty, on the ground that he intended to steal the horse at the time he hired it; and he was afterwards executed. (*k*)

Spence's case. The intent to steal must be at the time of the hiring.

The prisoner was indicted for horse stealing. It appeared in evidence that the prisoner came to the prosecutor's house, and asked him if he let horses out to hire, and if he could have one. The prosecutor answered, Yes! He had a little mare which he could have, and asked him what distance he was going. He replied to Stockport, a distance of between six and seven miles. The prosecutor then saddled and bridled the mare and asked the prisoner for his address, the prisoner wrote on a slate, which the prosecutor kept for that purpose, as follows: "Mr. Pope, Cannon-street, 24." The prisoner then begged the prosecutor to accompany him to the Crown Inn, which he did, and then the prisoner mounted the mare and rode away. The prosecutor did not know whether a person of the name of Pope lived

212. 2 East. P. C. c. 16, s. 112, p. 685, in which latter work the judgment (which is stated to have been settled and approved by several of the Judges before it was delivered) is given at large.

(*k*) Charlewood's case, O. B. 1786. 1 Leach, 409. 2 East, P. C. c. 16, s. 112, p. 689. Another point was submitted to the consideration of the jury as to a felonious taking after the prisoner's return to London, and the end and purpose of hiring the horse being determined; but as to this, see Rex *v.* Banks, *post*, p. 57.

in Cannon-street or not. The prisoner was apprehended at Bury, in an opposite direction to Stockport, and distant from it sixteen miles. It was Bury fair-day for cattle and horses, the prisoner offered the horse for sale for 5*l.*, and at the same time said it was his. Bayley, J. told the jury, "If a person gets possession of a horse by hiring, meaning at the time not to use it for the purpose for which he states he hired it, but to endeavour to make it his own, he is guilty of stealing. In these cases, the guilt or innocence of the party depends upon what passed in his mind at the time, and this is to be inferred from circumstances; if you find, that, instead of going to the place where he stated he was going, he went elsewhere, it raises a presumption that he meant to deprive the original possessor of the horse." (*l*) So where on a similar indictment it appeared that the prisoner borrowed a pony from the prosecutor to ride a short distance and return, but he did not return, nor did he send the pony; and some years after the prosecutor met the prisoner by accident, and took him into custody; Holroyd, J., said "If the prisoner obtained the pony with a preconcerted fraudulent design in respect of stealing it, it is a felony. If he did not do it with a fraudulent design originally it is not a felony." (*m*) So where on a similar indictment it appeared that the prisoner went to the house of the prosecutor, and told him that his father had sent him to borrow a horse for three weeks, and the prosecutor being acquainted with the prisoner's father, dispatched him with the horse agreeably to the supposed request, and the prisoner having got possession of the horse by means of the above story, sold it; Parke, J. held this to be a clear stealing, the prosecutor not having parted with it out and out. (*n*)

Armstrong's case.

Vicar's case.

Semple's case. The prisoner obtained a post-chaise, by hiring, with intent to convert it to his own use; and it was holden to be felony, although the contract of hiring was not for any definite time.

Major Semple was indicted for stealing a post-chaise, and the following facts were proved in support of the charge. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood under the name of Major Harrold, and had sometimes hired carriages from the prosecutor, as he had occasion for them, and had paid for them with punctuality. On the first of September, 1785, the prisoner hired a post-chaise of the prosecutor, saying, that he should want it for three weeks or a month, as he was going a tour round the North. It was agreed that the prisoner should pay at the rate of five shillings a day during that time; and a price of fifty guineas was talked about, in case he should determine to purchase the chaise on his return to London; but no positive agreement took place between them on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses, and was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned. He then took fresh horses at the same inn at Uxbridge; but where he went with the chaise afterwards did not appear. But it appeared that he never returned it to Mr. Lycett, and that no tidings could be obtained of him till twelve months afterwards, when he was apprehended on some other charge. It was submitted to the Court, on behalf of the prisoner, that upon these facts the offence did not amount to felony,

(*l*) Spence's case, 1 Lew. 197.
(*m*) Armstrong's case, 1 Lew. 195.
(*n*) Vicar's case, 1 Lew. 199.

and that the case was distinguishable from those of *Pear* (*o*) and *Aickles*, (*p*) inasmuch as in those cases the parties had never obtained the legal possession of the goods delivered to them; whereas, in the present case, the prisoner had obtained the chaise upon a *contract*, which it was not proved that he had broken, as the chaise was not hired for any definite length of time, or to go to any certain place; and the mere understanding that it was for three weeks or a month, for the purpose of making a tour round the North, made no part of the contract. And, even supposing that the contract should be thought not to extend beyond the three weeks or a month, yet, as it was clear that, during that time at least, the prisoner had the legal possession of the chaise, no intention to convert it wrongfully to his own use, arising afterwards, whether from necessity or dishonesty, would make the withholding it felony, as the *animus furandi* must exist at the time the property is obtained. But the Court said, that they were bound by the determination of former cases, that it was at that time settled that the question of intention was for the consideration of the jury; and that, in this case, if the jury should be of opinion that the original taking of the chaise was with a felonious intent to steal it, and the hiring a mere pretence to enable the prisoner to effectuate that design, without any intention to restore or pay for it, it would fall precisely within the principle of *Pear's case*, and the other decisions which had been made, and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it; but if there were a *bonâ fide* hiring, and a real intention of returning it at that time, the subsequent conversion of it could not be felony, for by such contract and delivery the prisoner would have acquired the lawful possession of the chaise; in which case his subsequent abuse of that trust would not be felony. That as to there being no proof of actual conversion in this case, it was not necessary, but the jury must judge of it from the circumstances. If the prisoner had staid out six weeks, or two months, and on his return had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have been evidence of an honest intention at the time of the hiring. But there was no account given of it, even up to that moment, and therefore a presumption was raised against the prisoner, which it was incumbent on him to repel, and if he could not, the jury would have to consider, from all the facts in proof, whether the taking were with a felonious intent or not. If it were, the case fell directly within the principle which governed that of *Pear's*, from which it could not be distinguished. The Court, therefore, left the question of intention to the jury, who found the prisoner guilty, and he received sentence of transportation for seven years. (*q*)

It seems there must not

In a recent case it has been held, that to constitute a larceny by a party, to whom goods have been delivered on hire, there must not

(*o*) *Ante*, p. 50.
(*p*) *Ante*, p. 42.
(*q*) Semple's case, *cor.* Gould, J., and Adair, Serjt., Recorder, O. B. 1786, 1 Leach, 420. 2 East, P. C. c. 16, s. 112, p. 691.

only be an intention to steal at the time of the hiring, but also an actual conversion afterwards.

only be an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods is not such a conversion, if the party who makes the offer does not intend to purchase, unless his suspicions as to the honesty and right of the vendor to sell are removed. Upon an indictment for stealing a horse and gig it appeared that the prisoner, about half-past ten in the morning, hired the horse and gig of a livery-stable keeper in London, stating that he wanted them for two days for the purpose of going down to Windsor. Instead of going to Windsor he immediately drove in a contrary direction to Rumford, in Essex, where he arrived at about twelve o'clock, and offered the horse and gig for sale to Mr. Orbell, the landlord at the King's Head Inn at that place, for 25*l.* Mr. Orbell offered him 15*l.*, which the prisoner at first refused to accept, but half an hour afterwards, the gig being then in the yard, and the horse in the stable, he told Mr. Orbell that he must let him have them for the sum offered, as he had been desired by his father to sell them before his return home. Mr. Orbell stated that the value of the horse and gig was at least 45*l.*, in consequence of which his suspicions were excited, and he did not intend to purchase them, unless the prisoner gave him a satisfactory account of how he became possessed of them; that after the prisoner agreed to accept the 15*l.* those suspicions were increased, and he asked further questions of the prisoner, and then, under pretence of going to fetch the money to pay the amount offered, he procured a constable and gave the prisoner into custody. It was objected, that the indictment for the felony could not be sustained, as there had been no conversion. Conceding the hiring was only a pretence made use of to obtain the horse and gig, for the purpose of afterwards disposing of them, the possession in law still continued in the owner, and was not determined without a subsequent conversion, either actually proved as in *Pear's case* and *Charlewood's case*, or to be presumed from the circumstances, as in *Semple's case;* and in the present case the subsequent conversion was incomplete, as the contract for the purchase was not concluded on the part of Mr. Orbell. Tindal, C. J., "This case comes near to many of those which have decided that the appropriation of property under circumstances in some degree similar to the present amounted to larceny. However here there has been no actual conversion of the property, and only an offer to sell. I am of opinion, therefore, that the prisoner must be acquitted." (*r*)

A delivery of goods obtained by a fraudulent abuse of legal pro-

(*r*) Reg. *v.* Brooks, 8 C. & P. 295. Assuming that this case is accurately reported, the correctness of the decision seems liable to great doubt. The question for the jury in such cases is, what was the intention of the prisoner *at the time when* he obtained possession of the chattel? Now the acts of the prisoner subsequent to that time are only material, for the purpose of enabling the jury to decide what his intention was at the time of the taking. An actual conversion is undoubtedly cogent evidence that the chattel was originally obtained for that purpose; but it is only evidence; and it is easy to suggest cases equally strongly indicative of a felonious intent at the time of the taking; thus, suppose a prisoner had hired a horse from A. for a day, and had taken it into a distant part of the country, and there used it for his own purposes for a long period, and being apprehended had confessed that he obtained the horse fraudulently with intent to keep it for his own use, and wholly to deprive the owner of it; and that he had made false representations for that purpose; could it be contended that there was no evidence to go to the jury of an intent to steal at the time of the taking? So in the principal case it is submitted that although no actual conversion took place,

cess has been already mentioned as amongst the most aggravated of those cases of larceny where the taking is effected by procuring a delivery of the goods from the owner, or other person authorized to dispose of them. (*s*) It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted, for it has been justly observed that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder. (*t*)

Delivery of goods obtained by the fraudulent abuse of legal process.

The books do not furnish many instances of larcenies of this description. But it is laid down that if a person, intending to steal a horse, take out a *replevin*, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man, intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases the taking will amount to larceny. (*u*) So if, under pretext or colour of a *capias utlagatum* sued out after an outlawry clandestinely obtained against a visible man, his goods be taken with a felonious intent, it will be felony. (*v*)

Farre and Chadwicke's case. Goods obtained by a fraudulent ejectment.

In a case of this description, where the prisoners were indicted for breaking the house of R. Stanyer, putting his wife in fear, and stealing goods, the following facts were proved. The prisoners intending to rifle a house in which a Mrs. Stanyer lived, apart from her husband, went to an attorney, and pretending that Mrs. Stanyer was tenant to one of them, and in arrear for rent, obtained possession of the house by means of a fraudulent ejectment; and at the same time arrested Mrs. Stanyer, by virtue of a writ of latitat, and caused her to be carried to prison. The prisoners then rifled the house, and took away the goods, some of which they hid, altered the marks of others, and sold the rest. When they were questioned concerning these acts, and asked what colour of title they had to the house or goods, they could pretend none. And it was proved, that the real landlord had received the rent of the house for many years, and that no rent was in arrear. Neither could the prisoners pretend to any cause of action against Mrs. Stanyer. Upon these facts the jury were directed, that if they believed that the prisoners had done all this with an intent to rob, they ought to find them guilty, which they accordingly did, and both prisoners were executed. (*w*)

still there was evidence for the jury that the horse and gig were obtained with intent to convert them to the prisoner's use. It seems difficult also to see how the fact that Mr. Orbell did not intend to complete the contract could vary the effect of the prisoner's acts; the prisoner had done all on his part to complete the contract, and as against him it might well have been held that the conversion was complete: in the same way as it has been held that the offence of bribery is complete where A. gives money to B. to induce him to vote for a candidate, and B. agrees so to do, although he never intends so to vote. Henslow *v.* Fawcett, 3 Ad. & E. 51. Harding *v.* Stokes, 2 M. & W. 233. See also Spence's case, *ante*, p. 51, where there seems to have been no sale. C. S. G.

(*s*) *Ante*, p. 35.

(*t*) 1 Hawk. P. C. c. 33, s. 12. 2 East, P. C. c. 16, s. 96, p. 660.

(*u*) 3 Inst. 108. 1 Hale, 507. Kel. 43. 1 Hawk. P. C. c. 33, s. 12. 2 East, P. C. c. 16, s. 96, p. 660.

(*v*) 2 East, P. C. c. 16, s. 96, p. 660. And see cases of a breaking and entering in burglary, effected by fraud, *ante*, vol. 1, p. 793.

(*w*) Rex *v.* Richard Farre and Eleanor Chadwicke, O. B. 1665. Kel. 43, 44. 2 East, P. C. c. 16, s. 96, p. 660. 2 Leach, 1064, note (*a*).

Delivery of the goods obtained without fraud, and question whether there has been a new and felonious taking.

II. Where it appears that the delivery of the goods by the owner, or person authorized to dispose of them, *was not obtained fraudulently*, and with intent to steal, a remaining inquiry may be; —whether such lawful possession has been determined, and whether there has been any new and felonious taking. (*x*) Thus it has been held, that if a carrier take a pack of goods to the place appointed, and deliver or lay it down, his possession is determined; and if he afterwards carry it away with intent to steal it, this will be a new taking, and felonious. (*y*)

If the lawful possession has not been determined, the goods will continue in the possession of the party to whom they were delivered by *bailment;* and the general principle of law will prevail, "that if a person obtain the goods of another without fraud, although he have the *animus furandi* afterwards, and convert them to his own use, he cannot be guilty of felony." (*z*) A principle which has been holden to extend to the cases of a tailor, who has cloth delivered to him to make clothes with; a carrier who receives goods to carry to a certain place; and a friend who is entrusted with goods to keep for the use of the owner; which they afterwards severally embezzle. (*a*) And so if a watch be delivered to a person to mend, and he sells it, this has been held not to be larceny. (*b*) And so also, if plate be delivered to a goldsmith to work or to weigh, or as a deposit, it has been held that his conversion of it will not be a felony. (*c*) It has, however, been already noticed, that some of the cases of this nature seem to make a near approach to those where a bare charge, or mere special use of the goods, is transferred by the delivery, and where, consequently, the legal possession of them remaining exclusively in the owner, larceny may be committed in respect of them, exactly as if no delivery at all had been made. (*d*)

Delivery of a horse, &c., upon hire, or loan, *bonâ fide.*

It appears always to have been considered, that where a horse was delivered upon hire or loan, and such delivery was obtained *bonâ fide*, no subsequent wrongful conversion pending the contract would amount to felony; and so of other goods. (*e*) But it was at one time held that when the purpose of the hiring, or loan, for which the delivery was made, had ended, felony might be committed by a conversion of the goods: and consequently, that if the hiring of a horse was limited to a particular time or place, and after that time had expired, or the party had arrived at the proper place for the re-delivery, he rode away with the horse, and converted it to his own use, it was larceny. (*f*) But this doctrine was considered, and held to be wrong in a case of recent occurrence. The prisoner had borrowed a horse to take a child to a neighbouring surgeon, and after he had done so, and returned, he took the horse in a different direction, and

(*x*) *Ante*, p. 35.

(*y*) 3 Inst. 107. 1 Hale, 505.

(*z*) 3 Inst. 107. 2 East, P. C. c. 16, s. 113, p. 693.

(*a*) Staundf. P. C. c. 25. 1 Hale, 504, 505. 3 Inst. 107, 108. 1 Hawk. P. C. c. 33, s. 2. 2 East, P. C. c. 16, s. 113, p. 693.

(*b*) Rex *v.* Levy, 4 C. & P. 241, Vaughan, B.

(*c*) 3 Hen. 7, pl. 12, cited by Shower. 1 Show. 52. 2 East, P. C. c. 16, s. 113, p. 693.

(*d*) *Ante*, p. 21, *et seq.*

(*e*) 1 Hale, 504. 2 East, P. C. c. 16, s. 114, p. 693.

(*f*) Charlewood's case, 1 Leach, 409. 2 East, P. C. c. 16, s. 112, p. 689, and s. 114, p. 694. Tunnard's case, *cor.* Raymond, C J., Denton, J., and Hale, B., O. B. 1729. 2 East, P. C. c. 16, s. 112, p. 687, and s. 14, p. 694. 1 Leach, 214, note (*a*).

sold it. The jury were satisfied that he had no felonious intention when he borrowed it; but as the purpose for which he hired it was over before he took the horse to the place where he sold it, the jury were directed to convict in order that the point might be considered: and, upon a case reserved, the Judges held that there was no felonious taking, and that the conviction was wrong. (*g*) So that it is now settled, that where the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, &c.; a subsequent withholding and disposing of them, will not constitute a new felonious taking, nor make him guilty of felony. (*g*)

Leigh's case. The conversion of goods holden not to be felonious, on the ground that the original taking was not with intent to steal.

In the following case a conversion of goods was holden not to be felonious, on the ground that the original taking was not with intent to steal. The prisoner was indicted for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, in which was a shop containing the muslin and other articles mentioned in the indictment, was on fire; and that his neighbours had, in general, assisted at the time in removing his goods and stock for better security. The prisoner probably had removed all the articles, which she was charged with having stolen, when the prosecutor's other neighbours were thus employed; and it appeared that she removed some of the muslin in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor's applying to her next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house; most of the articles being artfully concealed in various ways. Upon this evidence it was suggested, on behalf of the prisoner, that she originally took the articles with an honest purpose, as her neighbours had done, and that she would not otherwise have taken some of them in the presence and under the view of the prosecutor; and that, therefore, the case did not amount to felony. The court left the case to the jury; telling them that whether the prisoner took the goods originally with an honest intent, was a question of fact for their consideration: but that even if they were of opinion that she did take them with an honest intent, yet her afterwards hiding them in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury, upon this direction, found her guilty; but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And the case being submitted to the consideration of the Judges, they held the conviction wrong; and were of opinion that upon this special finding there was no felonious taking, but merely a breach of trust: some of them, however, thought that it might have been left strongly with the jury that the subsequent conduct marked the original intention. (*h*)

(*g*) Rex *v.* Banks, East. T. 1821, MS. Bayley, J., and Russ. & Ry. 441. And see Rex *v.* Stock, and other cases, *post*, chap. xiv. tit. *Of Larceny by Servants.*

(*h*) Leigh's case, *cor.* Lord Eldon, Wells Sum. Ass. 1800, and considered by the judges (Lawrence, J., being absent) in Mich. T. 1800. 2 East, P. C. c. 16, s. 114, p. 694. 1 Leach, 411, note (*a*), and MS. The note of Le Blanc, J., as to the opinion of the judges is, that they thought the possession of the owner continued, and that the evidence of a subsequent taking away was not sufficient, MS. Bayley, J.

Where goods are delivered to a party by mistake, and he afterwards disposes of them to his own use, it is not larceny if he was guilty of no fraud in causing them to be delivered to himself.

Where goods are delivered to a party by mistake, such party having done no fraudulent act in order to cause them to be so delivered, and such party afterwards disposes of them to his own use, this is not a larceny, on the ground that there was no *animus furandi* at the time when the goods were delivered. The prisoner, James Mucklow, was indicted for stealing a draft, which was unstamped and was written on the same sheet of paper with a letter, directed "James Mucklow, Saint Martin's Lane, Birmingham," and was sent by post to Birmingham. No person of that name being found or heard of to be living in Saint Martin's Lane, and the prisoner living in a house, about a dozen yards from Saint Martin's Lane, with his father, the postman called with the letter at their house when they were out, and left a message that there was a letter for them, which they were to send for; and it was in consequence thereof delivered the same day to the father, and afterwards came to the hands of the prisoner his son, who appropriated the draft to his own use, and received payment of it, under circumstances proved by evidence arising from the contents of the letter and otherwise, that satisfied the jury he knew the letter and draft were not intended for him, but for another person. It was objected that this did not amount to larceny, as the possession of the letter and draft had been voluntarily parted with by the drawers, and by the postman, without any fraud on the part of the prisoner; and, upon a case reserved, the Judges held the conviction wrong, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter. (*i*)

Privity of contract determined, after delivery, by the tortious acts of the bailee.

The privity of a contract may be determined before its regular completion by the tortious acts of the bailee.

A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A. with intent to steal them; this has been holden to be felony, for the reason that the goods were not delivered to B. but taken by him; a judgment which appears to have proceeded upon the ground that, by the delivery of the key in this case, it was not in the contemplation of the parties to make a delivery of the goods contained in the room. (*j*) But supposing the key to have been delivered for the purpose of entrusting the party with the care of the goods, still, according to a very good opinion, the taking of the goods out of the room, with a felonious intent, might have been felony; on the ground that, by the act of taking the goods with such an intent out of the room in which they were intended to remain for safe custody, the privity of the contract would have been determined in the same manner as if they had been delivered in a box, and taken out of it afterwards. (*k*)

Carrier, weaver, &c., taking the goods delivered to them.

Upon the same principle of a determination of the privity of contract by a tortious act of the bailee, it has been holden, that if a carrier open a pack and take out part of the goods, or a weaver take part of the silk which he has received to work, or a miller take part

(*i*) Rex *v.* Mucklow, R. & M. C. C. R. 160. The letter and draft which was drawn by Lea and Sons at Kidderminster, were intended for another James Mucklow, of New Hall-street, Birmingham, but by mistake the letter was directed to St. Martin's Lane. Two other points were reserved, but no opinion given as to either of them, *viz.*, whether the draft being drawn more than ten miles from Birmingham, and unstamped, was not wholly void, and if so, not the subject of larceny, and whether the draft was of any value in the hands of the drawers, according to the opinion in Walsh's case, *ante*, p. 30.

(*j*) 1 Hale, 505.

(*k*) 2 East, P. C. c. 16, s. 11; p. 685.

of the corn which has been delivered to him to grind, such takings, if with a felonious intent, will be felony. (*l*) And in a more recent case, it was held that where a warehouseman took all the wheat out of certain bags which had been delivered to him for safe custody, and disposed of it, he was guilty of larceny. The prisoner had received forty bags of wheat to keep in his warehouse for one Neale; having no authority to sell, or to shew samples; he emptied eight of the bags, and sold the wheat they contained, and afterwards filled the bags with inferior wheat; but as it did not appear that he had taken less than the whole of any one bag, the point was saved, whether any larceny had been committed, and the Judges were unanimous that this was a larceny, and that taking the whole out of any one bag, was not less a larceny than taking a part. (*m*)

Distinction in the carrier's case.

With respect, however, to a conversion of goods by a carrier, a notable distinction should be observed, namely, that though if a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out part of the goods, it will be a felonious taking; yet it will be no felony if he take away the whole package. (*n*) The doctrine seems indeed to savour a little of contradiction, (*o*) and has been considered as standing more upon positive law not at this time to be questioned, than sound reasoning. (*p*) The distinction appears to have proceeded upon the ground that the act of breaking the package is an act of trespass in the carrier by which the privity of contract is determined; whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which it was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession. And, if this be the true principle of the distinction, it does not seem to make any difference, where there is such a breaking of the package, whether the carrier take the whole or a part only of its contents. (*q*)

It should be mentioned, that in a book of high authority a different principle is assigned for this distinction, namely, that the subsequent act of the carrier, in opening the goods and disposing of them to his own use, "declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them." (*r*) But it is well observed, that though such previous intent may appear from the evidence in particular cases; yet, if it were to be inferred from the mere fact of the carrier's embezzling the goods, there would be an end of the distinction itself; for if the taking of goods out of the package, be evidence of the carrier's having originally intended to take the goods,

(*l*) 3 Inst. 107, 108. 1 Hale, 505. 1 Hawk. P. C. c. 33, s. 4.

(*m*) Rex v Brazier, Mich. T. 1817, MS. Bayley, J., and Russ. & Ry. 337.

(*n*) 3 Inst. 107. 1 Hale, 504. 1 Hawk. P. C. c. 33, s. 2, 4.

(*o*) See Kel. 83, where the learned reporter says, "I marvel at the case put 13 Edw. 4, 9 b, that if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it, but sell it all, this is no felony; but if he draw part of it out, above the value of twelvepence, this is felony. I do not see why the disposing of the whole should not be felony also." As to the part of this passage—"above the value of twelvepence," there seems to be no reason why, if a taking to that amount would have been grand larceny, a taking to the value of twelvepence, or under, might not have been petit larceny.

(*p*) 2 East, P. C. c. 16, s. 115, p. 695.

(*q*) 2 East, P. C. c. 16, s. 115, p. 697.

(*r*) Kel 82.

not upon the agreement, but with intent to steal them, *à fortiori* the taking the whole package of goods, whether broken or not, and converting it, must be evidence of such intent. (*s*)

It will be material, therefore, in cases where goods are charged to have been stolen by a carrier, to show that the package in which they were contained was broken or opened by him; but what will amount to sufficient evidence of that fact will depend of course upon the circumstances of each particular case, and will be peculiarly within the province of the jury to determine. In a case where a woman had entrusted a porter to carry a bundle for her to Wapping, and went with the porter, and in going to the place the porter ran away with the bundle, which was lost; it is reported that a very learned Judge, after telling the jury that if they thought that the porter opened the bundle and took out the goods it was felony, and they ought to find him guilty, further declared it to be his opinion, that the facts, as they have been above stated, were evidence of his having opened the bundle and taken out the goods. (*t*) But it has been doubted, with great propriety, whether upon the facts, as thus stated, the evidence was sufficient to warrant the jury in finding that the porter opened the bundle, and took out the goods; (*u*) and there certainly seem to be better grounds upon which this case might have been decided. (*v*)

In a modern case it was held, that the master and owner of a ship disposing of some of the goods delivered him to carry, was not guilty of larceny, as it did not appear that he took the goods out of their packages. The prisoner received 280 casks of butter, to carry in a ship of which he was the master and owner; on the voyage he made a false protest, stating that he had been forced to throw overboard several casks; and he had in fact stopped at Cowes and disposed of thirteen casks at that place. The indictment contained one count upon the 24 Geo. 2, c. 45, and another for a larceny at common law, but upon a case reserved, the Judges held it to be no larceny, either at common law, or under the statute. (*w*)

Persons not common carriers.

If a person employed to carry goods for hire to one person, deliver them fraudulently to another, but does not break bulk, this is not larceny, although the person be not a common carrier, but was only employed in the particular instance. Upon an indictment against Fletcher and Mellor for stealing various articles, the prosecutor stated that the goods were packed up in four packages, and that he directed the prisoners to carry them to the house of Fletcher's father, who was to keep them safe for his use. The goods were to be conveyed in the prosecutor's cart, but the horse belonged to Fletcher. The prisoners were neither of them the servants of the prosecutor, but were to be paid for their trouble. The packages were not taken to Fletcher's

(*s*) 2 East, P. C. c. 16, s. 115, p. 696, 697.

(*t*) Anon. *cor.* Holt, C. J., O. B. 1701. 2 East, P. C. c. 16, s. 115, p. 697. 1 Leach, 415, note (*a*).

(*u*) 2 East, P. C. c. 16, s. 115, p. 696, 697.

(*v*) It is stated to have been suggested in 2 MS. Sum. 235, that a ground for the determination in this case might have been, that all the circumstances of it shewed that the porter took the bundle at first with intent to steal it; and also to have been suggested by some of the judges, in the argument on Pear's case (*ante*, p. 50), that the bundle, though delivered, being intended to continue in the owner's presence, was, in point of law, in her possession. 2 East, P. C. c. 16, s. 115, p. 698.

(*w*) Rex *v.* Madox, Mich. T. 1805, MS. Bayley, J., and Russ. & Ry. 92.

father's, and some of the goods were found loose in the house of one Beardmore. Patteson, J. "There is no evidence that the packages were opened while the goods were in the possession of the prisoners, and a carrier cannot be convicted of larceny, unless he breaks bulk." It was then urged for the prosecution, that the prisoners were not carriers; but were merely employed in this particular instance. Patteson, J. "They carried for hire. It is proved that they were to be paid for taking these goods. There is the case of a captain of a ship, which is a very strong authority on this point. The prisoners must be acquitted." (*x*) So where on an indictment for stealing a truss of hay, it appeared that Cheatle had sent three trusses of hay consigned to Bayliss by the prisoner's cart, and that the prisoner had taken away one of the trusses, which was found in his possession but not broken up; Parke, J. said "This is no larceny, as the prisoner did not break up the truss." (*y*)

Separating one stave from others equivalent to breaking bulk.

Upon an indictment for stealing three staves of wood it appeared that the prosecutor, who was the owner of a vessel laden with timber, employed the prisoner, who had a boat, to carry the staves in question, as well as other staves, ashore in that boat; the boat was manned principally by the prosecutor's men, but was under the entire control of the prisoner; the prisoner never landed two of the staves, and concealed them in the bottom of his boat under some nets; and one of the staves which he landed he carried to his mother's house; it was objected that the prisoner was bailee of the staves and could not be guilty of larceny, unless he broke bulk: it was replied, that this was a mere charge and not a bailment, as the servants of the owner were present during the transit of the staves; but that even if it were a bailment, yet as the staves were delivered to the prisoner all together, the separating one from the rest, and carrying that one to a different place, was equivalent to breaking bulk. Patteson, J., "I think that this was a case of bailment, although the prosecutor's servants were on board, because they were there under the prisoner's control. That being so, if the prisoner had not taken the staves out of the boat, the mere non-delivery of them would not have amounted to larceny; but the prisoner separating one of the articles from the rest, and taking it to a place different from that of its destination, was, if he did it with intent to appropriate it to his own use, equivalent to breaking bulk; and therefore, would be sufficient to constitute a larceny. I shall leave it to the jury to say, whether the prisoner removed the stave to his mother's with intent to convert it to his own use." (*z*)

Abstracting money from letters.

Upon an indictment for stealing two half sovereigns, it appeared that the prosecutrix asked the prisoner, who was not her servant, but only a casual acquaintance, to put a letter in the post for her, telling her at the same time that it contained two half sovereigns, for the purpose of paying a bill; the prisoner abstracted the money by breaking the seal of the letter before she put it in the post; Mirehouse, C. S. (after consulting Gaselee, J.,) said that in his opinion, and in that of the learned Judge it was larceny. (*a*) So where on an indictment for stealing bank notes, it appeared that the prosecutor

(*x*) Rex *v.* Fletcher, 4 C. & P. 545, and MS. C. S. G. Patteson, J., added, "If the horse had belonged to the prosecutor I should have thought differently." MSS. C. S. G.

(*y*) Rex *v.* Pratley, 5 C. & P. 533.

(*z*) Rex *v.* Howell, 7 C. & P. 325.

(*a*) Rex *v.* Jones, 7 C. & P. 151.

gave the prisoner, who was not his servant, a parcel containing the notes to take to the Bull and Mouth Inn, to be sent to Nottingham, and the parcel arrived, but without the notes in it, and two of the notes were afterwards found at the prisoner's lodgings. It was contended for the prisoner, that as he was not the servant of the prosecutor, there was no trespass, and therefore, there was no larceny, and that the cases as to breaking bulk were all cases of carriers; but the Court were of a contrary opinion, and held that as the parcel must have been opened and the notes abstracted, it did amount to larceny. (*b*)

SECTION II.

Of the Personal Goods in respect of which the Offence of Larceny may be committed.

In pursuing this part of the inquiry respecting the offence of larceny, there seem to be three points which more particularly require consideration; I. Whether the goods taken were in any way *part of the freehold;* II. Whether they consist of *written instruments;* and III. Whether they consist of *animals, birds,* or *fish.*

By the common law, larceny cannot be committed of things that are part of the freehold.

I. By the common law, larceny cannot be committed of things which savour of the realty, and are, at the time they are taken, *part of the freehold;* whether they be of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c. annexed to buildings. (*c*) The severance and taking of things of this description is, at common law, only a trespass. One reason for which doctrine (though it does not apply to the whole of the articles which have been enumerated) is said to be, that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen: (*d*) possibly also, the doctrine may have proceeded upon certain subtilties in the legal notions of our ancestors; (*e*) and it may perhaps in some measure have originated in the greater security from private depredations of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures. (*f*)

But they become subjects of larceny by being severed.

But things, though they savour of the realty, may become the subjects of larceny by being *severed* from the freehold: thus, if stones be dug out of a quarry, wood be cut, fruit be gathered, or grass be cut, larceny may be committed of them. (*g*) And this will be the

(*b*) Reg. *v.* Jenkins, 9 C. & P. 38, Gurney, B., and Bosanquet, J. See Reg. *v.* Heath, *ante*, p. 34.

(*c*) 3 Inst. 109. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 34. Bac. Ab. tit. *Felony* (A). 4 Black. Com. 232. 2 East, P. C. c. 16, s. 27, p. 587.

(*d*) 1 Hawk. P. C. c. 33, s. 34. 2 East, P. C. c. 16, s. 27, p. 587.

(*e*) 4 Black, Com. 232.

(*f*) Bac. Ab. tit. *Felony* (A).

(*g*) 3 Inst. 109. 1 Hale, 510.

case, not only where they have been severed by the owner, but also by the thief himself, if there be an interval between his severing and taking them away; so that it cannot be considered as one continued act. If therefore the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at another time when they are so turned into personalty and take them away, it is larceny. (*h*) Thus though "if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it: and so of a tree which has been some time severed." (*i*)

Statutes making it penal to take wrongfully things that are part of the freehold.

This being the common law, and many of the descriptions of property which come within this notion of a connection with the freehold being thereby placed in a very precarious and unprotected situation, the Legislature from time to time interfered for their protection, and made the wrongful taking of them in some instances felony, and in others a minor offence, punishable by summary proceedings before a magistrate. These provisions are for the most part amended and consolidated by the 7 & 8 Geo. 4. c. 29.

Stealing from certain mines.

The 37th section of which enacts, "that if any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in case of simple larceny." (*j*)

Stealing things annexed to buildings, &c.

By sec. 44, "if any person shall steal, or rip, cut, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*jj*) and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person." (*k*)

Construction of these statutes.

In a case upon the repealed statutes 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, where the prisoner was indicted for stealing a "window casement made of iron, lead, and glass," the property of the benchers of the Middle Temple, fixed to a certain building situate in Elm-

(*h*) 1 Hawk. P. C. c. 33, s. 34. 4 Black. Com. 233. 2 East, P. C. c. 16, s. 27, p. 587. And so in 1 Hale, 510, it is said, "But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the Court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead of Westminster Abbey." Dalt. c. 103, p. 166, (new edit. c. 156, p. 501.)

(*i*) Per Gibbs, Ch. J., Lee *v.* Risdon, M. T. 57 Geo. 3. 7 Taunt. 191.

(*j*) *Ante*, p. 2. The Irish Act, 9 Geo. 4, c. 55, s. 30, is verbatim the same.

(*jj*) *Ante*, p. 2.

(*k*) The Irish Act, 9 Geo. 4, c. 55, s. 37, is verbatim the same, with a proviso that it shall not affect the punishment under the Irish Paving Acts.

court, it was holden that the case was not within the acts. The Court said, that the statutes amongst the several articles which they enumerated did not mention "*a casement*," and that as the statute 21 Geo. 3, c. 68, was made to remedy the defects of the 4 Geo. 2, c. 32, which mentioned every specific article by name, the words "any copper, brass, bell-metal, utensil, or fixture," were to be taken as substantive nouns, and not as descriptions of the sorts of fixtures which the Legislature intended to protect. (*l*) Such an offence, however, would be clearly within the provisions of the recent statute upon an indictment properly framed.

Where the prisoner had obtained fraudulent possession of a house upon an agreement for a lease, and stripped it of the leaden pipes, &c., it was holden to be within the 4 Geo. 2, c. 32, now repealed.

In a case where the prisoner was indicted on the repealed statute, 4 Geo. 2, c. 32, for stealing two hundred weight of lead, fixed to a house and building, the facts were, that the house in question being to be let, the prisoner, giving a false description of his situation in life and his place of residence, obtained possession of it, under a treaty for a lease of it for one and twenty years, which was agreed to be executed: and, in a few days after he had so obtained possession of it, stripped it of the lead on the roof, and of the leaden pipes, &c. The jury said, that they were of opinion that he had entered into the contract for the purpose of getting a fraudulent possession of the house, and found a verdict of guilty: and, upon the case being reserved for the opinion of the judges, though no opinion was publicly delivered, the prisoner afterwards was sentenced to pay a fine of a shilling, and to be imprisoned for two years in the house of correction. (*m*)

A church was held to be a building within the 4 Geo. 2, c. 32, and an indictment for stealing lead affixed to it, need not state to whom the lead belonged.

A church was held to be a building within the 4 Geo. 2, c. 32, and an indictment for stealing lead affixed thereto need not have stated the person to whom the property or the freehold belonged. The first count charged that the prisoner 150 pounds weight of lead belonging to the Rev. C. G., then and there fixed to a certain building, called Hendon Church, of the said C. G., then and there did steal, &c. The second count stated the property as belonging to the churchwardens by name, and as fixed to a certain other building, called Hendon Church, of the said churchwardens: upon a case reserved, the judges were unanimous that a church was included within the words "any building whatsoever." And regarding the person or persons in whom the property or the freehold of the church by law resides, a majority of the Judges were of opinion, that the first count charging that the lead was stolen from the parish church of Hendon, and laying it to be the property of the vicar, was sufficient to support this indictment. It was also thought by many of the judges, that as this statute had made the stealing lead from any building a felony, the averment that the lead was stolen from a certain building called Hendon Church, was of itself a description of sufficient certainty, and that the further averment in whom the property resided was immaterial and unnecessary; the allegation that it was affixed to a building, describing the sort of building, and that the building,

(*l*) Senior's case, O. B. 1788. 1 Leach, 496. 2 East, P. C. c. 16, s. 31, p. 593. The prisoner was afterwards indicted for a similar offence, before Wilson, J., and acquitted upon the authority of this determination. In a former case, Rex. *v.* Hedges, 1 Leach, 201. 2 East, P. C. c. 16, s. 30, p. 590, note (*b*), the question appears to have turned upon whether the window sashes stolen were *fixed* to the freehold, which was ruled in the negative, upon the facts of the case, which shewed that they were only attached by a *temporary* fastening.

(*m*) Munday's case, O. B. 1799. 2 Leach, 850. 2 East, P. C. c. 16, s. 31, p. 594.

whether church or house, belonged to such a person, being all that the law in such a case required; and that the allegation as to the property might be rejected as surplusage. (*m*)

Buildings within the statutes.

A summer-house, used occasionally for tea and refreshment, situate in a park, at the distance of half a mile from the dwelling-house, was held to be a building within the 4 Geo. 2, c. 32. (*n*)

Upon an indictment for stealing two pieces of wood fixed to a certain building, it appeared that the place was intended for a cart-shed in a field, and that on all its sides it was boarded up, except where there was a door which had a lock to it; it had a wooden frame-work for a roof ready for thatching, but it had no thatch, some gorse being thrown on it; and Littledale, J., held that this was a building within the 7 & 8 Geo. 4, c. 29, s. 44. (*o*)

But where on a similar indictment for stealing a plank, it appeared that the plank was used as a seat in the grounds of the Duke of Beaufort, and that there was a wall, and pillars at the ends of it, and that the plank was laid in mortar on the top of the wall and pillars, and there was no roof; Park, J. A. J., held that this was not a building within the meaning of the act. (*p*)

Fixtures in churchyards.

It seems that a churchyard is a place dedicated to public use within the meaning of this section, and therefore stealing fixtures out of a churchyard is punishable under this section. Upon an indictment for receiving stolen brass, which alleged that one E. Smith had been convicted of stealing the brass fixed in the churchyard at M., that being a "place dedicated to public use," evidence was given that the brass was fixed into many of the tombstones in the churchyard: and it was objected that the words "other place dedicated to public use or ornament," meant places *ejusdem generis* with "square" and "street." Bosanquet, J., "This statute, which is rather peculiarly worded, makes it an offence to steal brass fixed in any square, street, or other place dedicated to public use or ornament; and I think that a churchyard is a place of that kind within the meaning of this act. If the prisoner is convicted, I do not say that I will reserve the point, but I will take it into further consideration." The prisoner was acquitted. (*q*)

In a previous case, where the prisoners were indicted for receiving brass, knowing it to have been stolen, and it was proved that the brass had been a plate affixed by rivets to a tombstone in a churchyard, and that the tomb was formed of one flat stone at the top, which was supported by others beneath; Vaughan, B., at first said, "The words of the act are very general, and I think extend to every kind of building, and I think that this kind of tomb may be said to be a building." But on being referred to *Rex* v. *Reece*, he expressed doubts whether the tomb could be considered as a building within the meaning of the act. It was then urged that the case came either

(*m*) Rex *v.* Hickman, 1 Leach, 318, S. C. 2 East, P. C. c. 16. s. 31, p. 593, Buller, J., thought that charging the lead to be property was absurd and repugnant; property in this respect being only applicable to personal things, and that it should only be charged to be lead affixed to the church, or to a house belonging to such a person. See Rex *v.* Isley, 1 Leach, 320, note (*a*), S. P. In a previous case it had been held that lead affixed to a church could not be laid as the property either of the churchwardens, or of the inhabitants and parishioners. Rex *v.* Parker and Easy, 2 East, P. C. c. 16, s. 31, p. 592.

(*n*) Rex *v.* Norris, Russ. & Ry. 69.

(*o*) Rex *v.* Worrall, 7 C. & P. 516.

(*p*) Rex *v.* Reece, Monmouth Lent Ass. 1828, MS. C. S. G.

(*q*) Rex *v.* Blick, 4 C. & P. 377.

within the words, "anything made of metal fixed in any land being private property," or a "place dedicated to public use or ornament;" and Vaughan, B., inclined to think the latter words sufficiently general to include this case; and the prisoners having been found guilty, he postponed the sentence, in order to consult Park, J. A. J.; and the prisoners were afterwards sentenced without any further notice being taken of the point. (*r*)

The ownership of the building must be correctly stated.

The ownership of the building from which the fixture is stolen must be correctly laid in the indictment. If therefore A. and B. are separate tenants of different rooms in the same house, an indictment describing a pipe, passing by the side of both rooms, as fixed to the dwelling-house of A. and B., is incorrect. Upon an indictment for stealing six feet of copper pipe fixed to the dwelling-house of E. Drummee and S. Allen, it appeared that the house consisted of two rooms, one on the ground floor, the other up one pair of stairs; one was in the occupation of Drummee, the other of Allen, as separate tenants to the same landlord. The pipe was placed for bringing down the water from the roof, and descended perpendicularly, passing on the outside of and against both rooms, part against the ceiling of each room. The jury having found the prisoner guilty, the question whether the house was properly described was submitted to the Judges, who were unanimously of opinion that the conviction was bad. (*s*)

The words of the 7 & 8 Geo. 4, c. 29, much larger than those of the 4 Geo. 2, c. 32.

The words "anything made of metal fixed in any land being private property" are so much larger than the words "fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house or other building" in the repealed act, 4 Geo. 2, c. 32, that they would seem to include a case like the following, which was held not to be within the 4 Geo. 2, c. 32. Upon an indictment framed upon that statute, it appeared that the lead stolen consisted of three images, which were standing on three pedestals, to which they were fastened with irons, and the pedestals were fixed in the ground. The images were standing near a building in an enclosed field, about half a mile from the dwelling-house of the prosecutor; the building was occasionally used as a tea-drinking place, and had doors and windows, the doors opened into the place where the images stood; and it was held that this case was not within the repealed statute, this being no outlet or garden belonging to any house or building. (*t*)

Upon an indictment for stealing fixtures, the prisoner cannot be convicted of larceny.

The statute does not make the offence of stealing fixtures a larceny, and, consequently, upon an indictment for stealing fixtures, the prisoner cannot be convicted of a larceny, if it appear that at the time he took the fixtures they had been severed from the building. Upon an indictment for stealing lead affixed to a building, the only evidence was, that the prisoner was seen to take the lead when it was lying at the distance of a quarter of a mile from the building, from which it had been cut, and the jury found the prisoner guilty of stealing the lead when lying severed, but not of stealing it when fixed; and the following morning Tindal, C. J., said, that he had looked into the cases, and conferred with Mr. J. Vaughan, and that he was satisfied that the prisoner could not be found guilty of a

(*r*) Rex *v.* John and Daniel Jones, Gloucester Spr. Ass. 1828, MS. C. S. G. Such cases were not within the repealed statutes. See John Davis's case, 2 East, P. C. c. 16, s. 31, p. 593.

(*s*) Rex *v.* Finch, R. & M. C. C. R. 418.

(*t*) Rex *v.* Richards, Russ. & Ry. 28.

simple larceny upon this indictment, and directed a verdict of not guilty to be entered. (*u*)

So also if a person steal fixtures in one county and carry them into another county, he cannot be indicted for simple larceny in the county into which he carries them. (*v*)

By the 45th section of the 7 & 8 Geo. 4, c. 29, for the punishment of depredations committed by tenants and lodgers, it is enacted, "that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny; (*w*) and in every such case of stealing any chattel it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire. (*x*)

7 & 8 Geo. 4, c. 29, s. 45. Stealing chattels or fixtures let to tenants and lodgers.

The statutes passed for the better preservation of *timber trees, plants, shrubs,* and other articles, which are the produce of the land, have been consolidated in the 7 & 8 Geo. 4, c. 29.

The thirty-eighth section of that statute enacts, "that if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*y*) and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." (*z*)

7 & 8 Geo. 4, c. 29, s. 38. Stealing trees, shrubs, &c., growing in certain situations, felony, if the value exceeds 1*l.*

Stealing trees, shrubs, &c., growing elsewhere, felony, if the value exceed 5*l.*

It has been held that young pear-trees about seven feet high are "trees" within the meaning of this section; and that the word "adjoining" denotes land absolutely contiguous, and without anything intervening, and only refers to the word "dwelling-house." The prisoner was indicted for stealing pear-trees, of the value of more than 1*l.* described in one count as growing in a garden, and in another as in ground adjoining to a dwelling-house, and it appeared that the

Meaning of the terms "trees," "adjoining," and "garden."

(*u*) Reg. *v.* Gooch, 8 C. & P. 293. It was held under the repealed act, 4 Geo. 2, c. 32, that judgment for petit larceny might be given on an indictment for stealing lead, where the prisoner was found guilty to the value of 10*d.* 2 East, P. C. c. 16, s. 31, p. 594.

(*v*) Reg. *v.* Millar, 7 C. & P. 665. See this case, *post.*

(*w*) *Ante*, p. 1.

(*x*) See the chapter on "Larceny by Tenants," &c., *post.*

(*y*) *Ante*, p. 1.

(*z*) *Ante*, p. 1. The Irish Act, 9 Geo. 4, c. 55, s. 31, is verbatim the same.

dwelling-house was occupied by a tenant of the prosecutor, and that a paved entry or walk of about a yard in width ran along the back of the house and was fenced on the opposite side by a low paling, with a wicket gate in the centre, which opened on an unfenced gravel walk running at right angles to the entry down the middle of a plot of enclosed ground of about half an acre. The ground on one side of this walk was occupied by the tenant as his garden; the other side was the ground on which the pear-trees were growing, and was retained by the prosecutor in his own occupation. The trees were grafted seedlings about seven feet high, and intended for sale. There were a few currant and raspberry bushes on the same part of the ground, and in the preceding summer the prosecutor had had a crop of potatoes and cabbages growing among the pear-trees. It was held first, that the land was not adjoining to the house, for ground cannot be properly said to adjoin a house, unless it is absolutely contiguous, without anything between them: secondly, that the pear-trees were trees within this section, and not "plants" within section 42: thirdly, that it was a question for the jury whether the place was a garden or not; (*a*) and fourthly, that the words "adjoining or belonging to" only refer to the word "ground", and not to "park, pleasure-ground, garden, orchard or avenue." (*b*)

Sec. 39. Stealing trees, shrubs, &c., wheresoever growing, and of any value above 1*s.*, punishable on summary conviction for first and second offences; third offence, felony.

By sec. 39, of the 7 & 8 Geo. 4, c. 29, "if any person shall steal, or shall cut, break, root up, or otherwise destroy, or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." (*c*)

Sec. 40. Stealing, &c., any live or dead fence, wooden fence, stile, or gate.

By sec. 40, "if any person shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up, or used as a fence, or any stile or gate, or any part thereof respectively, every such offender, being

(*a*) Rex *v.* Hodges, Moo. & M. 341, Parke, J., and Park, J. A. J. *Qu.* whether it can be said that ground "adjoins or belongs to" a dwelling-house within this act, unless it be occupied by the same person who occupies the dwelling-house. C. S. G.

(*b*) S. C. MS. C. S. G In Rex *v.* Taylor, Russ. & Ry. 373, it was held that young apple and pear-trees, from four to six feet high in the stem without the top, and which had been grafted and planted in order to sell the fruit which they might produce, were trees within the 9 Geo. 1, c. 22, s. 1, now repealed.

(*c*) *Ante*, p. 1. The Irish Act, 9 Geo. 4, c. 55, s. 32, is precisely similar.

convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the committing justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction." (*d*)

Sec. 41. Suspected persons in possession of wood, &c., not satisfactorily accounting for it.

By sec. 41, "if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of two shillings at the least, shall, by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person or on the premises of any person, with his knowledge, and such person being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds." (*e*)

Sec. 42. Stealing &c., any fruit or vegetable production in a garden, &c., punishable on summary conviction for first offence;

By sec. 42, "if any person shall steal, or shall destroy or damage with intent to steal, any plant, (*f*) root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." (*g*)

Second offence felony.

Sec. 43. Stealing, &c., vegetable productions not growing in gardens, &c.

By sec. 43, "if any person shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery-ground, every such offender, being convicted before a justice of the peace shall at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be im-

(*d*) The Irish Act, 9 Geo. 4, c. 55, ss. 33, 34, 35, 36, corresponds precisely with secs. 40, 41, 42, and 43 of the 7 & 8 Geo. 4, c. 29. As to the application of forfeitures and proceedings in case of non-payment see ss. 66, 67.

(*e*) As to the apprehension of offenders see s. 63, and as to the application of forfeitures and proceedings in case of non-payment, see ss. 66, 67.

(*f*) See Rex *v.* Hodges, *supra*, p. 68, that this word does not include young fruit trees.

(*g*) *Ante*, p. 1. As to the apprehension of offenders, &c. see ss. 63, 66, 67.

prisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, (if ordered,) shall be committed as aforesaid, for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction." (*h*)

Of larceny of written instruments.

II. Larceny could not by the common law, be committed of *written instruments*, whether they related to real estate, or concerned mere choses in action. If they related to real estate, the taking of them was considered as merely a trespass and no felony, upon a principle allied to those already mentioned, namely, that they concern the land, or (in technical language) savour of the realty, are considered as part of it by the law, and descend with it to the heir: (*i*) and when they concerned mere *choses in action*, as bonds, bills, and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person from whom they were taken. (*k*)

Westbeer's case. Parchment records, which concern the realty, are not the subject of larceny at common law.

Upon an indictment for stealing a parchment writing, purporting to be a *commission* for ascertaining the boundaries of certain manors, pursuant to an order of the court of Chancery, the goods of our sovereign lord the king; and also another parchment writing annexed thereto, purporting to be a return made to the said commission, the goods of persons unknown; it was found by a special verdict, that the prisoner was guilty of privately taking away these parchment writings, being of the value of one penny each, with intent to steal them. In the course of the argument, it was urged by the counsel for the crown, that the reason why felony could not be committed of charters which concerned the realty, was that they could not be valued; but that the reason would not apply in this case, because a value had been affixed by the jury; and that it was well known that for certain purposes old parchments will sell for a considerable price: and it was also urged, that the relation to the realty did not alone constitute the exemption, as there could be no doubt that it would be felony to steal an heir loom, though that savours of the realty. The court, however, were unanimously of opinion, that as the parchment writings in question concerned the realty, no larceny could be committed of them. (*l*)

(*h*) As to the apprehension of offenders, &c., see ss. 63, 66, 67.

(*i*) 3 Inst. 109. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 35. 4 Black. Com. 234. 2 East, P. C. c. 16, s. 34, p. 596.

(*k*) 1 Hawk. P. C. c. 33, s. 35. 4 Black. Com. 234. 2 East, P. C. c. 16, s. 36, p. 597.

(*l*) Westbeer's case, O. B. 1739. 1 Leach, 12. 2 East, P. C. c. 16, s. 34, p. 596. The special verdict and the indictment were removed into the Court of King's

But stealing rolls of parchment is larceny according to the value of the parchment, though they are the records of a court of justice, unless they concern the realty. The first count charged the prisoner with stealing one roll of parchment, being records of the Court of Common Pleas, value ten shillings, the property of the king; the second count was the same except laying the property in the Judges of the court; the third was the same except laying the property in the prothonotaries; the fourth was the same except laying the property in F. Sherwin. The fifth, sixth, seventh, and eighth counts were similar to the first, second, third, and fourth counts, but described the property stolen as one roll of parchment. The facts to prove the stealing were clear, and the jury found the prisoner guilty on the first four counts. Knowlys, R., was clearly of opinion that the crime of larceny at common law could not be established on the four last counts, charging the thing stolen to be mere parchment of the value of ten shillings; and he entertained very strong doubts whether an actual existing record of the Courts at Westminster could properly be described as mere parchment, so as to change its actual use and nature, and reduce it to mere personal chattels, the subject of larceny at common law: and he submitted that the stealing of a record of the Court at Westminster was only a misdemeanor, and no felony, till the 8 Hen. 6, c. 12, and that only in such cases where the judgment was liable to be reversed by such theft. In *Westbeer's case*, neither the commission nor the return could be legally considered as parchment, and as such a personal chattel; so in this case the same principle would apply, and the roll of records could not legally be considered as a mere personal chattel, which waste parchment would be; but, upon a case reserved, the Judges held that as the records did not concern the realty, as in *Westbeer's case*, stealing the parchment was larceny. (*m*)

Stealing records not relating to the realty, is larceny at common law

The doctrine of charters and other written assurances concerning the realty not being the subjects of larceny was carried so far, that it was holden that no larceny could be committed of the box or chest in which they were kept. (*n*)

Box, &c., in which they are kept.

These defects of the common law have been remedied by the 7 & 8 Geo. 4. c. 29, which by sec. 22 enacts, "that if any person shall either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned (viz. at the discretion of the court, transportation beyond the seas for seven years, or such other punishment by fine or imprisonment, or by both, as the court shall award) and it shall not in any indictment for such offence be necessary to allege

Stealing, &c., of wills.

Bench by certiorari in Trin. T. 1740. A question appears to have been raised, after the court had decided upon the point stated in the text, whether the prisoner should be discharged or receive judgment on this indictment as for a *trespass*: but it was determined without much difficulty that no such judgment could be given. 1 Leach, 14, 15.

(*m*) Rex *v.* Walker, R. & M. C. C. R. 155.

(*n*) Staundf. 25 b. 1 Hale, 510. And the same law is laid down in 3 Inst. 109, as to the box or chest, though it be of great value; and the reason given is, that "it shall be of the same nature the charters be of; *et omne majus dignum trahit ad se minus.*"

that such will, codicil, or other instrument, is the property of any person, or that the same is of any value." (*o*)

What is a "fraudulent purpose" within the act. Indictment should state what the fraudulent purpose was.

If a party conceal a will, and the money which ought under the will to have gone to certain legatees, and with it pay the debts of the husband of the next of kin, to whom the party was a creditor, this is a fraudulent purpose within this section. It seems that the indictment in such a case should state what the fraudulent purpose was. The first count charged the defendant with stealing the will of Mary Baskerville; the second count charged that the defendant the will of the said M. B. "unlawfully and for a fraudulent purpose did conceal:" The third count charged that the defendant the will of the said M. B. "unlawfully and for a fraudulent purpose did destroy." It was opened for the prosecution that Mrs. Baskerville had died in the year 1835, having made her will, by which she left a sum of money to a person named Apperley, the interest of other money to her (Mrs. B.'s) sister, Mrs. Rowland, and after her decease the principal to be divided among Elisha Cooper's children; and that this will was given by Mrs. Baskerville to a nurse, who gave it to Mr. Rowland, the husband of Mrs. Rowland, who put it on a desk, from which it was taken away by the defendant; and that, after this, administration was taken out by Mrs. Rowland as sole next of kin of Mrs. Baskerville, and that the defendant, who was the assignee of Mr. Rowland, for the benefit of creditors, paid away the property in making a dividend on Mr. Rowland's debts. Alderson, B. "The words of the act of Parliament are, 'for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument.' The purpose ought, I think, to be stated in the indictment, which here it is not. But I think also that if the defendant concealed this will, and took the money which ought to have gone to Mrs. Apperley and Elisha Cooper's children, to pay Mr. Rowland's debts, that would be a fraudulent purpose within the act of Parliament." (*p*)

7 & 8 Geo. 4, c. 29, s. 23. The stealing of writings relating to real estate.

By sec. 23 "if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned; and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person, or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof, and it shall not be necessary to allege the thing stolen to be of any value." (*q*)

Upon an indictment on this section for stealing three deeds relating to real estate, Patteson, J. told the jury, "Although this is not a felony you must be satisfied that the defendant took these parchment writings under such circumstances as would have amounted to larceny, had deeds of the kind been the subject of larceny." (*r*)

Sec. 24. These provisions as to wills and

By sec. 24 "nothing in this act contained relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any

(*o*) The Irish Act, 9 Geo. 4, c. 55, s. 22, is precisely similar.

(*p*) Reg. *v.* Morris, 9 C. & P. 89.

(*q*) The Irish Act, 9 Geo. 4, c. 55, s. 23, is nearly similar.

(*r*) Rex *v.* John, 7 C. & P. 324.

remedy at law or in equity which any party aggrieved by any such offence, might or would have had, if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

writings shall not lessen any remedy which the party aggrieved now has.

With respect to stealing, &c., of records and other proceedings of the courts of justice, the 21st section of the same statute enacts, "that if any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending or terminated in any such court, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not, in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value." (*r*)

7 & 8 Geo. 4, c. 29, s. 21. Records. The stealing, &c., of records and other proceedings of courts of justice.

It has been observed that written instruments which concerned mere *choses in action*, as being of no intrinsic value, and not importing any property in possession of the party from whom they were taken, were not at common law the subjects of larceny; (*s*) which offence can be committed only in respect of goods which have some worth in themselves, and do not derive their worth merely from their relation to some other thing. (*t*) But the Legislature found it necessary to interfere upon this subject, and make the stealing of *choses in action* in many instances an offence of the degree of felony. (*u*)

Choses in action.

The 7 & 8 Geo. 4, c. 29, s. 5, enacts, "that if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund

7 & 8 Geo. 4, c. 29, s. 5. Stealing public or private securities for money, or

(*r*) The Irish Act, 9 Geo. 4, c. 55, s. 21, contains similar provisions to these, and also some others.

(*s*) *Ante*, p. 70.

(*t*) 1 Hawk. P. C. c. 33, s. 35. 2 East, P. C. c. 16, s. 36, p. 597.

(*u*) The 2 Geo. 2, c. 25, s. 3, which was here introduced in the last edition, is repealed by the 1 Wm. 4, c. 66, s. 31.

warrants for goods, shall be felony, and punishable according to the circumstances, like stealing goods.

of any body corporate, company, or society, or to any deposit in any savings' bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature, and in the same degree, and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order, and each of the several documents hereinbefore enumerated, shall throughout this act be deemed for every purpose to be included under and denoted by the words *valuable security*." (*v*)

In a case upon the statute 2 Geo. 2, c. 25, s. 3, (now repealed) where the prisoner was convicted of stealing a note, by which the maker promised to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed, it was holden by all the Judges that its not being indorsed was immaterial. (*w*) In a case upon the same statute where the prisoners were indicted for stealing a bill of exchange, it appeared that when the bill was stolen from the prosecutor at Manchester, two names only were indorsed upon it; but that when it was negociated by one of the prisoners, at Leicester, a third name was added to the two other indorsers: upon which it was objected, on behalf of the prisoners, that this being an indictment in Leicester, for *then and there* stealing a bill of exchange, whereon were indorsed the names of the two first indorsers, it was not supported by the evidence of a bill with an additional name indorsed thereon, at the time the bill was negociated by one of the prisoners, in Leicester. But the prisoners were convicted; and the point being submitted to the twelve Judges, for their consideration, they all agreed that the addition of the third name made no difference; that it was the same bill that was originally stolen; and, therefore, that the conviction was proper. (*x*)

Exchequer bills not signed by the proper person.

In a case upon the 15 Geo. 2, c. 13, relating to embezzlements by servants of the Bank of England, which will be mentioned in a subsequent chapter, a prisoner was indicted for stealing certain bills, commonly called exchequer bills; and as it appeared that the person who signed them, on the part of the government, was not legally authorized so to do, the Court held that they were not good exchequer bills, and the prisoner was consequently acquitted. (*y*)

Clarke's case. The paper and stamps of the notes of country bankers, which have been paid by their correspondent

In a modern case it was holden that the *paper and stamps of the notes of a firm of country bankers*, which had been paid by their correspondent banker in London, and which were re-issuable by the country bankers, were the *valuable property* of such country bankers while they were *in transitu* for the purpose of being re-issued. The indictment consisted of several counts; in some of which the prisoner was charged with stealing "promissory notes;" and in others he

(*v*) The Irish Act, 9 Geo. 4, c. 55, s. 5, contains a similar provision.

(*w*) Anon. East. T. 1781. 2 East, P. C. c. 16, s. 37, p. 598.

(*x*) Rex *v.* Austin and King, Leicester Lent Ass. 1783. East. T. 1783. 2 East, P. C. c. 16, s. 37, p. 602.

(*y*) Aslett's (first) case, 2 Leach, 954.

was charged with stealing "one hundred and thirty-five *pieces of paper*, each being respectively stamped with a stamp of four shillings, value four shillings, being the stamp directed by the statute in such case made and provided on every promissory note for payment to the bearer on demand of any sum of money not exceeding, &c.; one hundred and eighty-four *pieces of paper*, each being respectively stamped with a stamp of one shilling, &c.: and seventy-seven *pieces of paper*, each being respectively stamped with a stamp of one shilling and sixpence, &c. all the said pieces of paper being so stamped as aforesaid, and being the property, &c.; and each and every of the said stamps being then available, and of full force and effect, against the peace, &c." It appeared that the paid notes in question were made up into a parcel by the London bankers, and sent by the mail to the country bankers, who never received them, and were under the necessity of issuing other notes on fresh stamps in their stead. It was also proved that many of the paid notes, so missed, were traced to the possession of the prisoner at the bar under very strong circumstances of suspicion. The prisoner's counsel objected that the charge being for a larceny, the law required that the property stolen should be of some value; that the notes, in the present instance, having been paid, they were become, both with respect to the money they were intended to secure, as well as to the stamps, mere waste paper; that their former value was extinct; and that before they could again become valuable property, it was necessary they should have been actually *re-issued* by the firm of the country bank. And it was also, objected, as to the counts for stealing the stamped pieces of paper that they could not be sustained; inasmuch as the *stamps*, having been issued, were not at the time when they were taken in any way saleable as stamps; that their operation, as stamps, was, at that time, completely finished, and at an end; and that they would not reassume the character of stamps, until the notes, to which they were affixed, had undergone the process of being re-issued. The jury having found the prisoner guilty, the case was referred to the twelve Judges, whose opinion was afterwards delivered by Grose, J., to the following effect:—"The question submitted in this case to the consideration of the Judges was, whether the paper and the stamps are, under the circumstances of the case, the subjects of larceny at common law; or, in other terms, whether they are the property of, and of any value to Messrs. Large and Co. (the country bankers) who were unquestionably the owners of them. These gentlemen had paid for the paper, the printing and the stamps of these papers, which once existed, both in character and in value, as promissory notes. Their character and value, as promissory notes, were certainly extinct at the time they were stolen; but, even in this state, they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value as papers, for it would have saved their owners the expense of reprinting other notes, and of purchasing other stamps, to which expense, it was proved, they were put, on their being deprived of these papers, by the crime of the prisoner. In what sense or meaning, therefore, can it be said that these stamped

bankers, in London, and are re-issuable by the country bankers, are the valuable property of the country bankers, while *in transitu* for the purpose of being re-issued, and the subject of larceny at common law.

papers were not the valuable property of their owners? *They were, indeed, only of value to those owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial.* The Judges, therefore, are of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and that the prisoner has been legally convicted." (z)

The halves of country bank notes are goods and chattels.

The halves of country bank notes, sent in a letter, are goods and chattels. The indictment in some counts charged the prisoner with embezzling pieces of paper of the value of one penny, and in other counts, "pieces of paper partly written and partly printed," bearing stamps, the values of which were specified: all the counts charged them to be "of the goods and chattels" of the prosecutor. A stamp distributor had remitted to the prosecutor, by post, the first halves of country bank notes, to the amount of 190*l.*, and evidence was given to show that this letter was received by the prisoner, and that he had embezzled the notes; it was objected that these halves of country notes were not goods and chattels: if the notes had been entire they would have been *choses in action*, not goods and chattels, and in their present state they were of no value. Bosanquet, J., "They might have been made of value to the prosecutor, by his putting the two halves together." After citing *Clarke's case*, his lordship added, "I will consider of the objection, and if I should think it is a valid one the prisoner shall have the benefit of it." The prisoner was afterwards sentenced to be transported. (a)

Re-issuable notes in the hands of their makers may be described as goods and chattels.

Re-issuable notes, if they cannot be called valuable securities while in the hands of their makers, may be called goods and chattels. The first count charged the prisoner with receiving thirty pieces of paper of great value, to wit, of 30*l.* each, the said pieces of paper being (stamped with a stamp value 5*d.*, the same being the stamp directed and required by the statute in that case made and provided, on every promissory note for payment to bearer on demand for every sum of money not exceeding 1*l.* 1*s.*) of the goods and chattels of J. Whitehead and others. Second count the same, but substituting the words "being duly stamped as directed and required by the statute in such case made and provided," instead of the words between the brackets. Third count, receiving "thirty valuable securities, commonly called promissory notes, each of the said valuable securities being for the payment of the sum of 1*l.*, and of the value of 1*l.*, of the property of J. Whitehead and others, and the said valuable securities at the several times of committing the several felonies last above mentioned, being of great value, to wit, 30*l.*" Fourth, for receiving "thirty other valuable securities of great value, to wit, of the value of 30*l.*" Neither of the two last counts stated that the monies secured by the valuable securities remained due and unsatisfied. The prosecutors, Whitehead and Co., were country bankers, and were in the habit of issuing promissory notes of 10*l.*, 5*l.*, and 1*l.*; the two former were made payable at the house of Glyn and Co., in Lombard-street, the 1*l.* only in the country, but

(z) Clarke's case, O. B. 1810. 2 Leach, 1036, and Russ. & Ry. 181. In a MS. note of the judgment in this case, with which the author has been favoured, the principle is thus stated, "If a chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of a larceny."

(a) Rex v. Mead, 4 C. & P. 535.

were occasionally paid when presented to Glyn and Co. The course of business at that house was, at the close of every day to roll up in a bundle all the notes which had been paid in the course of the day, and to lock up these bundles until an opportunity offered of delivering them to one of the parties when in town, or of sending a parcel of them to be re-issued. On the 21st of November, 1827, a large bag was delivered at the house of Glyn and Co., to one of the partners of the house of Whitehead and Co., containing the bundles of several days, and he was robbed of the bag at the door of Furnival's Inn coffee-house when about setting off for the country by the mail, and some of the notes were traced to the prisoner under circumstances which satisfied the jury of his guilty knowledge in receiving them, and they found him guilty. And upon a case reserved it was contended that in order to bring a case within the 7 & 8 Geo. 4, c. 29, s. 5, the notes must be outstanding, and the money purporting to be payable on them must be due and unpaid. In this case the notes had been satisfied, and were in the hands of the makers, they could not therefore be valuable securities of the value they purported to be, and had indeed been when in circulation. Besides, there was no averment that the money was due and unpaid, nor could these notes be said to be goods and chattels of the value of the stamps, or of any other value; they were in fact of none; but, supposing them to be of value, and the property of the owners, they could not be called goods and chattels. The Judges, ten of whom were present, held the conviction right; some doubted whether the notes could properly be called valuable securities; but if not, they all thought that they were goods and chattels. (*b*)

An imperfect bill of exchange, note, &c., is not a valuable security within the 7 & 8 Geo. 4, c. 29, s. 5.

In order to come within the 7 & 8 Geo. 4, c. 29, s. 5, an instrument must be a perfect and complete bill of exchange, promissory note, &c., and if the sum or the drawer be omitted they are not such securities as are included in that section; and although such imperfect instruments may properly be described as pieces of paper, each having a stamp, yet the prisoner cannot be convicted of stealing them, unless the prosecutor had such a possession of them as would have enabled him to maintain trespass. The first count charged the prisoner with stealing "ten bills of exchange for the payment of 500*l.* each, of the value of 500*l.* each," the property of Mr. Astley. The second count, "ten orders for the payment of 500*l.* each, and of the value of 500*l.* each." The third count, "ten securities for the payment of 500*l.* each, and of the value of 500*l.* each." And the fourth count, "ten pieces of paper, each being respectively stamped with a stamp of six shillings, and of the value of six shillings," &c. It appeared that, in consequence of an advertisement offering to lend money upon bills of exchange or other personal security, the prosecutor, who had occasion for a sum of money, had an interview with the prisoner, who told him he could accommodate him with 5000*l.*, at 6*l.* per cent. The prisoner produced from his pocket-book ten blank stamps, and the prosecutor wrote on each of them the words "payable at Messrs. Praed and Co., 189, Fleet-street, London." Nothing was written on the stamps at that time but these words; the prisoner took the stamps away. The prosecutor saw him again several days afterwards; he said

(*b*) Rex *v.* Vyse, R. & M. C. C. R. 218.

the prosecutor had omitted to sign his name, and he again produced the ten pieces of paper; the prosecutor signed them, and wrote "accepted" on each of them, and gave them to the prisoner again; he said he would send the money in a few days by the mail, but it was never sent. For the prisoner it was contended that the papers taken were not the subject of larceny, and that the 7 & 8 Geo. 4, c. 29, only makes perfect and available instruments the subject of larceny; and secondly, that there was no felony, because the paper stamps being the property of the prisoner, no trespass was committed in taking them. Littledale, J., "With respect to the first, second, and third counts, I am of opinion that when these acceptances were taken from the prosecutor, they were neither bills of exchange, orders, or securities for money." After stating the facts the learned Judge proceeded, "These papers were again taken away by the prisoner, and it appears to me, that, when they were so taken away they were neither bills of exchange nor orders for the payment of money, but were only in a sort of embryo state, there being the means of making them bills of exchange. The statute 7 & 8 Geo. 4, c. 29, s. 5, enacts, that if any person shall steal any "bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or any other state," the party is to be punished as he would be for stealing a chattel of the like value. Now, how could this be said to be of any value? and of what value can it be said to be? If these papers had been stolen from a dwelling-house, could they be charged to be of the value of 500*l.* each? There is no sum mentioned in them, and no drawer; and they being, as I before observed, but a kind of embryo security, I am of opinion that the first three counts of this indictment are not proved. There is, however, a fourth count, which describes the papers as ten pieces of paper, each having a six shilling stamp; and upon this count the question is, whether the prisoner can be said to have stolen this property? As to the first three counts, I think the case turns on a mere question of law, which is, I think, entirely for the court, as these papers do not come within the description contained in the statute 7 & 8 Geo. 4, c. 29. The fourth count correctly describes them, but it seems to me that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and Mr. Astley never had them, except for the purpose of writing on them; they were never out of the prisoner's sight; Mr. Astley writes on them, as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all. The case cited (*c*) was a case in trover, and, to maintain trover, it is not necessary that the party should have manual possession of the goods; if he has a right of possession, that is sufficient. To support an indictment for larceny there must be such a

(*c*) Evans *v.* Kymer, 1 B. & Ad. 528.

possession as would enable the party to maintain trespass. It has been incidently mentioned that these stamps might be charged in account to Mr. Astley, but that could only be if the transaction was completed. However, we must only take into consideration that which occurred on the last occasion, when the words "accepted" and "F. D. Astley" were written. Indeed, it appears to me, that on neither of the occasions when these parties met, can the prosecutor be said to have had either the property or the possession of these papers, so as to make the prisoner guilty of larceny in taking the papers out of the house." (*d*)

An unstamped order is not "a valuable security."

So an unstamped order for the payment of money, which ought to be stamped under the 55 Geo. 3, c. 184, is not a valuable security within this section. The prisoner was convicted of obtaining an order for the payment of the sum of 2*l.* by false pretences; the order was a check drawn upon Messrs. Child & Co., payable to D. Francis Jones for 2*l.*, and it was not payable to D. F. Jones, but to D. Francis Jones only; it was not payable to order or bearer. Upon a case reserved, the Judges were of opinion that it was not a valuable security, as it ought to have been stamped, and therefore the banker would have subjected himself to a penalty of 5*l.* by paying it. (*e*)

Ranson's case. Notes of a country bank paid in London, and not re-issued, held to retain the character and fall within the description of promissory notes.

In a case where the prisoner was indicted upon a statute (7 Geo. 3, c. 50, s. 1,) relating to larcenies and embezzlements, by persons employed in the Post Office, and the indictment charged him with secreting a letter, containing certain "*promissory notes;*" it was objected, on his behalf, that the notes contained in the letter could not be considered as promissory notes, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in London; and that as they had not been re-issued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes. But the case being reserved for the consideration of the twelve Judges, a majority of them were of opinion, that these notes, though not re-issued, still retained the character, and fell within the description of *promissory notes;* that they were, as promissory notes, valuable to the owners of them; and therefore, that the verdict given against the prisoner in this case was right in law. (*f*) But a case is mentioned in which it was ruled, that it was not felony within the statute of 2 Geo. 2, c. 25, (now repealed) to steal bankers' notes completely executed, but which had never been put into circulation; on the ground that no money was due upon them. (*g*)

Phipoe's case.

But where a party was compelled, by great violence and menace

(*d*) Rex *v.* Hart, 6 C. & P. 106, Bolland, B., and Bosanquet, J., delivered opinions to the same effect.

(*e*) Rex *v.* Yates, R. & M. C. C. R. 170. In Rex *v.* Mucklow, R. & M. C. C. R. 160, *ante*, p 58, one objection was that the cheque, which was drawn more than ten miles from the residence of the person in whose favour it was drawn, was void for want of a stamp, but this objection was not disposed of by the Judges.

(*f*) Ranson's case, O. B. 1812. 2 Leach, 1090, 1093. Russ. & Ry. 232.

(*g*) Anon. *cor.* Lord Ellenborough, C. J., Carlisle, 1802, mentioned in the notes to 4 Black. Com. 234, and in note (*b*), in 2 Leach, 1061. But they would probably be deemed valuable property, and the subject of larceny at common law. See Clarke's case, *ante*, p. 74. Some of the Judges in Ranson's case thought that the acts 2 Geo. 2, c. 25, and 7 Geo. 3, c. 50, were in *pari materiâ*, and that the term promissory note was to be taken in each act to mean notes on which the money thereby secured still remained due and unsatisfied to the holder thereof: but the majority of the Judges, as we have seen, differed.

Where a party was compelled by great violence to sign a promissory note which had been previously prepared by the prisoner who produced it and withdrew it again as soon as it was signed, the case was holden not to be within the 2 Geo. 2, c. 25.

of death, to sign a promissory note on stamped paper previously prepared by the prisoner, and the prisoner was present during the time, and withdrew the note as soon as it was made, it was holden not to be a case within the 2 Geo. 2, c. 25. The indictment charged the prisoner with robbing the prosecutor in a dwelling-house, and taking from him a promissory note of the value of 2,000*l.*, signed by the prosecutor, against the form of the statute; and another count laid the note as the property of the prosecutor. The facts proved were that the prisoner inveigled the prosecutor to her house, where he was detained by force for several hours, and at length induced, by great violence and menace of death, to sign the promissory note in question. It was dated March 30, 1795, and promised in the usual form two months after date to pay the prisoner, or order, two thousand pounds. And it appeared that the prisoner attempted to get the note discounted the next day, without success; and it was found in her possession when she was apprehended. The jury having found the prisoner guilty, the case was reserved for the consideration of the twelve Judges; the principal objection to the conviction, as urged by the counsel for the prisoner, being, that the case was not within the statute 2 Geo. 2, c. 25, the note being of no value while in the hands of the prosecutor, and the statute only extending to secure valid existing securities in the possession of the party robbed. It was argued, that nothing could be said to be due on this note as the statute required; and that it never was the property, nor in the possession of the prosecutor, the paper and stamp being the property of the prisoner, and never out of her possession: that the prisoner had in fact acquired the note, not by stealing, but by duress. It appears that there was considerable difference of opinion amongst the Judges upon this point. It is said, that nine of them expressly held, that the offence was not within the statute; some of them thinking that the statute was only intended to protect existing available notes in the hands of the person from whom they were taken; and that this note did not come within that description, being of no value in the hands of the prosecutor; and others inclining to think that the note was of value from the moment it was drawn; but that it never was in the possession of the prosecutor, but continued all the time in the possession of the prisoner herself, by whose duress the prosecutor was compelled to make it. And Eyre, C. J., observed, that the property never existed till the force, but arose out of it; and that, therefore, it was different from the case of money. And admitting that if the prosecutor had brought the note in his pocket, it would have been a case within the act, though the note would not be available while in his possession (upon which point he should have hesitated:) yet this was not that case. But all the nine Judges considered that the whole transaction was one continued act, and that the note was procured by duress, and not by stealing. One of the Judges, (Ashurst, J.,) who differed, thought that it was not a single act, but that there was a distinguishable interval between the writing of the note, and the actual taking of it by the prisoner, during which the prosecutor had the possession of it; and that therefore it was taking from him an instrument of value within the meaning of the statute, as it would have been available against him in the hands of an innocent holder. On this ground also, Macdonald, C. B., doubted. The other Judge (Buller, J.,) was absent. The opinion of the ma-

jority of the Judges was afterwards delivered by Ashhurst, J. He stated "that as the Legislature at the time of passing the statute 2 Geo. 2, c. 25, s. 3, whereby the stealing a *chose in action* was made felony, could not possibly have a case like the present in contemplation, it was not within that act of parliament; that it was essential to larceny, that the property charged to have been stolen should be of some value; that the note in the present case did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and the ink were the property of the prisoner; and the delivery of it by her to him could not, under the circumstances of the case, be considered as vesting it in him." (*h*)

Walsh's case. Argued that a *check* upon a banker was not within the 2 Geo. 2, c. 25.

This authority was cited in a case of recent occurrence, where the prisoner was charged with stealing a *check* upon a banker, which, in some of the counts of the indictment, was described as "a bill of exchange," and in others as "a warrant for the payment of money." It was argued, on behalf of the prisoner, that these counts were bad, on the ground that the 2 Geo. 2, c. 25, (now repealed) extended only to such instruments as were available securities in the hands of the party from whom they were stolen; that a check on a banker did not create any debt between the drawer and the banker, whose liability to the drawer remained precisely the same as before, and was not altered in any respect by such an instrument; and that, consequently, the check in the present case, not being a security to the prosecutor, could not be averred, as in this indictment, to be either "a bill of exchange," or "a warrant for the payment of money," the property of the prosecutor, and upon which the sum of money, for the payment whereof it was made, was due thereon to him. It was not, however, necessary to press this objection, as the case supplied others of greater importance, which have been already noticed. (*i*)

Chard's case. Bank post bill.

It was decided upon the 2 Geo. 2, c. 25, (now repealed) that where an instrument was described in the indictment as a bank post bill, and was not set out, the Court could not take judicial notice that it was a promissory note, or that it was such an instrument as under that statute might be the subject of larceny, though it was described as made for the payment of money. The prisoner was indicted for stealing a bank post bill made for the payment of the sum of 100*l.*, of lawful money of Great Britain; and it appeared that the bank post bill was in form a promissory note, and therefore would not support the indictment, unless the Court could take notice judicially, that a bank post bill was in form a note. The prisoner, however, was convicted, and a motion was made in arrest of judgment, on the ground that at the time the statute 2 Geo. 2, passed, it was not known what a bank post

(*h*) Rex *v.* Phipoe, O. B. 1795, and Serjeants' Inn, Feb. 1796, 2 Leach, 673. 2 East, P. C. c. 16, s. 37, p. 599; and see Rex *v.* Edwards, 6 C. & P. 521, which was a very similar case, but the paper on which the order was written was in the possession of the prosecutor for half an hour, whilst he was fastened down to a chair, and this was held to make no difference: *ante*, vol. i., p. 869, 870.

(*i*) Walsh's case, 2 Leach, 1061. Russ. & Ry. 215. *Ante*, p. 30.

bill was. Upon a case reserved, it appeared that bank post bills were not in use until two years after the statute 2 Geo. 2 had passed, and the Judges thought that they could not take notice, that what was afterwards called a bank post bill fell within any of the descriptions in that statute; and they also thought that they could not say, as the instrument was not set out, what a bank post bill was; and, further, that as the instrument was not what, at the time the statute passed, could properly be called a bill, the prisoner should have been acquitted, and a pardon was recommended. (*j*)

Of larceny of animals, birds, and fish.

III. The third subject of inquiry, under the head of personal goods in respect of which larceny may be committed, arises when the property taken consists either of *animals, birds,* or *fish.*

Domestic animals.

With regard to domestic animals, such as horses, oxen, sheep, and the like, there is no doubt whatever that they were the subjects of larceny at common law. (*k*) And the stealing of many of these animals has been made subject to transportation by an enactment which will be noticed in a subsequent chapter. (*l*) Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c., are clearly the subjects of larceny. (*m*) So also larceny may be committed of their eggs or young ones. (*n*)

And their produce.

And as the stealing of such animals is larceny, it is also larceny to steal the produce of them, though taken from the living animals. Upon this ground it was holden by all the Judges, on a case reserved for their opinion, that milking a cow at pasture, and stealing the milk, was larceny. (*o*) And it has also been holden that larceny may be committed by pulling wool from the bodies of live sheep and lambs with a felonious intent. (*p*) In one report of this last decision it is given as a part of the opinion of the Judges, to whose consideration the question was referred, that in order "to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when, perhaps, they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis,* requires the property stolen to be of the value of twelve-pence." (*q*) The distinction, however, between grand and petty larceny is now abolished by the 7 & 8 Geo. 4, c. 29, s. 2, but the application of it in this case seems to have been very questionable. Undoubtedly the quantity of wool taken, if considerable, would have been a strong additional circumstance in the evidence of felonious intent necessary to sustain a charge of larceny; but supposing the quantity not to have been of greater value than twelvepence, yet if the felonious intent of the party was manifest, as it might have been from the manner in which the fact was committed, the use to which the property was applied, and the behaviour of the party, there does not appear to have been any good reason why such a taking should not have been considered as petit larceny. (*r*)

(*j*) Rex *v.* Chard, Trin. T. 1822. Russ. & Ry. 488.

(*k*) 1 Hale, 511. 1 Hawk. P. C. 33, s. 43.

(*l*) *Post,* Chap. XI.

(*m*) 1 Hale, 511. 1 Hawk. P. C. c. 33, s. 43.

(*n*) Id. ibid. Hale's Sum. 68, 69.

(*o*) Anon. *cor.* Leigh, Serj., who sat for Bathurst, J., Oxford circuit about 1769. 2 East, P. C. c. 16. s. 49, p. 617. 1 Leach, 171.

(*p*) Martin's case, Northampton Lent Ass. 1777, 1 Leach, 171. 2 East, P. C. c. 16, s. 49, p. 618.

(*q*) 1 Leach, 172.

(*r*) It should be observed also that in the abstract of Martin's case, 2 East, P. C.

Animals, &c., *feræ naturæ* reclaimed or dead.

Where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for the food of man, and dead, reclaimed, (and known to be so) or confined. Thus, if hares or deer be so enclosed in a park, that they may be taken at pleasure; or fish in a trunk or net, or as it seems in any other enclosed place which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges be confined in a mew; or pigeons be shut up in a pigeon-house; or swans be marked and pinioned, or (though unmarked) be kept tame in a moat, pond, or private river: or if any of these creatures be dead and in the possession of any one, the taking of them with felonious intent will be larceny. (*s*) And of some things *feræ naturæ*, though not fit for food, felony may be committed, if they be reclaimed; in respect of their generous nature and courage, serving *ob vitæ solatium* of princes and noble persons, to make them fitter for great employment; so that larceny may be committed of hawks and falcons, when reclaimed and known to be so; (*t*) and it may be committed also, it is said, of young hawks, in the nest; (*u*) but not of the eggs of hawks or swans, though reclaimed, the reason of which seems to be that a less punishment, namely, fine and imprisonment, is appointed for taking them by statute. (*v*) The stealing a stock of bees seems to be admitted to be felony. (*w*)

Where pigeons were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny. (*x*) So where pigeons were so tame that they came home every night to roost in boxes at the side of the house of their owner, it was held to be larceny, if they were taken by night out of such boxes, although the boxes were not shut up at night. Upon an indictment for a misdemeanor in attempting to steal pigeons out of certain boxes affixed to the wall of a dwelling-house, it appeared that the boxes were fixed to the wall of the prosecutor's house for his pigeons to live and breed in, and the holes in them were left open at night. The pigeons were such as are generally about farm-houses, and were accustomed to feed with the prosecutor's fowls; they flew about the fields as they pleased, returning again to the boxes, in which they always roosted at night. The prisoners had reared a ladder against the house, and one of them was attempting to take the pigeons out of the box, when he was caught by the prosecutor. Taddy, Serjt., held that as these pigeons were so tame that they came home every night to roost in

c. 16, s. 49, p. 618, it is not stated as any part of the opinion of the Judges that the property stolen should be above the value of twelve-pence. And at the conclusion of the report in which that position is advanced, the doctrine appears to be contradicted, where it is said, "if a wicked disposition be discovered, *une disposition à faire un mal chose*, as it is described by Britton, it may be evidence of felony, notwithstanding the trifling quantity of the thing taken."

(*s*) 2 Inst. 109, 110. 1 Hale, 511. 3 Hawk. P. C. c. 33, s. 41. 4 Black. Com. 235. 2 East, P. C. c. 16, s. 41, p. 607.

(*t*) 1 Hawk. P. C. c. 33, s. 36. 3 Inst. 97, *et seq.*, and 3 Inst. 109. But the 37 Ed. 3, c. 19, is repealed by the 7 & 8 Geo. 4, c. 27.

(*u*) 1 Hale, 511. This law had relation to the *trained* hawks of former days.

(*v*) 11 Hen. 7, c. 17, and 31 Hen. 8, c. 12. 1 Hawk. P. C. c. 33, s. 42. 2 East, P. C. c. 16, s. 41, p. 607.

(*w*) 2 East, P. C. c. 16, s. 41, p. 607, citing Tibbs *v.* Smith, T. Ray. 33. 2 Black. Com. 392, 393.

(*x*) Luke's case, Rosc. Cr. Ev. 577, and ex-relatione Mr. Granger. The case was determined on the ground that the pigeons were reclaimed, and not on the ground that they were shut up in their boxes at the time they were taken.

the boxes, after they had been out to feed, they were reclaimed, so as to be the subject of larceny. (*y*)

Animals, &c., unreclaimed.

But a different doctrine prevails with respect to animals and other creatures *feræ naturæ* which are *unreclaimed*, as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus larceny cannot be committed of deers, hares, or conies, in a forest, chase, or warren; of fish, in an open river or pond; of wild fowls, when at their natural liberty; of old pigeons, out of the dove-house; (*z*) or even of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. (*a*) But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed, because they are then reduced to a state in which a right of property in them may be claimed and exercised. (*b*)

It seems that no person has any property in rooks, so that neither they nor their young ones can be the subject of larceny. (*c*)

Rough's case. An indictment for stealing an animal *feræ naturæ* must shew that it was either dead, tame, or confined.

It is so clearly established, that those creatures which are *feræ naturæ* can only become the subject of property by being dead, reclaimed, or confined, that it has been holden to be necessary that they should be so described in an indictment for stealing them. The prisoner, having been convicted on an indictment for stealing a pheasant of the value of forty shillings, of the goods and chattels of H. S., the case was referred to the consideration of the Judges; and upon a second conference, and after much debate and difference of opinion, they all agreed that the conviction was bad; that in cases of larceny of animals *feræ naturæ* the indictment must show that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such an one. (*d*)

Jones's case. An unqualified person may have a sufficient legal possession of

It has been ruled that though a person be not qualified to keep, or kill, *game*, he may have a sufficient legal possession of animals, &c. coming under that description, whereon to support an indictment for stealing them. The prisoner was indicted for stealing five pheasants, restrained of their natural liberty, the property of the prose-

(*y*) Rex *v.* Brooks, MS. C. S. G., and 4 C. & P. 131. "Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant (ut sunt cervi, cigni, pavones, et columbæ et hujusmodi) eo usque nostra intelliguntur quamdiu habuerint animum revertendi." Bracton, lib. 2, c. 1, fol. 9, cited in the case of Swans. 7 Rep. 16 b. See 1 Just. Inst. Tit. I., XV. In the argument of Dewell *v.* Sanders, Cro. Jac. 490. Doderidge, J., said, that if pigeons come upon my land I may kill them, and the owner hath not any remedy; but the owner of the land is to take heed that he takes them not by any means prohibited by the statutes. Ad quod Croke and Houghton, accord. But Montague, C. J., held the contrary, and that the party hath *jus proprietatis* in them, for that they be as domestics, and have *animum revertendi*, and ought not to be killed, and for the killing of them an action lies; but, adds the reporter, the other opinion is the best. See also 2 Bl. Com. 292.

(*z*) 3 Inst. 109, 110. 1 Hale, 510, 511. 1 Hawk. P. C. c. 33, s. 39, 40. 4 Black. Com. 235. 2 East, P. C. c. 16, s. 41, p. 607. But see 2 Bl. Com. 392.

(*a*) 1 Hale, 511.

(*b*) 3 Inst. 110. 1 Hale, 511. In 3 Inst. 110, it is said, "But the deer, &c., being wild, yet when he is killed larceny may be committed of the flesh, and so of pheasant, partridge, or the like; and so note a diversity between such beasts as be *feræ naturæ*, and being made tame, serve for pleasure only: and such as be made tame, and serve for food, &c., which diversity not being observed, hath made many men to err."

(*c*) Hannam *v.* Mockett, 2 B. & C. 934. 4 D. & R. 518. The Court said that rooks were not generally used for food, but the contrary is certainly the case with young rooks, which are very commonly used for food. C. S. G.

(*d*) Rough's case, Surrey Lent Ass. 1779, and East. T. 1779. 2 East, P. C. c. 16, s. 41, p. 607.

cutor: and, upon its appearing from the evidence that the prosecutor was not a qualified person to keep or shoot game, and that he had the pheasants for sale, it was objected that he could have no property in them nor any legal possession sufficient to support the indictment; that by the several statutes relating to the game laws, unqualified persons are forbidden, under certain penalities, to have pheasants in their possession; and that by one of those statutes authority is given to a justice of the peace to take away from such person any pheasant which he may have in his possession. But the learned Judge held that it was a sufficient legal possession for the purposes of the indictment, and the prisoner was convicted. (*f*)

game to support an indictment for stealing it from him.

The stealing of *deer*, of *fish*, and of *hares* and *conies*, in a warren, &c. has been made punishable by statute, as will be mentioned more particularly in some of the following chapters.

Deer, conies, and fish.

There is yet another kind of animals to be noticed; namely, those which, though they may be reclaimed, are not such of which larceny can be committed by reason of the *baseness of their nature*. Some animals which, in this country, are now usually tame, come within the class in question; as *dogs* and *cats*. And others which, though wild by nature, are often reclaimed by art and industry, clearly fall within the same rule; as *bears, foxes, apes, monkies, polecats, ferrets*, and the like. (*g*) The reason upon which this doctrine appears originally to have proceeded is, that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man should die. (*h*) And the doctrine extends to the whelps, or young, of such animals: the rule being established, that where no felony can be committed of any creatures that are *feræ naturæ*, though tame or reclaimed, it cannot be committed of the young of such creatures in the nest, kennel, or den. (*i*)

Animals of base nature.

The doctrine respecting larceny of animals, *of a base nature*, was considered in a late case, where the prisoner was charged in the indictment with stealing "five live tame ferrets, confined in a certain hutch, &c." the property of Daniel Flower. The evidence brought the fact of taking the ferrets clearly home to the prisoner; and it was also proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But, the jury having found the prisoner guilty, the case was submitted to the consideration of the Judges upon the question, whether ferrets must be considered as animals of so base a nature that no larceny can be committed of them. And the Judges held that judgment ought to be arrested. (*j*)

Searing's case. Ferrets are animals of a base nature, and not the subject of larceny.

With respect, however, to dogs, and also beasts and birds, ordinarily kept in a state of confinement, the 7 & 8 Geo. 4, c. 29, s. 31, enacts, "that if any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being con-

Dogs and certain beasts and birds, 7 & 8 Geo. 4, c. 29, s. 31, stealing dogs,

(*f*) Jones's case, *cor.* Grose, J., Bucks Lent Ass. 1809. 3 Burn's Just. tit. *Larceny*, D. & W. 457.

(*g*) 3 Inst. 109. 1 Hale, 511, 512.

(*h*) 1 Hawk. P. C. c. 33, s. 36. 4 Black. Com. 236. 2 East, P. C. c. 16, s. 45, p. 614.

(*i*) 3 Inst. 109.

(*j*) Searing's case, *cor.* Wood, B., Hertford Lent Ass. 1818, MS., and MS. Bayley, J., and Russ. & Ry. 350. The ferret was originally a native of Africa, but has been for a long time bred, kept, and sold in this country, as a tame animal.

or stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

victed thereof before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the dog, beast, or bird, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction." (*k*)

Persons found in possession of stolen dogs, &c., liable to penalties.

By sec. 32, "if any dog, or any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession, or on the premises of any person by virtue of a search warrant, to be granted as hereinafter mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof; and the person in whose possession, or on whose premises the same shall be so found, (such person knowing that the dog, beast, or bird, has been stolen, or that the skin is the skin of a stolen dog or beast, or that the plumage is the plumage of a stolen bird,) shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as persons convicted of stealing any dog, beast, or bird, are hereinbefore made liable to." (*l*)

Killing pigeons.

By sec. 33 "if any person shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds." (*l*)

SECT. III.

Of the Ownership of the Goods in respect of which Larceny may be committed.

It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels or property of such person.

Joint tenants, or tenants in common have not an ownership, as against each other, upon which an in-

And this ownership must, of course, exist as against the party by whom the goods are taken; and will not, in general, reside sufficiently in any other person, where the party taking the goods has a legal property in them, and a right of possession. So that joint tenants, or tenants in common, of a chattel, cannot be guilty of stealing such chattel from each other. Thus, if A. and B. be

(*k*) The Irish Act, 9 Geo. 4, c. 55, s. 28, 29, contains similar provisions to those in this and the following section.

(*l*) As to the apprehension of offenders, see s. 63, and as to the recovery and application of forfeitures, appeal against convictions, &c., see s. 67, *et seq.*

joint tenants, or tenants in common, of a horse, and A. take the horse, even *animo furandi*, yet it will not be a felony, because one tenant in common taking the whole only does that which he may do by law. (*m*)

dictment for larceny can be sustained.

The goods of a ready furnished lodging must be described as the lodger's goods, and not the goods of the original owner. An indictment was for breaking in the day time Anderson's house, and stealing his goods. The goods were the furniture of a room let by Anderson to another person by the week: and, upon a case reserved, the Judges held that the goods should have been described as the goods of such other person, for Anderson was not entitled to the possession, and could not have maintained trespass; and that the conviction was, therefore, wrong. (*n*)

Goods let with a house or lodging.

We have seen that a feme covert cannot commit larceny of her husband's goods by taking them from the possession of her husband, because in law they are considered as one person, and she has a kind of interest in the goods. (*o*) And upon the same ground it has been holden, that even a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he be her adulterer. (*p*) But, if the husband bail the goods to a third person, as there will then be a possession in the bailee, distinct from that of the husband, it may be larceny if the wife take such goods with a felonious intent. (*q*)

Nor has a husband such an ownership of his goods as against his wife, that she or any one, by her delivery, may commit larceny of them.

The last case proceeds upon an exception to the general rule, that a person cannot commit felony of the goods wherein he has a property. (*r*) He may, under particular circumstances, be guilty of larceny in stealing his own goods, as he may of robbery in taking his own property from the person of another. If A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is felony. (*s*) And so if A., having delivered money to his servant to carry to some distant place, disguised himself, and robbed the servant on the road, with intent to charge the hundred with the loss, according to the provisions of the repealed statute, it was robbery in A. (*t*) For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment. (*u*) So if a part-owner of property steals it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. The box of a female friendly society established according to 33 Geo. 3, c. 54, containing upwards of fifty pounds, was left in the custody of the

A man may, in certain cases, be guilty of larceny in taking his own goods from a bailee.

Friendly societies.

(*m*) 1 Hale, 513. 2 East, P. C. c. 16, s. 7, p. 558. See the 3 & 4 Vict. c. 92, s. 2, as to larceny by the members of joint stock banks, *post*, p. 104.

(*n*) Rex *v.* Belstead, East. T. 1820, MS. Bayley, J., and Russ. & Ry. 411, and the same point was decided in Rex *v.* Brunswick, Trin. T. 1824, MS. Bayley, J., and Ry. & Mood. C. C. 27. See the observations of Bayley, B., on these cases, *post*, p. 90 and 91. As to larcenies by tenants and lodgers see *post*, chap. *Of Larceny by Tenants and Lodgers.*

(*o*) Vol. 1, p. 22, 23, and see Rex *v.* Willis, *infra*, note (*w*).

(*p*) Ibid.

(*q*) 1 Hale, 513.

(*r*) Id. ibid.

(*s*) Staundf. 26 *a*. 3 Inst. 110. 1 Hale, 513, 514. 1 Hawk. P. C. c. 33, s. 47. Fost. 123. Aliquando etiam suæ rei furtum quis committit, veluti si debitor rem, quam creditori pignoris causâ dedit, subtraxerit. Just. Inst. lib. 4, tit. 1, s. 10.

(*t*) Fost. 123, 124. 3 Inst. 110. 4 Black. Com. 231. 2 East, P. C. c. 16, s. 7, p. 558, and s. 90, p. 654, where the learned author says, that even in this case he sees no objection to laying the property of the goods in the servant.

(*u*) See also the argument in Rex. *v.* Deakin, 2 Leach. 671.

landlord of the house where the society met: the prisoner was one of the members, and broke into the landlord's house in the night time, and stole the box. Upon an indictment for burglary and stealing the box and its contents, a case was saved for the opinion of the Judges, upon the question whether, considering the situation in which the prisoner stood with respect to this property, the conviction was right, and the Judges, (ten of them being present) were clear, that as the landlord was answerable to the society for the property, it was a right conviction. (*v*) But if the wife of a member of a friendly society steal money of the society deposited in a box in her husband's house, which is kept locked by the stewards, this is not larceny. Upon an indictment for stealing a quantity of money, laid to be the property of W. Orchard and thirty or forty others, and amongst them the prisoner's husband, all of whom were named in the indictment, it appeared that a friendly society was held at a public-house kept by the prisoner's husband, who was a member of the society, and the box containing the property was always left in his house, but the box had four locks kept by the stewards, of whom he was not one; the wife having broken open this box, and stolen a great deal of money to pay some debts of a former husband, was convicted; but Park, J. A. J., thought it fit to ask the opinion of the Judges, whether a wife can be convicted of larceny in stealing money in which her husband has a joint property; and the Judges were of opinion that the conviction was wrong. (*w*) An indictment for burglary and stealing the box of a friendly society, in all the counts, except one, laid the property in one of the stewards, and in that one in the landlord of the public-house where it was kept. There were four stewards of the society, and, by the rules, the landlord ought to have had a key of the box, but, in fact, he had none. The box was deposited in a room in the public-house, and two of the stewards had each a key. Parke, J., intimated that the case must rest on the count which stated the property to be in the landlord. It was then objected that if there was any property in the landlord, it was a joint property between him and the stewards. Parke, J., "I am of opinion that there is sufficient evidence to go to the jury of the property in the landlord alone." (*x*) And if a man steals his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession (as if he were bound to the crown for the specific appropriation of the goods,) and could have withheld them from the owner, the taking is a larceny. Wm. Marsden had a quantity of *nux vomica*, and, by means of one Cooper, employed Marsh and Co. lightermen to enter it for exportation, and carry it to the ship. Exportation exempts it from the duty, which

If the wife of a member of a friendly society steal the society's money, it is not larceny.

The property of such a society may be laid in the landlord of an inn, where it is deposited.

Stealing a man's own goods with intent to defraud the king is larceny.

(*v*) Rex *v.* Bramley, East. T. 1822, MS. Bayley, J., and Russ & Ry. 478.

(*w*) Rex *v.* Willis, R. & M. C. C. R. 375.

(*x*) Rex *v.* Wymer, 4 C. & P. 391. It is not stated in the report whether the prisoner was a member of the society or not; if not, it seems difficult to see how any doubt could arise as to the property being rightly laid in the innkeeper, who had the actual possession, which (unless it be the possession of a feme covert or servant, which is, generally speaking, the possession of the husband or master) is enough to support an action of trespass or trover, Armory *v.* Delamirie, 1 Str. 505. 1 Sm. Lead. C. 151, and an indictment, although the posession were wrongfully obtained; for "if A. steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon, *both* as to A. and as to B." 1 Hale, 507. C. S. G.

is two shillings and sixpence per pound. Marsh and Co. entered it accordingly, and gave bond to the crown for its exportation, and sent it by their lighter to the ship: and on the way to the ship, W. Marsden, J. Marsden, and Wilkinson, who had charge of this lighter, took out the *nux vomica*, and substituted cinders and rubbish, the object being to get the *nux vomica* duty free. The indictment was against J. Marsden and Wilkinson for stealing the goods of Marsh and Co., and upon a case reserved, four of the Judges, Richardson, Burrough, Wood, and Graham, doubted whether this were larceny, because there was no intent to cheat Marsh and Co., or to charge them, but the intent was to cheat the crown, but seven Judges (Best, J. being absent,) held it a larceny, on the grounds that Marsh and Co. had a right to the possession until the goods reached the ship, and had an interest in that possession, and that the intent to deprive them of that possession wrongfully, and against their will, was a felonious intent as against them, because it exposed them to a suit upon their bond, and that even if there had been no intent as against them, the intent to cheat the crown was in the opinion of most of the seven Judges sufficient to make it a larceny. (*y*)

Goods, &c., in the possession of the wife.

Where goods are in the possession of the wife, they must be laid as the goods of her husband; thus if A. is indicted for stealing the goods of B., and it appears that B. was a *feme covert* at the time, A. must be acquitted. (*z*) And even if the wife have only received money as the agent of another person, and she is robbed of that money before her husband receives it into his possession, still it is well laid as his money in an indictment for larceny. An indictment charged the stealing of a 5*l.* bank of England note, the property of E. Wall, averring, in the usual way, that the money secured by the note was due and payable to E. Wall; it appeared that E. Wall's wife had been employed to sell sheep belonging to her father, of or in which her husband never had either possession or any interest, and she received the note in payment for the sheep, and it was stolen from her before she left the place where she received it. It was objected that the note never was the property of E. Wall, either actually or constructively; the money secured by it was not his, and he had no qualified property in it, as it never was in his possession; but it was held, that the property was properly laid. (*a*)

Goods of a convicted felon.

But if the husband be a convicted felon, the goods in the possession of the wife must be laid as the property of the queen. In one count the prisoner was charged with breaking and entering the house of E. Andrews, and stealing her property; in another count, the property was laid in the queen; at the time the house was broken into, and the property stolen, the husband of E. Andrews was in gaol under sentence of imprisonment on a conviction for felony; all the property had been the husband's, and had remained in the house, and the wife continued in possession of the house and the goods, till they were stolen; and, on a case reserved, it was held that the prisoner could only be convicted of larceny on the second count, which laid the property in the queen. (*b*)

(*y*) Rex *v.* Wilkinson and others, Mich. T. 1821, MS. Bayley, J., and Russ. & Ry. 470.

(*z*) 1 Hale, 513. He may, however, be indicted again for stealing the goods of the husband, ibid.

(*a*) Rex *v.* Roberts, 7 C. & P. 485, Littledale, J., after consulting Patteson, J.

(*b*) Reg. *v.* Whitehead, 9 C. & P. 429.

The ownership will not be divested from the true owner by an intermediate tortious taking.

The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steal the goods of B., and afterwards C. steal the same goods from A., in such case C. is a felon, both as to A. and as to B., and he may be indicted for stealing the goods of B. (*d*) Upon this subject Gould, J., in delivering the opinion of the twelve Judges in a modern case, said, "It is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment, that the goods are my property: because these acts of theft do not change the possession of the true owner." And he further stated it to be his opinion that the doctrine would also hold where the goods are taken from the possession of the true owner by means of *fraud:* as otherwise a man might derive an advantage from his own wrong. (*e*)

But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C. who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.: because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it; neither is he a felon to A., for he had it by his delivery. (*f*)

Ownership sufficient where there is only *a special property* in the goods.

There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a *special property* in them; and that they may be laid as the goods and chattels of such person in the indictment. A *lessee* for years, a *bailee*, a *pawnee*, a *carrier*, and the like, have such special property; and the indictment will be good, if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them. (*g*)

But this position and the passage cited in support of it from East have been questioned, and it has been observed that," The law so declared in two text books of standard authority is unquestionably not reconcileable, in all its parts, with the decisions cited above in *Rex* v. *Belstead*, and *Rex* v. *Brunswick*. (*h*) The following clear and succinct observations, which have been allowed to appear in this work, will it is conceived, be deemed valuable in pointing out the true legal distinctions which govern cases of this nature: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession

(*d*) 1 Hale, 507. 2 East, P. C. c. 16, s. 90, p. 654.

(*e*) By Gould, J., O. B. 1790, in Wilkins's case, 1 Leach, 522, 523.

(*f*) 1 Hale, 507.

(*g*) 1 Hale, 513. 1 Hawk. P. C. c. 33, s. 47. 2 East, P. C. c. 16, s. 90, p. 652. The passage in the text is founded on the passage in East. The passage cited from Hawkins does not support the position in the text, but only shows that the goods may be laid in the bailee; and the passage in Hale is in favour of the distinction drawn by Bayley, B.: it is, "If A. have a special property in goods, as by pledge or a lease for years, and the goods be stolen, they *must* be supposed in the indictment [to be] the goods of A. If A. bail goods to B., to keep for him, or to carry for him, and B. be robbed of them, the felon may be indicted for larceny of the goods of A. or B., and it is good either way, for the property is still in A., yet B. hath the possession, and is chargeable to A. if the goods be stolen, and hath the property against all the world but A." C. S. G.

(*h*) *Ante*, p. 87.

when he thinks fit, the goods may be described either as his goods, or his bailee's. In the latter case he does not for an instant part with the general right of possession; he confers a qualified right only, which he may put an end to when he will; in the former case, he parts with the whole right of possession for the time. The bailee for safe custody, the carrier, the tailor, the pawnee, have never more than a partial right; the owner may resume the goods, on satisfying their lien, when he will. The agister is in the same situation, and the decision as to him, in *Rex* v. *Woodward*, (*h*) only is, that the cattle may be described as his, not that they must. The ground of decision in *Rex* v. *Belstead*, and *Rex* v. *Brunswick*, was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass." (*h*)

Where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the innkeeper or the guest. (*i*) And linen stolen from a washerwoman, by whom it was taken in to wash in the course of her business, may be laid as her goods. (*j*) In cases of this kind it is considered that the parties have a possessory property; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution. (*k*)

Agister of cattle.

It has also been holden, that an agister of cattle has such a special property in them that they may be laid as his goods in the indictment. When this case was referred to the Judges, after the conviction of the prisoner, there was at first some doubt upon the point: one of the Judges observing that an agister of cattle is not liable for them at all events, like an innkeeper for the goods of his guest; but ultimately all the Judges agreed that the conviction was right. (*l*)

Where a house was taken by Kyezor, and Miers, who lived on his own property, carried on the business of a silversmith there for the benefit of Kyezor and his family, but had himself no share in the profits, and no salary, but had power to dispose of any part of the stock, and might if he pleased take money from the till as he wanted it, and sometimes bought goods for the shop, and sometimes Kyezor did; it was held that Miers was a kind of bailee of the stock, and that the property in a watch stolen out of the house might properly be laid in him. (*m*)

In a case where, upon an indictment for stealing a window-glass and hammer-cloth from a carriage, it appeared that the prosecutor, in whom the property was laid, was a coach-master, and had the care of the carriage, which stood in a coach-house in his yard, at the time the articles were stolen from it; an objection that the property should have been laid in the owner of the carriage was overruled. (*n*) And a case was at the same time referred to by the court in which a pri-

(*h*) MS. observations of Bayley, B. 3 Burn's Just. D. & W. 463.

(*i*) Todds's case, O. B. 1711. 2 East, P. C. c. 16, s. 90, p. 653.

(*j*) Packer's case, O. B. 1714. 2 East, P. C. c. 16, s. 90, p. 653. 1 Leach, 357, note (*a*).

(*k*) 2 East, P. C. c. 16, s. 90, p. 653.

(*l*) Woodward's case, Leicester Sum. Ass. 1796, Mich. T. 1796, and Hil. T. 1797, at which last meeting of the Judges, 4 Inst. 293, was referred to as showing that an agister has a possession, and 2 Rol. Ab. 551, as an authority, that an agister may maintain trespass against any one who takes the beasts. 2 East, P. C. c. 16, s. 90, p. 653. 1 Leach, 357, note (*a*). See Rooth *v.* Wilson, 1 B. & Ald. 59.

(*m*) Reg. *v.* Bird, 9 C. & P. 44, Bosanquet, J. See this case, *ante*, vol. 1, p. 829.

(*n*) Taylor's case, O. B. 1785. 1 Leach, 356.

soner was convicted of stealing a chariot glass from a lady's chariot which had been put up at a coach-yard at Chelsea, while the owner of it was at Ranelagh; and the property was laid to be in the master of the yard, where the chariot had been put up. (*o*)

Ownership where the goods were *in custodiâ legis.*

If goods seized under a writ of *fieri facias* are stolen, they may be described as the goods of the party against whom the writ issued, for, though they are *in custodiâ legis*, the original owner continues to have a property in them until they are sold: if he pays the debt he is entitled to have them returned, and his debt to the plaintiff in the suit continues undiminished, until the goods seized are applied to its liquidation. And the sheriff is accountable to the original owner for the goods so seized. A sheriff's officer seized goods under a writ of *fieri facias* against J. S., and afterwards stole part thereof. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff: but, upon the point being saved, the Judges held that notwithstanding the seizure, the general property remained in J. S., as the loss would fall upon him if they did not go to liquidate the debt, that the seizure left the debt as it was, and that the whole debt continued until the goods were applied towards its discharge. (*p*)

Ownership, where the goods are in the custody of servants.

But the indictment will not be sustainable if it appear in evidence that the party in whom the goods are laid had neither the property nor the possession of them; as is usually the case of a feme covert or servant, who have in their custody the goods of the husband or master. (*q*) In a late case it was decided that the goods in a dissenting chapel vested in trustees could not be described as the goods of a servant who had merely the care of the chapel, and the things in it, to clean and keep them in order, though he had the key of the chapel, and no person except the minister had any other key. The indictment was for stealing the chandelier and sconces of a dissenting chapel vested in trustees: and the things were described as the property of the trustees, and also of one Evans. The evidence as to the property of the trustees failed, and it appeared that Evans was servant to the trustees, and had the care of the chapel and the things in it, for the purpose of cleaning and keeping them in order, and that he had the only keys, except that the minister had a key of the vestry, from whence he could enter the chapel. Upon a case reserved, the Judges were of opinion that the property could not be considered as the property of Evans. (*r*) But though, generally speaking, the possession of the servant is the possession of the master, (*s*) yet there are some cases where a kind of special property has been considered to exist in the servant. Respecting the case lately mentioned, of a master delivering money to his servant to carry to a certain place, and then robbing his servant on the road, a learned writer observes, "I see no objection to laying the property of the goods in the servant, for though, in general, it may be said that he has no property in

(*o*) Statham's case, O. B. 1770. 1 Leach, 357.

(*p*) Rex *v.* Eastall, Mich. T. 1822, MS. Bayley, J. See Lucas *v.* Nockells, 10 Bing. R. 157.

(*q*) 2 East, P. C. c. 16, s. 90, p. 652, 653.

(*r*) Rex *v.* Hutchinson, East. T. 1820, MS. Bayley, J., and Russ. & Ry. 412. They should be laid in such cases as the property of one of the members "and others." Rex *v.* Boulton, 5 C. & P. 537, *post*, p. 102.

(*s*) *Post*, Chap. XVII. *On Larceny, &c., by Servants.* And *ante*, p. 21, *et seq.* as to the distinction between a bare *charge* and a possession of goods delivered.

them, as against his master, although he has against every other person; yet having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master in his presence, by putting in fear, is a taking from the master, and the offender may be indicted for robbing him." (*t*)

If a servant be employed by his master to receive money for him, and be robbed of such money before he take it to his master, the money may be described as the money of the servant. Upon an indictment for robbery of the monies of S. Webb, it appeared that Webb's servant was sent out by his master to receive money from his customers, and was robbed of the money he had received, as he returned home. Mr. B. Alderson was inclined to think the money could not be laid as the property of the master; for it was difficult to see how such an offence as the crime of embezzlement could have been a part of our criminal law, if the possession by the servant of the property, which had never come to the hands of the master, were construed to be the possession of the master; if it were, every servant, who converted to his own use property received by him, for his master would be guilty of larceny. (*u*)

Deakin's case. Where a box was stolen from a stage-coach on its journey, it was holden that it might be laid as the *property* of the driver of the coach.

The question concerning the sort of possession, or special property which a servant may have in the goods of his master, was much discussed in a modern case, where a stage-coach having been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the *coachman*. There were three counts in the indictment: but one of them which laid the property in the coach proprietors failed on account of a variance; another, which laid the property in persons unknown, was rejected by the court as improper in this case; and the case, therefore, necessarily proceeded upon the remaining count, which laid the property in the coachman. It appeared in evidence, that the box was delivered by the servant of a tradesman in London to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and delivered it to a porter, who put it into the coach; and that the coachman, in whom the property was laid, drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoners. It also appeared, that the proprietors of the coach never called upon the coachman to make good any losses, except when they happened by his neglect; and that for goods stolen privately from the coach they never expected any compensation from the driver. The jury having found the prisoners

(*t*) 2 East. P. C. c. 16, s. 90, p. 654, *ante*, p. 87.

(*u*) Reg. *v* Rudick, 8 C. & P. 237. His lordship discharged the jury, and directed a new bill laying the property in the servant to be preferred. Rex *v.* Bull, 2 Leach, 841, cited in Bazeley's case, shows that the servant would not have been guilty of larceny if he had converted the money to his use; but a distinction seems to exist between cases where the question arises between the master and servant, and between the master and a third person. "As between the master and servant or agent, where the master has no otherwise the possession than by the receipt of the servant or agent, the servant or agent cannot be charged with a tortious or felonious taking, but as against a third person where there could be no question of a trust, the receipt of effects by an agent by the master's directions might be considered as a receipt by the master himself; and in the common course of business there is often no receipt or possession by the master." Per Graham, B. Rex *v.* Remnant, Russ. & Ry. 136, *post*, p. 94, and see Rex *v.* Murray, R. & M. C. C. R. 276, *post*, tit. *Embezzlement*. And Rex *v.* Deakin, *infra*. C. S. G.

guilty, the case was saved for the consideration of the Judges; and, after it had been ably argued, a majority of the Judges were of opinion that the property was well laid to be in the driver. Hotham, B., who delivered their opinion, said, that the material question was, whether the driver had the possession of the goods, or only the bare charge of them; but that the case was not open to that distinction: for although, as against his employers the masters of the coach, the mere driver can only have the bare charge of the property committed to him, and not the legal possession of it, which remains in the coach-master; yet, as against all the rest of the world, he must be considered to have such a special property therein, as will support a count charging them as his goods; for he has in fact the possession of and control over them; and they are entrusted to his custody and disposal during the journey. And the learned Judge further observed, that the inconvenience would be great indeed, if the law were otherwise: as the difficulties and mistakes which must unavoidably arise in seeking after all the persons concerned as proprietors of a stage-coach, for the purpose of prosecuting an indictment of this nature, would be endless and insurmountable. That the law, therefore, on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. (*v*)

Property may be laid as belonging to the real owner, though it has only been in the possession of his agent.

Property may be laid as belonging to the real owner though it never was actually in his possession but in the possession of his agent only; as in the following case. Turner as agent for Nash sent up notes to Morgan, another of Nash's agents, and Morgan as agent for Nash sent them by the coach directed to Walker: and the prisoner stole them from the coach. The indictment having described them as Nash's, it was urged that they could not be so described, because Nash never had them, except by the hands of his agents; but all the Judges thought they had been rightly described, and held the conviction right. (*w*) But the property cannot be laid in a man who has never had either actual or constructive possession, except as far as it resulted from the possession of the thief and of persons acting under him. Thus where Paul had ordered a hat of Beer and the prisoner sent for it in Paul's name and got it, and was indicted for stealing Paul's hat, the Judges held that the property could not be said to be in Paul. (*x*)

Ownership of the clothes, &c., of children.

Clothes, and other necessaries provided for children by their parents, are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. (*y*) There are cases, however, of exclusive property in the children. Thus, in a case where the prisoner was charged with stealing wearing apparel, the property of J. Wilson, and it appeared in evidence that the wearing apparel had been furnished by J. Wilson to his son George, and that the son was nineteen years of age and

(*v*) Rex *v.* Deakin and Smith, O. B. 1800 2 Leach,862, 87 6. 2 East, P. C. c. 16,s . 90, p. 653.

(*w*) Rex *v.* Remnant, Mich. T. 1807, MS. Bayley, J., and Russ. & Ry. 136.

(*x*) Rex *v.* Adams, East. T. 1812, MS. Bayley, J., and Russ. & Ry. 225.

(*y*) 2 East, P. C. c. 16, s. 91, p. 654. Hayne's case, 12 Rep. 112.

bound apprentice to his father, who had covenanted to find him in clothing; the court held that the indictment was defective, and that the wearing apparel was exclusively the property of the son, who had been furnished with it in pursuance of the condition of the indentures. (*z*) And in a case which occurred at the Old Bailey above a century ago, upon the court doubting whether the property of a gold chain, which was taken from a child's neck who had worn it for four years, ought not to be laid to be in the father, an ancient clerk of the court said that it had always been usual to lay it to be the goods of the child in such case; and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges. (*a*)

Where the prisoner was indicted for stealing a pair of trowsers the property of J. Jones, and it appeared that J. Jones bought the cloth of which the trowsers were made and paid for it, but the trowsers were made for his son Thomas, who was seventeen years of age: and J. Jones stated that he found clothes for his son, who was not his apprentice, but a labourer like himself, and worked for the same master, but at different work, and lived with his father. Patteson, J. said, "I think the property is well laid. It may be laid in these cases either in the father or the child; but the better course is to lay it in the child." (*b*)

Scott's case. Property of sheep laid jointly in the grandfather and grand-children.

In a case where the prisoner was indicted for sheep stealing, the property was laid in Simon Dodd the elder, Simon Dodd the younger and several other persons of the same name. The evidence was, that Simon Dodd the elder, and a son of his, who afterwards died, took a farm on their joint concern, and kept a stock of sheep, which was their joint property, upon it; that the son died intestate about five years ago, leaving a widow, who died soon after him, and several children (being the S. Dodd the younger and the other persons named in the indictment); that no division was ever made of the stock; and that it was from the same stock that all the sheep upon the farm at the time of the felony committed were bred; some before and some after the son's death. It was also proved, that S. Dodd the elder continued to occupy the farm and use the stock as before, considering himself as acting for his grand-children who were still infants, in respect of one moiety; and that he accordingly kept a regular account with them in his books. The prisoner having been convicted, a question was submitted to the consideration of the Judges, whether the property were well laid jointly in the grand-father and grand-children. And the Judges were of opinion that it was well laid; for though in the case of joint traders there was no *jus accrescendi*, and the remedy survived; yet here it was proved, by the evidence of the grandfather, that he held one moiety for his grand-children; and he might make distribution among them. And some of the Judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent. The

(*z*) Forsgate's case, O. B. 1787, 1 Leach, 463.

(*a*) Anon. O. B. 1701, 2 East, P. C. c. 16, s. 91, p. 654. 1 Leach, 464, note (*a*). If apparel be put upon a boy, this is a gift in the law; for the boy hath capacity to take it. Hayne's case, 12 Rep. 112.

(*b*) Reg. *v.* Hughes, Salop Spr. Ass. 1842, MS. C. S. G.

Judges were all of opinion that it was not necessary that the property in the thing taken should be the strict legal property. (*c*)

Gaby's case. The *actual possession* of the goods by a surviving partner, and the widow of a deceased partner, holden to be a sufficient ownership.

In another case where the prisoner was indicted for stealing some drapery goods, which were stated in the indictment to be the property of Benjamin Dodge and Sarah Chilcott, widow, it was objected that the property in the goods was misdescribed. The facts, upon which the objection was taken, were that the goods in question had been part of the joint stock in trade of B. Dodge, and one Chilcott, the late husband of S. Chilcott, who died a short time only before the theft was committed. He died without a will, leaving S. Chillcott and some young chidren; and no administration of his effects had been granted; but S. Chilcott, from the time of his death, acted as a partner, and regularly attended the business of the shop. The goods in question were stolen on the 6th of January, after the death of the husband, who died about the Christmas preceding: and on the 20th of January a division was made of the remaining stock in trade; S. Chilcott taking one-half, and B. Dodge the other half. Upon these facts it was contended, on the part of the prisoner, that the children, in respect of their interest under the statute of distributions, should have been named with B. Dodge and S. Chilcott, as joint proprietors; or that the property should have been alleged to be in the ordinary and surviving partner. But the learned Judge, before whom the prisoner was tried, held that the *actual possession* in B. Dodge and S. Chilcott, as owners, was sufficient; upon which the prisoner was convicted: and the Judges afterwards, upon the case being saved for their consideration, held that the conviction was right. (*d*)

Ownership of game by an unqualified person.

A case has been already mentioned, in which, upon an indictment for stealing pheasants, restrained of their liberty, it appeared in evidence that the prosecutor, in whom the property in the pheasants was laid, was not a qualified person to keep or shoot game; whereupon an objection was taken that he could not have any property in them, or any legal possession, sufficient to support the indictment, and was overruled. (*e*)

Ownership of treasure-trove, estrays, wrecks, &c.

It is laid down, in some of the books, that larceny cannot be committed of things wherein no person has any determinate property; and, therefore, that the taking away treasure-trove, or waif, or stray, before they have been seized by the persons who have a right thereto, cannot be felony. (*f*) But it is observed, that there seems to be some incorrectness in the generality of this position; as, although the lord has no determinate property in waifs, treasure-trove, &c., till seizure, the true owner, though unknown, who has lost, or been robbed of the things, has still a property in them. (*g*) And as to the reason assigned by one writer of these things not being the subject of larceny, namely, the uncertainty of the true owner, (*h*) it is ob-

(*c*) Scott's case, *cor.* Chambre, J., Northumberland Sum. Ass. 1801, Mich. T. 1801, 2 East, P. C. c. 16, s. 91, p. 655. Russ. & Ry. 13.

(*d*) Rex *v.* Gaby, *cor.* Chambre, J., Taunton Spr. Ass, 1810, MS. Russ. & Ry. 178.

(*e*) Jones's case, *ante*, p. 85.

(*f*) 3 Inst. 108. 1 Hale, 510. 1 Hawk. P. C. c. 33, s. 38.

(*g*) 2 East, P. C. c. 16, s. 40, p. 606, and s. 88, p. 651.

(*h*) Pult de pace, 131. And so also in 3 Inst. 108, the reason is given that *dominus rerum non apparet.*

served, that it, at least, implies that if the owner be known, larceny may be committed of them. (*i*)

But, further, it is well settled that larceny may be committed by stealing goods, the owner of which is *not known:* and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. (*j*) But upon prosecutions of this kind some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino;* and Lord Hale, C. J. said that he never would convict any person for stealing the goods *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods. (*k*) It is said, therefore, with respect to these cases, that the true ground upon which persons so indicted, may in any instance, claim to be acquitted, when the other facts, necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases. (*l*)

Ownership where the person of the owner is unknown.

It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper if the owner be really known; and that in such case the prisoner must be discharged of the indictment so framed, and tried upon a new one for stealing the goods of the owner by name. (*m*) In a case where the prisoner was charged with stealing a box of goods from a stage-coach, one of the counts of the indictment, which stated the box to be the property of persons unknown, was rejected by the court, on the ground that where it was in the power of a pleader to state a legal proprietor, as in this case, by laying the property to be in the persons from whom and to whom the goods were sent, it was improper to lay the property as belonging to persons unknown. (*n*) And the same principle is stated to have been acted upon in a case where the indictment charged the prisoner as an accessory before the fact to a larceny, and it appeared, from the opening of the case by the counsel for the prosecution, that the grand jury had found the bill upon the evidence of the thief, who was about to be called as a witness to establish the guilt of the prisoner, upon which the learned Judge interposed, and directed an acquittal. (*o*)

An indictment cannot be sustained for stealing the goods of a person unknown, if it appear that the owner is really known.

Where the owner might easily have been ascertained, an indictment for stealing the goods of a person unknown, is not maintainable. The first count laid the property stolen in persons who were therein named, and the second count laid it in persons unknown; evidence was offered of the ownership as laid in the first count, but

(*i*) 2 East, P. C. c. 16, s 40, p. 606.

(*j*) 1 Hale, 512. 2 Hale, 181. 1 Hawk. P. C. c. 33, s. 44. 2 East, P. C. c. 16, s. 88, p. 651. Anon. Dy. 99 *a*, pl. 61, 285 *a*. Westbeer's case, *ante*, p. 70. And see note (*v*), *post*.

(*k*) 2 Hale, 290.

(*l*) 2 East, P. C. c. 16, s. 88, p. 651.

(*m*) 2 East, P. C. c. 16, s. 88, p. 651.

(*n*) Rex *v.* Deakin and Smith, 2 Leach, 862, *ante*, p. 94.

(*o*) Walker's case, *cor.* Le Blanc, J., Gloucester Sum. Ass. 1812. 3 Campb. 264. And see also as to the statement of the principal felon being unknown in the indictment against a receiver of stolen goods, *post*, Chap. *Of Receiving Stolen Goods.*

the witness could not recollect the Christian names of some of the owners; the second count was then relied upon. Richards, C. B., "I think the prisoner must be acquitted. The owners, it appears, are known, but the evidence is defective on this point. How can I say that the owners are unknown? I remember a case at Chester, before Lord Kenyon, where the property was laid in a person unknown; but, upon the trial, it was clear that the owner was known, and might easily have been ascertained by the prosecutor; Lord Kenyon directed an acquittal." (*p*)

It is said that where a felony has been committed by stealing the goods of a person unknown, the king shall have the goods. (*q*)

Ownership of goods belonging to a church, and of shrouds or coffins in which corpses are deposited.

The property in the bells, books, or other goods, belonging to a church, has been already spoken of. (*r*) It is clearly settled that there can be no property in a dead corpse. (*s*) If, however, a shroud be stolen from a corpse, it may be laid to be the property of the executors, or whoever else buried the deceased; but not as the property of the deceased himself. (*t*) And a case is mentioned where several persons were convicted of larceny, in stealing leaden coffins out of the vaults of a church; the coffins being laid as the goods of the executors. (*u*) If the personal representatives of the deceased cannot be ascertained, or even, as it seems, if it appear probable, from the time which has elapsed since the death, that it might be a matter of some difficulty to ascertain them, it will be sufficient to lay such goods as the property of "a person unknown." In a case where the prisoner was indicted for stealing a leaden coffin, the property of a person unknown, it was objected that, though the coffin had lain in the ground near sixty years, yet, as the same family, of which the deceased had been a member, remained on the spot, and as it did not appear that any inquiry whatever had been made to ascertain the personal representative, there was a want of reasonable diligence in the prosecutor; but it was ruled to be sufficient after so many years had passed. (*v*) In the same case it was also ruled that a count, laying the coffin as the

(*p*) Rex *v.* Robinson, Holt. N. P. C. 595. 2 Stark. Ev. 608. The averment in the indictment always is "to the jurors aforesaid," *i. e.* the grand jury, "unknown," and in Rex *v.* Cordy, Gloucester Spr. Ass. 1832. MS. C. S. G., upon its being stated in argument that it had been held that if it were alleged that property was stolen by a person unknown, and it was proved at the trial that the person was known the prisoner must be acquitted; Littledale, J., said, "That case has been decided, but it is subject to some doubt; the question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the grand jury, I should doubt about that case." If a case should occur where the witnesses who went before the grand jury were wholly ignorant of the party said to be unknown, and it turned out by other evidence, *e. g.* by a witness called for the prisoner, that the party was known, it would deserve consideration whether the prisoner would thereby be entitled to be acquitted. In Rex *v.* Deakin, *ante*, note (*n*); Walker's case, *ante*, note (*o*), and Rex *v.* Robinson, the grand jury had evidence before them to show that an owner might be ascertained. It may, however, be difficult to distinguish this part of the indictment from the other parts, and as the prisoner may clearly contradict the other parts of the finding, it would probably be held that he might contradict this part also. C. S. G.

(*q*) 1 Hawk. P. C. c. 33, s. 44. 2 East, P. C. c. 16, s. 88, p. 651.

(*r*) *Ante*, vol. 1, p. 844. Chap. on *Sacrilege*.

(*s*) 2 East, P. C., c. 16, s. 89, p. 652.

(*t*) Hayne's case, 12 Co. 112, and 3 Inst. 110, where the theft is called *furtum inauditum*. 1 Hale, 515. 1 Hawk. P. C. c. 33, s. 46. 4 Black. Com. 236.

(*u*) Anon. 2 East, P. C. c. 16, s. 89, p. 652.

(*v*) Anon. *cor.* Buller, J., Exeter Lent Ass. 1794. 2 East, P. C. c. 16, s. 89, p. 652.

property of certain persons being the then churchwardens, could not be supported. (*w*)

Of the ownership of the goods of a deceased person.

If a man die intestate, and the goods of the deceased be stolen before administration committed, such goods shall be supposed to be the goods of the ordinary; but if a man die, having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him. (*x*) Where property is stolen before administration is granted, with the will annexed, in a case where the executor refuses to prove, it cannot be laid in the administrator. Upon an indictment for stealing the property of R. Roberts, it appeared that a person had made a will and appointed executors, who would not prove it, upon which Roberts took out letters of administration with the will annexed, but they were not dated till after the time when the felony was committed; and it was held, that the property ought to have been laid in the ordinary, as letters of administration only had their operation from the time when they were granted, though the rights of an executor commenced from the time of the death of the testator. (*y*) Neither the ordinary, nor an executor, nor administrator, need shew their title specially, it being founded on their own possession; in which case a general indictment lies without naming themselves ordinary, executor, or administrator. (*z*)

Of the ownership of goods of corporations and trustees.

Property vested in a body of persons ought not to be laid as the property of that body, unless such body is incorporated, but should be described as belonging to the individuals (or one of them by name "and others," 7 Geo. 4, c. 64,) who constitute such body. The 7 Geo. 4, c. 64, s. 20, has, however, enacted that judgment shall not be stayed or reversed on the ground that any person or persons, mentioned in an indictment or information, is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names. (*a*) This statute does not, however, apply to objections taken upon demurrer.

Where a statute gives a corporate capacity and name to individuals, and vests property in them, such property must be laid in an indictment as belonging to them, in their corporate name, and not in the names of the individual members.

In a case which occurred upon the 17 Geo. 3, c. 17, it was decided, that where an act of parliament gives a corporate capacity and a corporate name to any body of persons, and vests property in them, such property must be stated in the indictment to belong to them in their *corporate name*, and not in the names of the individual members. The prisoners were indicted for cutting down in the night-time trees growing on Enfield Chase; and the indictment contained two counts, the first laying the property in the trees as belonging "to Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of Enfield aforesaid;" and the second laying the property as belonging "to Joseph Brown, George Cook, and William Sedcole, they the said Joseph Brown, George Cook, and William Sedcole, then being the churchwardens of the parish church of Enfield, in the county of Middlesex." It appeared that by the 17 Geo. 3, c. 17, (which was passed for the purpose of dividing Enfield Chase) the allotment of land from which the trees were taken, was vested in the "churchwardens of Enfield for the time

(*w*) Id. ibid.

(*x*) 1 Hale, 514. 2 East, P. C. c. 16, s. 89, p. 652.

(*y*) Rex *v.* Smith, 7 C. & P. 147, Bolland, B., and Coleridge, J.

(*z*) 1 Hale, 514.

(*a*) See the section more fully stated, *post*, p. 113.

being," and their successors for ever in trust, &c.; but that by a subsequent section of the statute the churchwardens were incorporated by the name of "The Churchwardens of the parish church of Enfield in the county of Middlesex." And the counsel for the prisoner submitted that the indictment was defective in laying the property in the trees as belonging to the individual members composing the corporation by their private names, instead of laying the property as belonging to the corporation by their public name. On the part of the Crown, it was contended, that the private names might be expunged as surplusage. The court held the objection to be fatal, and said, "The indictment would have been clearly right, if the first clause of the act of parliament which vests the property in the churchwardens for the time being had stood single. But the clause which gives the churchwardens a corporate capacity, and a corporate name, puts an end to the question; for where any description of men are directed by law to act in a corporate capacity, their natural and individual capacity as to all matters respecting the subject of their incorporation, is totally extinct. The present indictment describes the trees to be the property of certain *individuals*, by their names; but the act of parliament shews the property to be in the *corporation*. If an action were brought in the private names of the present prosecutors, for any matter relating to their public capacity, they must unavoidably be nonsuited; and, *à fortiori*, it must be erroneous in a criminal prosecution. But it is said that the private names may be expunged as surplusage. In the first count, supposing them expunged, the remaining description would be 'the churchwardens of Enfield,' which is not the name of the corporation; and, therefore, that count would still be wrong. In the second count, it is true, the corporate name is used; but the property is not laid to be in the corporation of that name, it is laid to be in the private persons, and the public name is used merely as a description of those persons. The prisoners, must, therefore, be discharged on this indictment." (*b*)

But where property is vested in trustees not incorporated, nor having a public name given to them collectively, it should be laid in the indictment in their individual names. Sherrington's case.

But where property was vested in certain trustees, under an act of parliament, who were *not incorporated*, nor had any public name given to them collectively, it was holden that the property should have been laid in the indictment as belonging to them in their individual names. This point was decided in a case where the prisoners were indicted for stealing lead, which had been affixed to a workhouse of the poor of a certain place, called the "Old Artillery Ground;" and the property was laid as belonging to "the Trustees of the Poor of the Old Artillery Ground." It appeared that by the 14 Geo. 3, c. 30, certain persons were appointed trustees of the workhouse in question, and that all fixtures, furniture, &c., were vested in them; and that the act also contained this clause, "and the said trustees are hereby empowered to prefer, or order the preferring of any bill or bills of indictment against any person or persons, who shall steal, take, or carry away any, or any part of such things; and the monies and things which shall be so stolen, taken, or carried away, shall in every such indictment be laid, and deemed and taken to be the property of *the Trustees*

(*b*) Rex *v.* Patrick and Pepper. O. B. 1783, 1 Leach, 253. 2 East, P. C. c. 22, s. 7, p. 1059.

of the Poor of the Old Artillery Ground. And every indictment so preferred shall be held good in law, to all intents and purposes." The question having been raised, whether the indictment had well laid the property as belonging to "*the Trustees of the Poor of the Old Artillery Ground:*" the Court held that it had not; for as the act of parliament had not incorporated the trustees, and by that means given them collectively a *public name,* the property should have been laid as belonging to A., B., C., &c., by their proper names, and the words "*Trustees of the Poor of the Old Artillery Ground*" subjoined, as a description of the capacity in which they were authorized by the Legislature to act. (*c*)

Property vested in a body of persons cannot be laid as the property of that body unless it is incorporated.

The point is therefore settled, that property vested in a body of persons cannot be laid as the property of that body, unless the body is incorporated; but should be described as belonging to the individuals who constitute that body, or some one of them by name "and others." (*d*) And a recent case was decided upon this principle. By the 24 Geo. 3, c. 15, certain inhabitants in seven parishes were incorporated by the name of the "Guardians of the Poor" of those parishes, and it was enacted that twelve directors should be appointed out of the guardians, and the property belonging to the corporation was vested in the "directors for the time being." The prisoner was indicted for embezzling monies of the *directors;* and an objection was taken that the money should have been described as the money of the guardians by their corporate name, or as the money of the individuals who formed the body of the directors, calling them by their private names as individuals. And upon a case reserved, the Judges were of that opinion, on the authority of Rex *v.* Sherrington, and held the conviction wrong. (*e*)

7 Geo. 4, c. 64, s. 14. How indictments for offences committed on the property of partners may be laid.

It remains to notice certain cases in which the ownership of goods, and the mode of describing property in them have been regulated by the 7 Geo. 4, c. 64, s. 14, which, in order to remove the difficulty of stating the names of all the owners of property in the case of partners, and other joint owners, enacts, "that in any indictment or information for any felony or misdemeanor wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be, and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees." (*f*)

Where a bible and hymn book had been given to a society of Wesleyans, at whose expense they had been bound, and they were laid in an indictment as the property of B. "and others," B. being both a trustee and a member of the society, it was held that the

(*c*) Rex *v.* Sherrington and Bulkley, O. B. 1789, 1 Leach, 513, *infra.*

(*d*) 7 Geo. 4, c. 64, s. 14, *infra.*

(*e*) Rex *v.* Beacall, East. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 15.

(*f*) The Irish Act, 9 Geo. 4, c. 54, s. 28, is similar to this section.

property was rightly laid. (*g*) So where the property in ore stolen from a mine was stated to be in S. Davey "and others," who were proved to be the adventurers in the mine, and it was objected that they were not partners, joint-tenants, or tenants in common, within the 7 Geo. 4, c. 64, s. 14, the objection was overruled. (*h*)

If an indictment allege property to belong to A. B. and others, and it appears that A. B. has only one partner, it is a variance. The prisoner was indicted for stealing the property of George Eyre "and others," and it was proved that George Eyre had only one partner, Andrew Strahan, it was held that the prisoner must be acquitted. (*i*) So where a count for forgery laid the intent to be to defraud S. Jones "and others," and it appeared that Jones had only one partner, it was held that the count was not supported. (*j*)

7 Geo. 4, c. 64, s. 15. How property belonging to counties may be laid.

The 7 Geo. 4, c. 64, s. 15, with respect to the property of counties, ridings, and divisions, enacts, "that in any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building erected or maintained, in whole or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any such inhabitants."

Sec. 16. How property ordered for the use of the poor of parishes, &c., may be laid.

Sec. 16, with respect to the property of parishes, townships, and hamlets, enacts "that in any indictment or information for any felony or misdemeanor committed upon or with respect to any workhouse, or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house, in or belonging to the same, or by the master or mistresses of such workhouse or poor-house, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; (*k*) and in

(*g*) Rex *v.* Boulton, 5 C. & P. 537, Parke, J. S. C. MS. C. S. G.

(*h*) Rex *v.* Webb, R. & M. C. C. R. 431, per Patteson, J., on the trial; but the point was mentioned to the Judges afterwards, who gave no opinion upon it, deciding the case on another ground. See the case, *ante*, p. 4.

(*i*) Hampton's case, Greenw. Coll. St. 143, Denman, Com. Serj.

(*j*) Wright's case, 1 Lewin, 268, Bayley, J.

(*k*) The 55 Geo. 3, c. 137, s. 1, vests goods, furniture, apparel, &c., provided for the use of the poor in the overseers of the parish, &c., for the time being, and their successors, and enacts that in any indictment in respect of such goods, &c., the said goods, &c., shall be laid or described to be the property of the overseers of the poor for the time being of such parish, &c., without stating or specifying their names. It was held that an indictment for stealing goods under this statute might state them to be the goods of the overseers of the poor *for the time being* of the parish of A., and that this sufficiently imported that they belonged at the time of the theft to the persons who were then the overseers. Thus, where the indictment stated that the prisoner 6lbs. weight of pork of the goods and chattels of the overseers of the *poor for the time being*, of the parish of K., feloniously did steal, &c., and a case was reserved on the ques-

any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet or place, otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors."

How materials, &c., for repairing highways, may be laid.

Sec. 17, with respect to the property under turnpike trusts, enacts "that in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners."

7 Geo. 4, c. 64, s. 17. How property of turnpike trustees may be laid.

Sec. 18, with respect to property under commissioners of sewers, enacts "that in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners."

Sec. 18. How in indictments for offences committed on sewers the property may be laid.

The 7 Geo. 4, c. 46, an act for the better regulating of copartnerships of certain bankers in England, provides in what cases, and under what circumstances, copartnerships of more than six persons may carry on business in England; and by sec. 9, "all indictments, informations and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of one of the public officers nominated as aforesaid, for the time being of such copartnership, and that in all indictments and informations to be had or preferred by or on behalf of such copartnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers nominated as aforesaid, for the time being of such copartnership, and that any forgery,

7 Geo. 4, c. 46, joint stock banks.

tion whether this was properly laid, the Judges were of opinion that it sufficiently imported that the goods at the time of the theft were the property of the then overseers, and therefore held the conviction right. Rex v. Went, East. T. 1818, MS. Bayley, J., and Russ. & Ry. 359.

fraud, crime, or other offence committed against, or with intent to injure or defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against, or with intent to injure or defraud any one of the public officers nominated as aforesaid, for the time being of such copartnership, and any offender or offenders may thereupon be lawfully convicted, for any such forgery, fraud, crime, or offence: and that in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of any one of the public officers nominated as aforesaid, for the time being of such copartnership; and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, prosecution, information, or other proceedings, commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being."

It is not imperative upon the banking companies constituted under this act to prosecute in the name of one of their public officers; thus it has been held in a case of forgery that they are not bound to allege an intent to defraud one of their public officers, but may lay the intent to be to defraud one of the shareholders by name, "and others," under the 1 Wm. 4, c. 66, s. 28. (*l*)

In an indictment for forgery it has been held sufficient to aver the intent to be to defraud R. B., "then and there being one of the public officers for the time being of a certain copartnership of persons carrying on the trade and business of bankers in England, exceeding the number of six persons, and called the National Provincial Bank of England;" and that it is not necessary to aver that R. B. was nominated under the 7 Geo. 4, c. 46. (*m*)

The return made to the Stamp Office under the 7 Geo. 4, c. 46, is not the only mode of proving that a person is a public officer; that fact may be proved by other evidence. (*n*)

The 7 Geo. 4, c. 46, was amended and continued by the

(*l*) Reg. *v.* Beard, 8 C. & P. 143, Coleridge, J. In Rex *v.* Burgiss, 7 C. & P. 488, Littledale, J., had expressed great doubts on the point; but in Rex *v.* James, 7 C. & P. 553, Patteson, J., had expressed an opinion that either the one mode or the other might be adopted. And it should seem that there is no doubt that an indictment laying property to belong to one member of such a company by name, "and others" would be good, especially as the 7 Geo. 4, c. 64, s. 14, extends to "all joint stock companies," *ante*, p. 110. C. S. G.

(*m*) Reg. *v.* Beard, *supra*. So it has been held in an action brought in the name of a public officer of such a company, that it is not necessary to allege in the declaration that he is a member of the company, that he is resident in England, or that he has been duly registered as required by sec. 4; but that it is sufficient to allege that he has been "duly nominated and appointed, and now is one of the public officers of the said company according to the force, form, and effect of the said act of parliament." Spiller *v.* Johnson, 6 M. & W. 570. So it has been held sufficient to state in the declaration that the plaintiff is the manager of a certain joint stock copartnership, established for the purpose of banking, and that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership under the provisions of the statute, without expressly stating that he has been named as manager, or that the copartnership has been established under the provisions of the act. Christie *v.* Peart, 7 M. & W. 491.

(*n*) Edwards *v.* Buchanan, 3 B. & Ad. 788. Reg. *v.* Beard, *supra*, note (*l*).

1 & 2 Vict. c. 96, and is further continued by the 3 & 4 Vict. c. 111, until the 31st August, 1842, and sec. 2 of that act enacts, that "If any person or persons, being a member or members of any banking copartnership within the meaning of the said act, or of any other banking copartnership consisting of more than six persons, formed under or in pursuance of an act passed in the third and fourth years of the reign of king William the Fourth, intituled "An act for giving to the corporation of the governor and company of the Bank of England certain privileges for a limited period, under certain conditions," shall steal or embezzle any goods, money, effects, bills, notes, securities, or other property of or belonging to any such copartnership, or shall commit any fraud, forgery, crime, or offence against or with intent to injure or defraud any such copartnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of any such copartnership, in whose name any action or suit might be lawfully brought against any member or members of any such copartnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such copartnership, any law, usage, or custom to the contrary notwithstanding."

3 & 4 Vict. c. 111. Joint-stock banks.

The Friendly Society Act, 10 Geo. 4, c. 56, s. 21, provides that "all real and heritable monies, goods, chattels, and effects whatever, and all titles, securities for money, or other obligatory instruments and evidences or muniments, and all other effects whatever, shall be vested in the treasurer or trustee of such society for the time being," "and shall for all purposes of action or suit as well criminal as civil in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be the property of the person appointed to the office of treasurer or trustee of such society for the time being, in his or her proper name without further description;" and such person is authorized to bring any prosecution touching the property belonging to the society, provided he has been thereunto authorized by the consent of the majority of the members present at any meeting of the society or a committee thereof, and no prosecution shall abate by the death of such person or his removal from office, but shall and may be proceeded in by the succeeding treasurer or trustee in the name of the person commencing the same.

Friendly Society Act, 10 Geo. 4, c. 56.

The 9 Geo. 4, c. 92, which consolidates the laws relating to savings' banks, by sec. 8, vests the effects of such institutions in the trustee or trustees for the time being, and in all criminal proceedings the property may be stated to be that of the trustee or trustees for the time being "in his, her, or their proper name, without further description."

Savings' Banks.

The 5 & 6 Wm. 4, c. 23, s. 4, authorizes the laying the property of any loan society in England and Wales in the proper name or names of the trustee or trustees of such society without further description.

Loan Societies.

The 5 & 6 Wm. 4, c. 69, an act to facilitate the conveyance of workhouses and other property of parishes and unions, by sec. 7 provides that "the guardians of the poor of every union already formed, or which hereafter shall be formed, by virtue of the aforesaid act, passed in the fourth and fifth years of his present Majesty, and of every parish placed under the controul of a board of guardians by

5 & 6 Wm. 4, c. 69. Workhouses, &c.

virtue of the said act, shall respectively, from the day of their first meeting as a board, become, or be deemed to have become, and they and their successors in office shall for ever continue to be, for all the purposes of this act, a corporation, by the name of the guardians of the poor of the union, (or of the parish of) in the county of ; and as such corporation the said guardians are hereby empowered to accept, take and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal; and they are further empowered by that name to bring actions, to prefer indictments, and to sue and be sued, and to take or resist all other proceedings for or in relation to any such property, or any bonds, contracts, securities, or instruments, given or to be given to them in virtue of their office; and in every such action and indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the union, or of the parish of ; and in case of any addition to or separation of any parishes from any such union, under the authority of the said act, passed in the fourth and fifth years of the reign of his present Majesty, the board of guardians for the time being shall (notwithstanding such alteration) have and enjoy the same corporate existence, property and privileges, as the board of guardians of the original union would have had and enjoyed had it remained unaltered."

By the 1 Vict. c. 36, s. 40, letters, money, &c., sent by the post, may be laid as the property of the Postmaster-General. (*n*)

SECTION IV.

Of the Indictment, Trial, and Punishment.

Indictment.

It is not intended to enter particularly upon the form of an indictment for larceny, concerning which ample information is given in those works which treat expressly upon the subject of criminal pleading. (*o*) It may be briefly observed, that the prisoner must be charged with the offence in the technical form, "feloniously did steal, take, and carry away;" or, as it is said to be most proper, when cattle are the subject matter of the larceny, "feloniously did steal, take, and *lead* away." (*p*) And though it is not now necessary that the value of the goods should be stated in order that it may appear whether the offence be grand or petit larceny, yet some value should in general be stated, as if the property be of no value it is not a subject in respect of which larceny can be committed. And it has

(*n*) See this section, *post*, in the chapter relating to the post-office.

(*o*) Stark. Crim. Plead. 192, *et seq.* 449, *et seq.* 3 Chit. Crim. L. 944, *et seq.* Cro. Circ. Comp. p. 38, *et seq.*

(*p*) 2 Hale, 184. 2 East, P. C. c. 16, s. 159, p. 778. Starkie Crim. Plead. 78, 451. 3 Chit. Crim. L. 950. In Stark. Crim. Plead. 78, note (*u*) the learned author says, "It has been said that for stealing a horse it should be *cepit et abduxit*, for stealing a sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions."

been abundantly shewn that the property must be laid in some person who has in legal consideration a sufficient ownership for that purpose. (*q*)

Description of the goods.

With respect to the proper description of the goods stolen, difficulties will sometimes occur. The general rule is given, that they should be described with such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and shew judicially to the court that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. (*r*) And it is quite necessary that it should appear, on the face of the indictment, that the thing taken is such whereof larceny may be committed: so that, as we have seen, where the indictment was for stealing a pheasant, which *primâ facie* is not a subject of larceny, it was holden to be necessary to state that it was either dead, tame, or confined. (*s*)

Name of the owner.

The goods may be described as the goods of a person by the name which such person has assumed, though it be not his right name. The prisoner was indicted for stealing in the dwelling-house of Mary Johnson certain goods, her property; and it appeared in evidence that her real name was Davis, but that she had passed by the name of Johnson, without any purpose of fraud, for five years. Upon the point being saved, the Judges, (seven being present) were clear that the time she had been known by the name of Johnson warranted her being so called in the indictment. (*t*)

Certainty in the indictment.

The same certainty is required in an indictment for stealing goods as in trespass for goods, and rather more certainty, for what will be a defect of certainty in a declaration will be much more defective in an indictment. (*u*) Where several things are stolen, it is necessary to state the number; therefore, it is not sufficient to say, *felonicè furatus est aves* or *columbas* out of a dovecote, or young hawks out of the nest, without expressing the number. (*v*) And where the number is required to be stated, it must be stated with certainty. It is not, therefore, sufficient to say that the prisoner stole twenty sheep and lambs or twenty sheep and wethers, because it does not appear how many of one sort and how many of another. (*w*) The property itself must be accurately described; it is not therefore sufficient to say that the prisoner stole the goods and chattels of B., without shewing what goods and chattels in certain, as one horse, one ox, &c. (*x*) So an indictment charging the stealing of "one hundred articles of household furniture" would be bad. (*y*) But an indictment charging the things stolen to be nine printed books would be good. (*z*) So in an indictment for stealing a handkerchief, it is not necessary to describe it particularly, as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. (*a*)

(*q*) *Ante*, p. 86, *et seq.*
(*r*) Stark. Crim. Plead. 193. 1 Ch. Cr. Law, 235.
(*s*) *Ante*, p. 84
(*t*) Rex *v.* Norton, East. T. 1823, MS. Bayley, J., and Russ. & Ry. 510. See vol. 1, p. 555.
(*u*) 2 Hale, 183.
(*v*) 2 Hale, 182.
(*w*) 2 Hale, 183.
(*x*) 2 Hale, 182.
(*y*) Rex *v.* Forsyth, Russ. & Ry. 274.
(*z*) Per Lord Ellenborough and Bayley, J., in Rex *v.* Johnson, 3 M. & S. 540.
(*a*) Per Le Blanc, J., ibid.

A chattel ought to be described by its proper name.

If a chattel has obtained a particular name of its own, it ought to be described by that name, and it would be wrongly described as so many pounds weight of the metal of which it is made; but whilst metal is in the progress of manufacture, it may be described as so many pounds weight of metal. Upon an indictment for stealing twenty-five pounds weight of tin, it appeared that the tin consisted of two pieces, which a witness called "lumps of tin," but afterwards admitted that they were called in the trade "ingots;" but added that that term was applied as well to the pieces of tin, as to the mould in which they were cast, and was applied to the shape. The tin had been cast into these pieces for the purpose of being again melted up for use, in the manufacture of tin; and in the middle of each was an indentation for the purpose of breaking them in two when wanted to be melted up again. It was objected that the tin ought to have been described as two ingots, for wherever an article has obtained a name in the trade, it must be described by it. Coleridge, J., "It seems to me that the description is sufficient to answer all the purposes which are required by law. First, it is the subject of larceny equally whether it be an ingot or so many pounds weight of tin. Secondly, as to the facility of pleading *auterfois acquit*, the prisoner stands in the same situation, whether it be one or the other, because there must be some parol evidence in all cases to shew what it was that he was tried for before, and it would be as easy to prove one as the other. The last question is, whether it is described with sufficient certainty, in order that the jury may be satisfied that it is the thing described. If this had been some article, that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed; as, if a piece of cloth were called so many pounds of wool, because it has ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds weight of iron." (*b*)

Description of goods as they are known in the trade.

A set of new handkerchiefs in a piece may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handkerchiefs. Upon an indictment against the prisoners for stealing six handkerchiefs, it appeared that the handkerchiefs were new and in one piece, but that the pattern designated each, there being a light coloured line between each; and it also appeared that the article was known in the trade as a piece of silk handkerchiefs, and that it was the custom to charge such an article as so many handkerchiefs. The point being saved, the

(*b*) Reg. *v.* Mansfield, 1 C. & M. 140. Rex *v.* Stott, 2 East, P. C. c. 16, s. 144, p. 752, 753, was cited in support of the objection. There the indictment was for receiving stolen iron, described as so many "pieces of iron called strokes," so many "pieces of iron," and so many "pieces of iron called horse-shoes;" and the only question seems to have been whether the 29 Geo. 2, c. 30, related to metals in their raw state, as contradistinguished from wrought goods, and no opinion was given; the counsel for the prisoner waiving the further prosecution of a writ of error upon a doubt intimated by the Court of B. R., whether any other judgment could be passed than that of transportation, directed by the 29 Geo. 3, c. 30. C. S. G.

Judges held that the property was rightly described as six handkerchiefs, and that the conviction was right. (c)

Description of matters defined by a statute.

It is also laid down as a rule that, when the subject matter is defined by a statute, the descriptive words contained in the act should be also used in the indictment; and that where the act uses several descriptive terms, one of which, being general, includes the more specific term, an indictment would be bad which used the more general instead of the more special description. (d) And an instance is given where an indictment under the statutes 14 Geo. 2, c. 6, and 15 Geo. 2, c. 34, for stealing a *cow*, was holden not to be sustained by the fact that the defendant stole a *heifer*; on the ground that as those statutes mention both *heifer* and *cow*, they must be considered as having used one term in contradistinction to the other in describing the several animals they were intended to protect. (e) Where an article is described in a statute by a particular name, it is enough to describe it by that name in an indictment for larceny. (f)

Where a chattel is described by a name, such description imports the whole of that chattel, and if it appear that at the time it was stolen it was in pieces, or only part of it stolen, it is a fatal variance. Thus an indictment charging the stealing of a "brass furnace" is not supported by evidence of stealing the pieces of brass, into which the furnace has been broken up. (g) So where an indictment charged the prisoner with stealing a "spade," and it appeared that he only stole the bit or flat iron part of the spade, the handle being off at the time the iron was stolen, it was held a fatal variance. (h) Where articles of different kinds are mixed together, as oats, beans, and chaff, the indictment should describe it as a "certain mixture consisting of one bushel of oats, &c." The prisoner was indicted for stealing "one bushel of oats, one bushel of chaff, and one bushel of beans, of the goods and chattels of A. B., then and there found;" and the proof was, that these articles, at the time of the felonious taking, were mixed together; Bayley, J., held that the articles ought to have been described as mixed, thus, "a certain mixture consisting of one bushel, &c.," and he directed an acquittal on this count. (i)

Description of money.

An indictment for stealing 10*l.* in monies numbered is not sufficient; some of the pieces of which that money consisted should be specified. Upon an indictment for breaking and entering a dwelling-house, and stealing therein 10*l.* in monies numbered, and a pair of stockings, the prisoner was found guilty of stealing the 10*l.* only; and upon the point being reserved, a majority of the Judges held the description to be insufficient, and the judgment was arrested. (j)

Description of written securities.

It is said to have been formerly the practice, upon all indictments for stealing notes or other written securities, to set out the notes or other securities at full length; (k) but it has been long settled that

(c) Rex v. Nibbs and Yeams, Trin. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 25.

(d) Stark. Crim. Plead. 193.

(e) Cooke's case, 1 Leach, 105.

(f) Rex v. Johnson, 3 M. & S. 540.

(g) Rex v. Halloway, 1 C. & P. 127, Hullock, B., *post*, p. 112.

(h) Rex v. Stiles, Gloucester Sum. Ass. 1833, Gurney, B. MS. C. S. G.

(i) Rex v. Kettle. 3 Chitt. Cr. L. 947 *a*.

(j) Rex v. Fry, East. T. 1822, MS. Bayley, J., and Russ. & Ry. 482.

(k) 3 M. & S. 541.

they may be described in a general manner, and need not be set out *verbatim.* (*l*) But still the indictment must follow some of the descriptions of property as given in the statute; so that where a prisoner was charged with stealing "a certain note commonly called a bank-note," of the value, &c., and convicted, an objection which was taken to this description of the note was referred to the Judges, who all held the indictment ill laid; as, in describing the property stolen to be a "*note commonly called a bank-note,*" it did not follow any of the descriptions of property in the statute, and that the addition "commonly called a bank-note" did not aid such original wrong description. (*m*) But if the indictment describe the instrument in the words of the statute creating the offence, it is sufficient. The prisoner was indicted for stealing a note of the bank of England out of a letter, which note was described as "a bank-note" in every count, and it was objected that the description was insufficient, and the preceding case was relied upon; Taunton, J., "There, the only substantial averment was that it was 'a certain note;' that was the only description. It might have been a note of invitation. The words 'bank-note' followed the words 'commonly called,' that is like 'to wit,' which will not remedy an imperfect previous averment. It is sufficient to describe the offence in the words of the statute. If this had been a banker's promissory note, it must have been averred to be for the payment of money; but I do not think that is necessary in this case." (*n*)

If described in the words of the statute, it is good.

An indictment for stealing a promissory note is good which describes it as "one promissory note for the payment of five guineas." (*o*)

Johnson's case. "Divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money, and of the value of 9*l.* of like lawful money:" held to be a sufficient description of bank-notes, in an indictment on the embezzling act, 39 Geo. 3, c. 85.

The necessary description of a bank-note underwent considerable discussion in a late case of an indictment upon the Embezzling Act 39 Geo. 3, c. 85, (now repealed.) The indictment charged the prisoner with embezzling "divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* of lawful money of Great Britain, and of the value of 9*l.* of like lawful money;" and, upon error to reverse the judgment, it was objected that none of the cases had determined that such an indictment containing no description of any particular note whatever was sufficient: but the court held that this was a sufficient description. Lord Ellenborough, C. J., said, that he considered that after the statute had made bank-notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel; that to describe them as bank-notes for the payment of money seemed to be a larger description than the statute strictly required; and that the indictment in question had set forth number, value, and species, (bank-note being the species, the value 9*l.*, and the number nine,)

(*l*) 2 East, P. C. c. 16, s. 159, p. 777. Milnes's case, 2 East, P. C. c. 16, s. 37, p. 602. Johnson's case, 2 Leach, 1103, note (*a*). Stark. Crim. Plead. 454, note (*k*).

(*m*) Craven's case, Lancaster Sum. Ass. 1801. Mich. T. 1801. 2 East, P. C. c. 16, s. 37, p. 601, 602. Russ. & Ry. 14.

(*n*) Rex *v.* Newman, Gloucester Spr. Ass. 1832, MS. C. S. G. The indictment was on the 52 Geo. 3, c. 143, s. 2, the words of which are "any bank-note, bank post-bill," &c. In Rex *v.* Johnson, *infra*, the Judges seemed clearly of opinion that the words "for the payment of divers sums of money" were unnecessary. C. S. G.

(*o*) Milnes's case, 2 East, P. C. c. 16, s. 37, p. 602.

and thereby complied with the strict and technical rule of law. Le Blanc, J. in delivering his judgment, said, "Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary, in charging a larceny of sheep to describe it either as a wether, ewe, or lamb, yet it cannot be doubted, if such an argument could prevail, that it would be of advantage to the prisoner that it should be described more particularly, because if it were, and the prosecutor, in such case, should fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also it may be said of bank-notes; it is not necessary to describe a bank-note particularly, as a bank-note for the payment of 1*l.*, 5*l.*, or 20*l.*, because for whatsoever sum it may be payable it is still a bank-note. In like manner, in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument upon this part of the case has arisen from the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another it is equally a bank-note, and a bank-note is the subject of larceny. Therefore, this is not a good objection, that the bank-note is not sufficiently set out. No further description is necessary than is required for other chattels, which are the subject of larceny; and under the general name of bank-note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved." (*n*)

Bank-post-bill.

It was holden that where the thing stolen was described as "a bank-post-bill," and was not set out, the court could not take judicial notice that it was a promissory note, or that it was such an instrument as under the 2 Geo. 2, c. 25, might be the subject of larceny, though it were described as made for the payment of money. (*o*)

Bank-notes, &c., should not be described as chattels.

It appears to have been determined, that notes, bills, &c., within the 2 Geo. 2, c. 25, now repealed, should be laid to be the property of A. B., and ought not to be described as *chattels;* but it was also holden, that upon an indictment which laid them to be "the property and chattels of S. S.," the word chattels might be rejected as surplusage. (*p*)

We have seen that re-issuable notes, which are stolen on their way from the Bank in London, at which they have been paid, to the bankers in the country to be re-issued may be described as so many pieces of paper stamped with stamps. (*q*) And that such re-issuable notes if they cannot properly be described as "valuable securities" may be well laid as goods and chattels. (*r*) And that the halves of country bank-notes may also be described as goods and chattels. (*s*) An indictment is good which charges the stealing of a certain valuable

(*n*) Rex *v.* Johnson, 3 M. & S. 540, 552, 553.

(*o*) Rex *v.* Chard, Trin. T. 1822. Russ. & Ry. 488. Bank-post-bills were not in use until two years after the 2 Geo. 2, c. 25, had passed, *ante*, p. 82. A bank-post bill cannot be described as a bill of exchange. Moor's case, 1 Lew. 90.

(*p*) Rex *v.* Sadi and Morris, O. B. 1718, and afterwards before all the Judges, 2 East, P. C. c. 16, s. 37, p. 601.

(*q*) Clarke's case, Russ. & Ry. 181, *ante*, p. 76.

(*r*) Rex *v.* Vyse, R. & M. C. C. R. 218, *ante*, p. 77.

(*s*) Rex *v.* Mead, 4 C. & P. 535 *ante*, p. 76.

security (to wit) a cheque of the value specified without stating the drawees to be bankers. An indictment charged the prisoner with stealing "a certain valuable security, to wit, a banker's cheque, drawn by J. W. Bidewell for 37*l.* 16*s.* 8*d.* upon J. Mortlock and sons, and payable to G. Mumford or bearer, and of the value of 37*l.* 16*s.* 8*d.*, the property of the said J. W. Bidewell;" and the question being reserved whether the cheque was well described, it not being stated that J. Mortlock and sons, upon whom it was drawn, were bankers, the Judges unanimously held that the indictment was good. (*t*) A stamped receipt may be described as "one piece of paper stamped with a certain stamp denoting the payment of a duty to our said Lady the Queen of sixpence, of the property, goods and chattels of A. B.," or as "one piece of paper of the value of one penny." (*u*) So a memorandum of a sum of money due to the prosecutor may be described as "one piece of writing paper, of the value of one penny, one other piece of paper of the value of one penny, and one written memorandum of the value of one penny, of the goods and chattels of J. A." (*v*) So coalmeters' printed certificates, before they are signed and filled up, may be described as "pieces of paper." (*vv*)

Cattle and other animals. Before the 7 & 8 Geo. 4, c. 29, s. 5, which abolishes the distinction between grand and petty larceny, it was holden that an indictment for stealing a sheep or any other cattle, must ascribe to it some value, as, unless the value exceeded 12*d.*, it would not be a capital offence. Thus, where the prisoner had been convicted of stealing a cow, a case was reserved, on the ground that no price or value was ascribed to the cow, in the indictment; and a majority of the Judges held, that though the statute in terms made the stealing any sheep, cow, &c. felony without clergy, yet it ought, in construction and by analogy to the statute which took away clergy, to be confined to what exceeded the value of 12*d.*, and therefore that a capital sentence could not be passed. (*w*)

Dead animals. An indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. (*x*) And *à fortiori*, upon an indictment for stealing a live animal, evidence of stealing a dead one is insufficient. Thus, upon an indictment for stealing live tame turkies, if the evidence is that they were dead when stolen, the indictment will not be supported. The prisoners stole four live tame turkies in Cambridgeshire; killed them there, and carried them dead into Hertfordshire. They were indicted in Hertfordshire for stealing four live tame turkies; and upon a case reserved, the Judges held that the word *live* in the description could not be rejected as surplusage, and that as the prisoners had not the turkies in a live state in Hertfordshire, the charge, as laid, was not proved, and that the conviction was wrong. (*y*)

(*t*) Reg. *v.* Heath, 2 Moo. C. C. R. 33. See other points decided in this case, *ante*, p. 34.

(*u*) Reg. *v.* Rodway, 9 C. & P. 784, *ante*, p. 45.

(*v*) Rex *v.* Bingley, 5 C. & P. 602, Gurney, B.

(*vv*) Reg. *v.* Morris, 9 C. & P. 349. See this case, *post*.

(*w*) Rex *v.* Peel, Mich. T. 1819, MS. Bayley, J., Russ. & Ry. 407; and Pearles's case, *post*.

(*x*) By Holroyd, J., in Rex *v.* Edwards, Hil. T. 1823, MS. Bayley, J., and Russ. & Ry. 497. In Rex *v.* Halloway, 1 C. & P. 128. Hullock, B., held that an indictment for stealing "two turkies" was not supported by evidence of stealing two dead turkies, as "two turkies" must be taken to mean live turkies; but this case seems overruled by Rex *v.* Puckering, *post*, p. 113. C. S. G.

(*y*) Rex *v.* Edwards and Walker, Hil. T. 1823, Russ. & Ry. 497.

So it has been held upon an indictment for sheep-stealing that a removal whilst the sheep is alive is essential to constitute the offence. (*z*)

But where an animal has the same appellation, whether it be alive or dead, and it makes no difference as to the offence, whether it were alive or dead; and the indictment uses such appellation, it is no variance if the animal was dead at the time the offence was committed. The prisoner was indicted for receiving *a lamb* knowing the same to have been stolen, and the lamb had been killed before it was received; upon a case reserved, the Judges all agreed that the conviction was good, as it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same. (*a*)

Parish.

The offence of larceny is transitory and not local, it is therefore immaterial whether there be any such parish in the county as that laid in the indictment. On an indictment for larceny "at the parish of Hales Owen in the county of Worcester" it appeared that the parish of Hales Owen is partly in Worcestershire, and partly in Shropshire; and it was held that the indictment was sufficient. (*b*)

Conclusion of an indictment on 2 Geo. 2, c. 25.

Where an indictment upon the 2 Geo. 2, c. 25, (now repealed), stated the offence to have been committed against the form of the statute, and not of the statutes, it was objected to, on the ground of the 2 Geo. 2, c. 25, having once expired, and being revived by the 9 Geo. 2, c. 18. It became unnecessary for the Judges to give any opinion on this objection, another point having been reserved for their consideration; but those Judges who adverted to it thought the form of the indictment good, and that the re-enacting statute was the only statute in force against the offence; (*c*) and in a subsequent case, an indictment for stealing bank-notes against the form of the statute was ruled to be good. (*d*)

An indictment for a common law felony must contain a *contra pacem*; and so must an indictment for stealing articles, the stealing of which is made felony by statute; and laying the offence to have been against the form of the statute will not supply the defect. An indictment was for stealing bank-notes against the form of the statute, but it was not laid to be against the peace, &c. and, after conviction, the Judges held the indictment bad, and judgment was arrested. (*e*)

What defects shall not vitiate an indictment after verdict or otherwise.

But objections of this kind will not now avail in arrest or reversal of judgment. The 7 Geo. 4, c. 64, s. 20, professing to have for its object that the punishment of offenders may be less frequently interrupted in consequence of technical niceties, enacts "that no

(*z*) Rex *v.* Williams, R. & M. C. C. R. 107. See this case, *post*, p. 137.

(*a*) Rex *v.* Puckering, R. & M. C. C. R. 242.

(*b*) Rex *v.* Perkins, 4 C. & P. 363. See Rex *v.* Woodward, R. & M. C. C. R. 323, where there was no such parish as that laid in an indictment for burning a stack of beans, and it was held immaterial. If, however, the offence were local, as burglary, house-breaking, &c., a variance in the name of the parish would be fatal; or if it turned out to be part in and part out of the county, where it was described in the usual way, as the parish of A., in the county of B. Rex *v.* Brookes, Worcester Spr. Ass. 1842, Addenda to 1 vol. Reg. *v.* Jackson, ibid.

(*c*) Phipoe's case, 1795. 2 East, P. C. c. 16, s. 37, p. 599, 601. *Ante*, p. 79.

(*d*) Morgan's case, *cor.* Lawrence, J., Reading Lent Ass. 1796. 2 East, P. C. c. 16. s. 37, p. 601. Lawrence, J., conferred with Thomson, B., on the occasion, who declared his concurrence, considering the reviving statute as in effect re-enacting the provisions of the expired law.

(*e*) Rex *v.* Cook, East. T. 1810, MS. Bayley, J., and Russ. & Ry, 176.

judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versâ*, nor for that any person or persons mentioned in the indictment or information, is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence."

A bad *contra pacem* is cured.

A bad conclusion of *contra pacem* is as no *contra pacem*, and is cured after verdict by this section. If, therefore, an indictment for an offence committed in the reign of one king conclude against the peace of another king, the error is cured by this section. An indictment preferred in May, 1832, charged that the prisoner on the 12th of March, 1830, had in his possession a bill of exchange, and that afterwards, to wit, on the day and year aforesaid, he forged an acceptance on the said bill of exchange, and concluded "against the peace of our lord the king." At the conclusion of the case for the prosecution, it was objected that inasmuch as the felony was committed in the reign of the late king, and the indictment was not preferred till William the Fourth came to the throne, the indictment ought to have concluded "against the peace of our lord the late king;" but, upon a case reserved, the Judges held unanimously that the objection was cured by the statute. (*e*)

Except upon demurrer.

But such a conclusion is still bad upon demurrer. An indictment alleged a forgery to have been committed on the third of June in the seventh year of William the Fourth, but concluded "against the peace of our lady the now queen," and upon demurrer it was held that the indictment was bad for not concluding "against the peace of the late king." (*f*) And if the indictment be good upon the face of it, but the offence be proved to have been committed in a different reign from that alleged, the prisoner must be acquitted. An indictment for uttering a forged receipt charged the offence to have been committed in the first year of the reign of queen Victoria, and concluded "against the peace of our lady the now queen." The uttering was in the reign of William the Fourth, and it was held that the variance was fatal, because there was a distinct averment that the offence was against the peace of the now queen, and the proof negatived that averment; and as the indictment was good on the face of it, the prisoner could not demur, and therefore, the time to take the objection was when it appeared by the evidence at what time the offence was committed. (*g*)

(*e*) Rex *v.* Chalmers, R. & M. C. C. R. 352. 5 C. & P. 331.

(*f*) Reg. *v.* Smith, 2 M. & Rob. 109, tried March 13, 1838.

(*g*) Reg. *v.* Pringle, 2 M. & Rob. 276, Erskine, J.

The entire omission of "against the form of the statute" in an indictment for an offence created by statute, is not cured by this section. The jury found a prisoner guilty on two counts for larceny in stealing bank-notes, neither of which counts concluded "against the form of the statute;" and it was objected, after verdict, that both counts were bad in point of law, as the offence of stealing a bank-note was not an offence at common law, but was created by statute; and, upon a case reserved, the Judges held the omission fatal, and not cured by this section, and the judgment was arrested. (*h*)

Omission of *contra formam.*

So where an indictment against a bankrupt for fraudulently concealing part of his effects omitted the conclusion "against the form of the statute," and it was objected, in arrest of judgment, that it was bad on account of such omission; the Judges, upon a case reserved, held that the omission was not cured by this section, and that it was fatal to the indictment. (*i*)

Objections to an indictment which fall within sec. 20 or sec. 21 must be taken by demurrer, and it is too late to take them after a plea of not guilty, though before verdict. The case for the prosecution, on an indictment for housebreaking and stealing money therein against the form of the statute, being closed, it was submitted that the indictment ought to have concluded *contra formam statutorum;* that the prisoner was in fact proceeded against under two statutes, the 7 & 8 Geo. 4, c. 29, s. 12, and the 3 & 4 Wm. 4, c. 44, s. 2. For the prosecution it was urged that the defect was cured by sec. 20, and that the objection ought to have been raised by demurrer, and it was said that Parke, B., had at a former assize ruled that no advantage could be taken of any defect cured by the 20th and 21st sections, except by demurrer. Alderson, B., "I am clearly of that opinion, and am glad to find it confirmed by the authority of my brother Parke. The object of the Legislature, as it is stated in the preamble, was to discourage "technical niceties, which interrupt the punishment of offenders." Here this objection is indeed taken before verdict, but still too late, for it should have been taken by demurrer." (*j*)

Objections cured by ss. 20 and 21 must be taken on demurrer.

The 7 Geo. 4, c. 64, s. 21, enacts, "that no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held

What shall not be sufficient to stay or reverse judgment after verdict.

(*h*) Rex *v.* Pearson, R. & M. C. C. R. 313.

(*i*) Reg. *v.* Radcliffe, 2 Moo. C. C. R. 68. 2 Lew. 57.

(*j*) Reg. *v.* Law, 2 M. & Rob. 197. Alderson, B., is reported to have added, "Even if it had been taken then, I should have recommended the grand jury to add the letter *s* to the word statute. See 2 Hawk. P. C. c. 25, s. 98, where it is said to be the common practice at this day while the grand jury who found the bill is before the court to amend it by their consent in a matter of form, as the name or addition of a party. See also Kel. 37.

sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute."

7 & 8 Geo. 4, c. 28, s. 14. Rule for the interpretation of all criminal statutes.

It will not now be an objection to an indictment, that the matters alleged or the persons described in it, do not correspond in number or gender with the descriptions in the statute upon which it is framed. The 7 & 8 Geo. 4, c. 28, s. 14, enacts, "that wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject matter on or with respect to which it shall be committed, or the offender, or the party affected, or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved."

Trial. Larceny must be tried in the proper county. But this offence is considered as committed in every county into which the thief carries the goods.

Larceny, like every other offence, must regularly be tried in the same county or jurisdiction in which it was committed: but it should be noted with respect to larceny, that the offence is considered as committed in every county or jurisdiction into which the thief carries the goods; for the legal possession of them still remains in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation. (*j*)

Therefore, if a man steal goods in the county of A. and carry them into the county of B., he may be indicted for the larceny in the county of B. But if a compound larceny be committed in one county, and the offender carry the property into another, though he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. Thus where the prisoner robbed the mail of a letter either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted capitally in Middlesex on the statutes 5 Geo. 3, c. 25, s. 7, and 7 Geo. 3, c. 40, the Judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail. (*k*) So robbery can only be tried in the county where committed; the felony travels. (*l*) The larceny may, however, in some respects be considered as a new larceny, and as not necessarily including all the qualities of the original larceny: therefore, if the thing stolen is altered in character in the first county so as to be no longer what it was when stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. An indictment was preferred in Hertfordshire for stealing four live tame turkies; and it appeared that they were stolen alive in Cambridgeshire, killed there, and carried dead into Hertfordshire; and upon the point being saved, the Judges held that though the carrying into Hertfordshire constituted a larceny in that county, yet it was a

(*j*) 3 Inst. 113. 1 Hale, 507, 508. 2 Hale, 163. 1 Hawk. P. C. c. 33, s. 52. 4 Black. Com. 304. 2 East, P. C. c. 16, s. 156, p. 771.

(*k*) Rex *v.* Thomson, Hil. T. 1795, MS. Bayley, J.

(*l*) 1 Hale, 536.

new larceny there, and a larceny of dead turkies not of live ones. (*m*) So where the prisoner was indicted for stealing "a brass furnace" in Herefordshire, and it was proved that he stole the furnace in Radnorshire, broke it up there, and carried the pieces into Herefordshire, it was held that the prisoner must be acquitted as he never had the "brass furnace," but merely certain pieces of brass in Herefordshire. (*n*) But a considerable space of time intervening between the theft in one county and the carrying the stolen property into another county will not prevent the case from being considered as a larceny in the county into which the property is carried. Upon the 4th of November the prisoner stole a note in Yorkshire, and upon the 4th of March he carried it into Durham; and he was indicted for stealing it in Durham: and, upon a case reserved, the Judges were clear that the interval between the first taking and the carrying it into Durham, did not prevent it from being a larceny in Durham, and that the conviction in that county was right. (*o*)

The four prisoners stole goods in Gloucestershire, divided them in that county, and then carried their shares into Worcestershire, in their separate bags: and it was ruled that this was not a joint larceny in Worcestershire, but separate larcenies in that county. (*p*)

The following case was ruled upon the principle that the larceny in the county into which a thief carries the goods may be in some respects of a different nature from the larceny in the county in which he first took them. Four prisoners were indicted for stealing a variety of articles of hardware in the county of *Worcester*. It appeared upon the evidence that the articles in question were made up into a package at Birmingham, and dispatched by the canal from that place to Worcester, to be forwarded down the river Severn to Bristol. The package arrived safely at Worcester, where it was transferred from the canal boat to a barge called the Blucher, in which it was to be conveyed a great part of the way down the Severn; namely, to a place called Brimspill in the county of *Gloucester*. The prisoners were bargemen on board the Blucher; and during the voyage from Worcester to Brimspill, the course of which was nearly equal in the two counties of *Worcester* and *Gloucester*, being about thirty miles in each, the articles in question were stolen from the package; but they were not missed till the barge arrived at Brimspill. At that place the cargo was unloaded, and put on board another vessel, to be carried onwards to Bristol; and the Blucher barge returned to Worcester navigated by the prisoners. Suspicion having fallen upon them, they were apprehended in the county of *Worcester*, when their respective bags were immediately searched, and a portion of the stolen articles was found in each of them. It was then proved, that upon their apprehension, and upon being required to account for the possession of the articles, they stated that the package was broken by accident while on board the Blucher, on the voyage from Worcester to Brimspill, when the articles fell out, and they took them and made a division of them immediately. They did not state at what part of the voyage this transaction took place; but it appeared probable that it took place in the county of *Gloucester*, and there was no evidence to rebut that probability. Upon these facts the learned Judge ruled that the indictment could not be supported against the prisoners as for a joint larceny in the county of *Worcester*, and put

(*m*) Rex *v.* Edwards and Walker, Hil. T. 1823, MS. Bayley, J., and Russ. & Ry. 497, *ante*, p. 112.

(*n*) Rex *v.* Halloway, 1 C. & P. 127, Hullock, B.

(*o*) Rex *v.* Parkin, Mich. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 45.

(*p*) This case would now fall within the 7 Geo 4, c. 64, s. 13, *post*, p. 120.

the counsel for the prosecution to his election: who accordingly proceeded against one only of the prisoners, who was convicted, and sentenced to transportation. (*k*)

If two persons jointly steal in one county, and concur in securing the goods in another county, they may be indicted in that county.

But if two persons be guilty of a felonious taking in one county, and one of them alone carry the property into another county, yet if the other afterwards concur with him in the second county in securing the possession, both may be jointly indicted in the second county. County and Donovan laid a plan to get some coats from the prosecutrix under pretence of buying them. The prosecutrix had them in Surrey at a public-house; the prisoners got her to leave them with Donovan whilst she went with County, that he might get the money to pay for them; in her absence Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was laid against both in *Middlesex;* and upon a case reserved, the Judges were unanimous that as County was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in *Middlesex*. They therefore held the conviction right. (*l*)

So if two jointly commit a larceny in one county, and one of them carry the stolen goods into another county, the other still accompanying him, without their ever being separated, they are both indictable in either county; the possession of one being the possession of both in each of the counties, as long as they continue in company. (*m*)

The property must be in the prisoner's free control in the second county.

The prisoner must have the stolen property under his control in the second county to render him liable to be indicted there, and it is not enough that he has the mere possession of it, he being in the custody of the constable who apprehended him. On an indictment for stealing two geldings in Kent, the only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, in Surrey, he said he had been at Dorking to fetch them, and that they belonged to his brother, who lived at Bromley. The police officer offered to go to Bromley. They took the horses, and went as far as Beckenham Church, when the prisoner said he had left a parcel at the Black Horse in some place in Kent. The police officer accordingly went thither with him, each riding one of the horses; when they got there the officer gave the horses to the ostler. The prisoner made no inquiry for the parcel, but made his escape, and afterwards was again apprehended in Surrey. And, on a case reserved, the Judges were unanimously of opinion that there was no evidence to be left to the jury of stealing in Kent. (*n*)

(*k*) Rex *v.* Barnett, Smith, Burton, and Purser, *cor.* Holroyd, J., Worcester Sum. Ass. 1818. Separate indictments were afterwards preferred against the three other prisoners, (as the grand jury had not been discharged,) to which they pleaded guilty. The learned counsel (Sir Wm. Owen) who was retained to defend them, inclined much to put in a plea of *autrefois acquit* on their behalf; and only permitted them to plead guilty, on the prosecutor undertaking to recommend them strongly to mercy. And it should seem that such a plea *might* have succeeded. See Rex *v.* Dunn, R. & M. C. C. R. 424. C. S. G.

(*l*) Rex *v.* County, East. T. 1816, MS. Bayley, J.

(*m*) Rex *v.* M'Donagh, Carr. Supp. 2nd edit. 23.

(*n*) Rex *v.* Simmonds, R. & M. C. C. R. 408.

It should further be observed, that there are some exceptions to the rule that a larceny is committed in every county or jurisdiction into which the thief carries the goods. For if the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them. (*o*)

Exceptions to the rule that a larceny is committed in every county into which the thief carries the goods.

So if a larceny be committed out of the kingdom, though within the king's dominions, bringing the stolen goods into this kingdom will not make it larceny here. The prisoner stole a quantity of wearing apparel at St. Helier's, in Jersey, and they were shortly afterwards found in his possession in the county of Dorset; upon a case reserved it was held that this was not larceny in Dorsetshire, and that the case did not fall within the 7 & 8 Geo. 4, c. 29, s. 76, as Jersey could not be considered as part of the united kingdom. (*oo*) So if a larceny be committed in France, the party cannot be tried in England, though he bring the goods here. (*p*)

A similar exception prevailed formerly where the original taking was in Scotland or Ireland. And it appears to have been holden, that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods. (*q*) But the 7 & 8 Geo. 4, c. 29, s. 76, enacts, "that if any person having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever in any one part of the united kingdom, shall afterwards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person, knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the united kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part." (*r*)

Exceptions as to Scotland and Ireland.

Removed by 7 & 8 Geo. 4, c. 29, s. 76.

We have seen that the stealing of things affixed to the freehold was not a larceny at common law, (*s*) and although it is made felony by the 7 & 8 Geo. 4, c. 29, s. 44, still the prisoner cannot be indicted in any other county except the one in which the fixtures are first taken. The prisoner was indicted at common law for stealing lead in Middlesex; the lead had been stolen from a church at Iver, in Buckinghamshire, and the prisoner was found in possession of it at Southall, in Middlesex, a place within the jurisdiction of the Central Criminal Court, which Iver was not; and it was held

Stealing fixtures.

(*o*) 3 Inst. 113. 1 Hawk. P. C. c. 33, s. 52.

(*oo*) Rex *v.* Prowes, R. & M. C. C. R. 349.

(*p*) Reg. *v.* Madge, 9 C. & P. 29, Parke, B.

(*q*) Rex *v.* Anderson and others, Carlisle Sum. Ass. 1763, and before the Judges, Nov. 1763, 2 East, P. C. c. 16, s. 156, p. 772.

(*r*) The statutes 45 Geo. 3, c. 92, and 54 Geo. 3, c. 186, make provision for the more easy apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other, and from one county to another.

(*s*) *Ante*, p. 62.

that the prisoner could not be convicted within the jurisdiction of the Central Criminal Court. (*s*)

Offences committed at sea.

By the 7 & 8 Geo. 4, c. 29, s. 78, "where any felony or misdemeanor punishable under this act shall be committed within the jurisdiction of the Admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction."

Offences near the boundaries of counties, or on a voyage or journey through several counties.

Some general provisions have also been made with respect to offences committed near the boundaries of counties, and during a journey or voyage through several counties.

7 Geo. 4, c. 64, s. 12. Offences committed on boundaries of counties may be tried in either county.

The 7 Geo. 4, c. 64, s. 12, for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, enacts, "that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein." (*t*)

We have seen that the provisions of this section do not apply to prosecutions in limited jurisdictions, but only to county boundaries, and to county prosecutions. (*u*)

It may be observed, that an important alteration has recently been made in the boundaries of some counties by the Boundary Act, 2 & 3 Wm. 4, c. 54, and the Municipal Reform Act, 5 & 6 Wm. 4, c. 76; so that if a felony be now committed in that part of the county of a town, which has been added to it by the Boundary Act and the Municipal Reform Act, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm; the offence was committed at a place which was added to the borough of Haverfordwest, which is a county of itself, by the Boundary Act, and declared by the Municipal Reform Act to be part of the borough, the place in question not having been within the borough before the passing of those acts; and it was held that the prisoner might be tried by a jury of the borough. (*v*)

Offences committed during a journey or voyage may be tried in any county through which the coach, &c., passed.

By the 7 Geo. 4, c. 64, s. 13, "where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage,

(*s*) Rex *v.* Millar, 7 C. & P. 665, Park, J. A. J., Alderson, B., and Patteson, J. The 44th section does not make the stealing fixtures a larceny, it only provides that the "offender shall be guilty of felony," and punished "in the same manner *as* in the case of simple larceny." C. S. G.

(*t*) See Rex *v.* Ruck, MSS. C. S. G., *ante*, vol. 1, p. 827.

(*u*) Rex *v.* Welsh, R. & M. C. C. R. 175, *ante*, vol. 1, p. 550.

(*v*) Rex *v.* Piller, 7 C. & P. 337, Coleridge, J. In Rex *v.* the Justices of Gloucestershire, 4 Ad. & E. 689, it was held that the effect of these statutes was to transfer the parts entirely and for all purposes out of the one county into the other.

or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in either of the said counties, through or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

Larceny on a coach.

To bring a case within this section, in order to maintain an indictment in a county other than that in which the offence was committed, it must be proved that the offence was committed "in or upon the coach," &c. The prisoner had been held to bail to appear at the Cumberland assizes, to answer a charge of larceny committed on a journey. He had acted as guard of a coach from Penrith in the county of Cumberland to Kendal in Westmoreland, and was entrusted with a banker's parcel, containing bank-notes and two sovereigns; on changing horses at some distance from Penrith, he carried the parcel to a privy, and while there took out of it the sovereigns: and Parke, B., held that as the act of stealing was not "in or upon the coach," the case was not within the statute, and the felony having been committed in Westmoreland, the indictment ought to be preferred in that county. (*w*)

Justices may commit prisoners from detached parts of counties locally included in their county, and such prisoners may be tried in such surrounding county.

The 2 & 3 Vict. c. 82, s. 1, reciting, that "the administration of justice is hindered by the distance of divers detached parts of counties in England and Wales from the body of the counties to which they severally belong, and wherein the justices of the peace having jurisdiction in such detached parts for the most part do dwell," enacts, that after the 26th August, 1839, "it shall be lawful for any justice or justices of the peace acting for any county to act as a justice or justices of the peace in all things whatsoever concerning or in any wise relating to any detached part of any other county, which is surrounded in whole or in part by the county for which such justice or justices acts or act; and that all acts of such justice or justices of the peace, and of any constable or other officer in obedience thereto, shall be as good, and all offenders in such detached part may be committed for trial, tried, convicted, and sentenced, and judgment and execution may be had upon them, in like manner as if such detached parts were to all intents and purposes part of the county for which such justice or justices acts or act; and all constables and other officers of such detached parts are hereby required to obey the warrants, orders, and acts of such justice or justices, and to perform their several duties in respect thereof, under the pains and penalties to which any constable or other officer may be liable for a neglect of duty."

By sec. 3, "the word 'county' shall be taken to mean and include county, riding, division, and parts of a county having a separate commission of the peace." (*x*)

(*w*) Sharpe's case. 2 Lew. 233.

(*x*) Sec. 2 provides for payment of expenses of prosecutions by the county to which the detached part belongs.

The grand jury of the surrounding county may find a bill for an offence committed in the other county.

It has been held that the grand jury of the county, which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner may be tried by a jury of such surrounding county. The prisoner was indicted in Dorsetshire for larceny in a parish of Somersetshire, entirely detached from it, and surrounded in whole by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indictment laid the offence to have been committed in the parish of Holwell, the same being a detached part of the county of Somerset, surrounded in the whole by the county of Dorset; the venue in the margin, was Dorset. The indictment did not state that the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. Fitzherbert objected, first, that this should have appeared on the face of the indictment; and, secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; and he referred to the 60 Geo. 3, c. 4, the 7 Geo. 4, c. 64, s. 12, and the 4 & 5 Wm. 4, c. 36, to shew that the word "try" in a statute did not include the finding of a bill by the grand jury; but Rolfe, B., overruled the objection, saying, that it would strike the act out of the statute-book. (*y*)

Proof of the loss of the chattel.

Some evidence is requisite as to the loss of the property, and where it appears that it was last in the possession of a person, either that person should be called, or some evidence given to show the loss, for otherwise it may be that it has been delivered by that person to the prisoner, or to some one else from whom the prisoner may have received it, or, indeed, it may have been lost. Upon an indictment for stealing a horse, the prosecutor proved that he had put the horse to be agisted with a person who resided twelve miles distant from his own residence, and, in consequence of hearing of its loss from that person, he went to the field where the horse had been put, and discovered that it was gone. Gurney, B., "I think you should prove the loss more distinctly, because *non constat*, but the prisoners might have obtained possession of the horse honestly. I do not see how we can get at that without the person with whom it was put to agist, or his servant. It is perfectly consistent with what has been proved that the horse might have got out of this person's possession in some other way, and not by felony." (*z*) So where, on a similar indictment, it appeared that a servant was sent to turn out a horse in a field, and was sent to fetch it up again the next morning, when it was missed, but the servant was not called as a witness, and the prisoner was found in possession of the horse the

(*y*) Reg. *v.* Loader *Ex relatione* Mr. Fitzherbert. S. C. Talf. Dick. Q. S. 188, where a *quære* is added to the decision by the learned editor; but with all respect to his opinion, it should seem that the decision is perfectly correct, as the object of the act clearly was to render prisoners triable in the surrounding county, and to prevent expense, and the effect of a contrary decision would be that they never could be so tried in such county, except where an indictment had been found by a grand jury of the county to which the detached part belonged; which would greatly add both to the inconvenience and expense, which it was intended to avoid. It is difficult also to see how it can be correctly said that a person is "tried in like manner as if such detached part were to all intents and purposes part of the county for which such justice acts," unless he is tried on an indictment found by the grand jury of such county; for that is the mode in which he would be tried if the part were to all intents part of that county. C. S. G.

(*z*) Rex *v.* Yend, 6 C. & P. 176, and MSS. C. S. G.

next day; it was held, that there was not sufficient proof given of the loss; and that the servant ought to have been called to prove what he did with the horse, as for anything that appeared to the contrary, the servant might have delivered the horse to the prisoner. (*a*)

Evidence. Rule that where the stolen property is found in the possession of a person, it is incumbent on such person to prove how he came by it.

With regard to the evidence in cases of larceny, it generally consists, (unless the prisoner is detected in the fact,) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will attach, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. (*b*) This rule, founded on the necessity of the case, which cannot admit offences of this kind to go unpunished, wherever positive and direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances, by which such presumption may be weakened, or entirely destroyed. (*c*) Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been, at the time of the theft, near the place from which the property was taken; and more especially the conduct of the prisoner from first to last, with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing.

It has been held that the possession of stolen property sixteen months, (*d*) or three months (*e*) after it was lost, is not such a recent possession as to put the prisoner upon shewing how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss.

Where a prisoner was indicted for stealing two sacks, which had been found about twenty days after they were missed, Coleridge, J., told the jury, "If I was now to lose my watch, and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it; but if a month hence it were to be found in your possession, the presumption would be greatly weakened, because stolen property usually passes through many hands." (*f*)

As some articles pass from hand to hand much more readily than others, the nature of the articles ought to be taken into con-

(*a*) Rex *v.* Fellows, MSS. C. S. G. Stafford Sum. Ass. 1830, Bosanquet, J.

(*b*) 2 East, P. C. c. 16, s. 93, p. 656, Phil. on Evid. 168, 7 Edit.

(*c*) That it will sometimes, like every other rule of human institution, fail to guide rightly must be admitted. Lord Hale mentions a case, which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse-stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief being closely pursued had overtaken the poor man upon the road, and asked him to walk the horse for him while he turned aside upon a necessary occasion, upon which the thief made his escape, and the man was apprehended with the horse. 2 Hale, 289. And it is probable that, upon this rule, receivers of stolen goods are frequently convicted of stealing them.

(*d*) Rex *v.* ———, 2 C. & P. 459, Bayley, J. It is not stated what the goods were.

(*e*) Rex *v.* Adams, 3 C. & P. 600, Parke, J. The goods found in the possession of the prisoner were an axe, a saw, and a mattock.

(*f*) Cockin's case, 2 Lew. 235.

sideration by the jury in determining whether the possession is so recent as to lead to the conclusion that the prisoner stole them. Upon an indictment for stealing two ends of woollen cloth, which were about twenty yards each in length; it appeared that the cloth was missed on the 23rd of January, when it was in an unfinished state, and that part of it was left on the 21st of March by the prisoner at the house of one Porter, and that on the 30th of the same month, the prisoner sent the residue to be shorn. It was submitted that the length of time since the loss was so great that no presumption of guilt was raised against the prisoner by the possession of it. Patteson, J., "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time, but here that is not so: it is a question for the jury." (*f*)

Cases frequently occur where property is found in a house in which several persons reside, any of whom might have stolen it: upon such cases Mr. Starkie observes, "it is also to be carefully observed, that the mere finding of stolen goods in the house of the prisoner where there are other inmates of the house capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner." (*g*)

Where several articles are lost and they may have been taken at the same time, evidence of the loss of all may be given.

Where several chattels are lost, and there is no evidence to show that they were stolen at different times, and they may have been all stolen at one time, the prisoner may be proved to have had some of them in his possession at one time and some at another, although it be probable that they were stolen at different times. On an indictment for stealing a quantity of robes, silk, and other articles, it appeared that the prisoner was the servant of the prosecutors, and nothing was missed till just before his apprehension, nor had he been seen to take anything out of the house, but after he was apprehended, he admitted having taken a great variety of things, some of which he had sent to one Smith; the prosecutor swore that he had no doubt that the articles were taken at different times, and it appeared probable that that was the case from the great variety of the articles, and from its appearing that Smith had been in the habit of pledging several articles, at different times, during a period of between four and five months. Gaselee, J., held that he could not compel the prosecutors to elect what set of goods they relied upon; and that though it was probable the goods were taken at different times, it was not impossible that they had been all taken at one time; and, on a case reserved, the Judges were unanimously of opinion that the learned Judge was right in not requiring an

(*f*) Rex *v.* Partridge, 7 C. & P. 551. It may frequently be very important to consider the number of articles stolen, and the number found on the prisoner, as it should seem that in proportion as the number found is large is the probability increased that he was the thief. C. S. G.

(*g*) 2 Stark. Evid. 614, note (*g*), 3rd edit. It must be observed, however, that learned judges have generally considered such evidence as sufficient to call upon the occupier of the house to account for the possession; on the ground that the house being in his occupation the property was found in his possession; and there seems good reason for this course, because, as master of the house he must be presumed to have the control over it, and to permit nothing to come into it without his sanction; at the same time it is for the jury, under all the circumstances, to say whether the master stole the property, or any of the other inmates of the house. G. S. G.

election to be made. (*h*) So where seventy sheep were put on Thornly Common on the 18th of June, and were not missed till November, and the prisoner was in possession of four of those sheep in October, and of nineteen others of them on the 23rd of November, Bayley, J., allowed evidence of both to be given. (*i*) But where two horses were stolen from different persons at different times, but were taken at the same time by the prisoner into a different county, and it was submitted that the felonies were distinct, and the prosecutor should elect on which he would proceed; Littledale, J., said, "If you could confine your evidence entirely to a single felony in this county, you need not elect; but this you cannot do; for you must prove that the horses were originally stolen in another county. The possession of stolen property soon after a robbery is not itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking with all its circumstances. I think, therefore, that you must, in this instance, make your election," (*j*)

Identity of the property.

Where all that can be proved concerning property found in the possession of a supposed thief is that it is *of the same kind* as that which has been lost, this will not in general be deemed sufficient evidence of its having been feloniously obtained, and some proof of identity will be required. But where the fact is very recent, and the property consists of articles, the identity of which is not capable of strict proof, from the nature of them, the conclusion may be drawn that the property is the same, unless the prisoner can prove the contrary. (*k*) Thus, if a man be found coming out of another's barn, and upon his being searched corn be found upon him, of the same kind as that in the barn, the evidence of the guilt will be pregnant; and cases have frequently occurred where persons employed in carrying sugar and other articles from ships and wharfs have been convicted of larceny, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could no otherwise be proved. (*l*)

Value of the property.

Evidence that the property stolen is of some *value* will also be material, as if it be of no value, it is not a subject in respect of which larceny can be committed. (*m*) But property may be of value to the owner though not of general value. Thus, where the indictment was for stealing pieces of paper with available stamps thereon, and it appeared that the pieces of paper were re-issuable notes of a country bank which had been paid, and were in *transitu*, for the purpose of being re-issued, it was decided that they were the valuable property of the country bankers, (though not promissory notes within 2 Geo. 2, c. 25) and subjects of larceny. (*n*)

So a memorandum of a sum of money which a person owed the prosecutor has been held to be the subject of robbery. (*o*) But although

(*h*) Rex *v.* Dunn, R. & M. C. C. R. 146, and see Rex *v.* Hunt, Hindmarch's Supp. to Deacon's Cr. L. 1583. Rosc. C. E. 217.

(*i*) Rex *v.* Dewhirst, 2 Stark. Ev. 614, 3rd edit.

(*j*) Rex *v.* Smith, R. & M. N. P. R. 295.

(*k*) 2 East, P. C. c. 16, s. 93, p. 657.

(*l*) Id. ibid.

(*m*) Phipoe's case, *ante*, p. 79. Com. Dig. Ind. G. 2. Stark. Crim. Plead. 450.

(*n*) Clarke's case, 2 Leach, 1036. *Ante*, p. 74.

(*o*) Rex *v.* Bingley, 5 C. & P. 602, Gurney, B.

Property need not be of the value of some known coin.

the chattel must be of some value, it need not be of the value of some known coin, as of a farthing at least. Upon an indictment for receiving nine pieces of paper, value two shillings, it appeared that the papers had been torn out of a book kept by a coalmeter; the book was a certificate book, which the coalmeters received when they went on board ships; the certificates were those given to different merchants; they are not signed as they are in the book; there are blanks left for the name of the ship from which the coals are delivered, the quantity, the barge, the number of it, the lighterman, and to whose account they are delivered, and the date of the delivery; it is signed by the meter. One only of these pieces of paper was traced to the prisoner. It was submitted that it was not of any value so as to sustain an indictment; and that it must be of the value of some coin known to the law. Parke, B., "There is no doubt it must be of some value, and it is of some value, but it is quite new to me that it must be of the value of some coined money, of a farthing at least." "It must be assigned of some value, you say of the value of some known coin, but I do not know any authority for that, I do not know that it could not be stated as of the value of a hundredth part of a farthing. Shew me some case where the indictment has failed on the ground of the article being valueless." (*p*)

The value must be of goods stolen at the same time.

With respect to those larcenies which are aggravated by the amount of the property stolen, as in the case of stealing in a dwelling-house to the value of 5*l.*, it should appear that the property, the value of which is taken into computation, was all stolen at the same time. For though in former times when the distinction between grand and petty larceny existed, it appears to have been the received opinion in the older books that a man stealing, at several times, several parcels of goods, each under the value of twelve-pence, but amounting in the whole to more, from the same person, might have been convicted of grand larceny; (*q*) the severity of that rule became obsolete; and it was afterwards settled that the value of the property stolen must not only be, in the whole, of such an amount as the law required to constitute grand larceny, but that the stealing must be to that amount at one and the same particular time. For, in fact, where things are stolen at different times, there are different acts of stealing; and no number of petit larcenies would amount to a grand larceny, nor any number of grand larcenies, where it depended on the value of the property stolen, to a capital offence. (*r*) But it seems that if the property of several persons lying together in one bundle or chest upon the same table, or even in the same house, be stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony. (*s*) And we have seen that where a servant steals several articles at different times, but carries them out of his master's house at the same time, he may be convicted of stealing in a dwelling-house to the value of 5*l.*, if all the articles amount

(*p*) Reg. *v.* Morris, 9 C. & P. 349. It was afterwards shown that in fact the paper was of more than a farthing's value, therefore the point did not arise, but the very learned judge said, "I must be understood for one as not considering that it is necessary to show that the article must be of the value of some known coin. It must be of some value no doubt."

(*q*) See 1 Hale, 531, and the authorities there cited.

(*r*) 1 Hawk. P. C. c. 33, s. 50, 51. 2 East, P. C. c. 16, s. 136, p. 740. Petric's case, 1 Leach, 294. Farley's case, *cor.* Ashhurst, J., Surrey Lent Ass. 1786. 2 East, P. C. ibid.

(*s*) 1 Hale, 531. 2 East, P. C. c. 16, s. 136, p. 740, 741.

to that value, although he never took to that amount at any one time. (*t*)

In a case where the prisoner was indicted upon the 12 Anne, c. 7, (now repealed), for stealing in a dwelling-house to the amount of forty shillings, and the goods found were not proved to amount to forty shillings; the court left it to the jury to consider, upon the facts of the case, whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced. (*u*) **Goods not produced.**

A prisoner indicted for larceny cannot be convicted merely of a trespass, for though larceny, as has been before stated, includes a trespass, yet if, upon an indictment, the taking appear not to be felonious, though amounting to a trespass, the defendant is entitled to a general acquittal. (*v*) **Verdict.**

It should be observed, that although to some purposes the taking of divers articles at one and the same time may be considered as one entire felony, (*w*) yet to other purposes the taking of each article has been held to constitute a distinct felony. Thus if two articles are stolen at the same time, and the prisoner is tried and acquitted or convicted of stealing one of them, he may be indicted afterwards, and convicted of stealing the other, and no plea of *auterfois convict* or *auterfois acquit* can be supported; for "it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time." (*x*) **The taking of each article is a separate felony.**

Where, however, the prisoner has been already convicted and sentenced for stealing one article, it is not usual to indict him again for stealing another at the same time, and if he be so indicted the court in its discretion may recommend the second indictment to be abandoned. The prisoner, who was undergoing his sentence for stealing one pig, was indicted for stealing another pig: both were stolen at the same time, and from the same person; it was admitted by the counsel for the prisoner that a plea of *auterfois convict* could not be maintained, but the prisoner's case was submitted to the merciful consideration of the court. Cresswell, J., "I remember a case before Baron Wood, where a prisoner was tried and acquitted of uttering a forged note, and afterwards indicted for uttering another forged note, which he had uttered at the same time as the former note, and he held that it might be done; but here the prisoner has been convicted, and is suffering the punishment for stealing the one pig, and therefore, I think it would be as well not to proceed with the present indictment." On which the counsel for the prosecution offered no evidence, and the prisoner was acquitted. (*y*)

(*t*) Rex *v.* Jones, 4 C. & P. 217, *ante*, vol. 1, p. 857.

(*u*) Hamilton's case, 1 Leach, 348, *ante*, vol. 1, p. 857. The jury found the prisoner guilty of stealing to the value of forty shillings.

(*v*) Staundf. 24 *b*. Kel. 29 Scofield's case, Cald. 401. 2 East, P. C. c. 16, s. 134, p. 737, and s. 159, p. 778.

(*w*) *Supra*, note (*s*).

(*x*) 2 Hale, 245.

(*y*) Rex *v.* Brettell, Monmouth Spring Ass. 1842, MSS. C. S. G. Where a prisoner has been acquitted, perhaps a case might occur where a subsequent indictment might not be considered as improperly preferred; but where a prisoner has been convicted and received sentence, such a proceeding can hardly be considered otherwise than vindictive, inasmuch as the court always looks at all the circumstances of the case, and particularly the amount of the property stolen, before fixing the sentence; and if the prisoner were sentenced to any further punishment on the second indictment, he would in effect be twice punished for the same offence. C. S. G.

Jury not to inquire of the prisoner's lands, &c.

By the 7 & 8 Geo. 4, c. 28, s. 5, "where any person shall be indicted of treason or felony, the jury empannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony."

Punishment for simple larceny.

For the punishment of simple larceny, the 7 & 8 Geo. 4, c. 29, s. 3, enacts, "that every person convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall, (except in the cases hereinafter otherwise provided for,) be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment."

The court may for all offences within this act order hard labour or solitary confinement.

By sec. 4, "where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement, (*y*) for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

Principals in the second degree, and accessories.

By sec. 61, "in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person, who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be indicted and punished as a principal offender."

Abettors in misdemeanors.

Attainder of another crime not pleadable.

The 7 & 8 Geo. 4, c. 28, s. 4, enacts, "that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment."

If a person under sentence for another crime is convicted of felony, the court may pass a second sentence, to commence after the expiration of the first.

By sec. 10, "wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

Punishment for a subsequent felony.

The 11th section of the same statute reciting that it was expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such

(*y*) But now, by the 1 Vict. c. 90, s. 5, no offender "shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

conviction shall have taken place before or after the commencement of this act, enacts, "that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment; (z) and in an indictment for any such felony committed after a previous conviction for felony it shall be sufficient to state that the offender was, at a certain time and place, convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight-pence and no more shall be demanded or taken) shall, upon proof of the identity of the person of the offender be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

Form of indictment for a subsequent felony.

Evidence of first conviction.

The 6 & 7 Wm. 4, c. 111, reciting this provision of the 7 & 8 Geo. 4, c. 29, and that "since the passing of the said act the practice had been on the trial of any person for any such subsequent felony to charge the jury to inquire at the same time concerning such previous conviction, and that doubts may be entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, and that it is expedient that such practice should be discontinued," enacts, that "it shall not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction, until they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: Provided nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony." (a)

6 & 7 Wm. 4 c. 111. Previous conviction not to be read to the jury till the finding for the subsequent felony.

The practice since this statute has been to charge the jury first with the subsequent felony, and if they find the prisoner guilty of that felony, then to charge them with the question as to the prisoner being the same person that has been previously convicted. In order to prove that he is the same person that was before convicted, it is

(z) See p. 2, as to hard labour and solitary confinement.

(a) This statute has only half remedied the mischief, for as the prisoner is arraigned in open court, both as to the previous conviction and the subsequent felony, some of the jury in most instances hear the charge; and in order to avoid this it has been the practice to take the arraignment during the absence of the jury, where that is practicable, but there are many cases where it cannot be done. C. S. G.

not necessary to call any witness that was present at the former trial; it is sufficient to prove that the prisoner was the person who underwent the sentence mentioned in the certificate. In order to prove a previous conviction a certificate was put in, stating that at the sessions for the borough of Newbury, held on the 31st October, 1 Vict., the prisoner had been convicted of stealing cotton-prints, and sentenced to be imprisoned for four months. The governor of Reading gaol proved that the prisoner was in his custody before those sessions; that he sent him to Newbury at that time, and received him back with an order from the Newbury sessions, and that he remained in his custody for four months under that sentence; and this was held sufficient. (*a*) But where a certificate having been put in, a gaoler, who was called to prove an admission made by the prisoner, said "I asked the prisoner, 'how many years ago was it that you were here before?' He said, 'it was a many years ago.' I then said 'You were then convicted of felony,' and the prisoner said, 'Yes, I was.'" It was objected, first, that some one ought to have been called who was present when the prisoner was previously tried; and, secondly, that this admission was not sufficient, as it did not show of what felony the prisoner was convicted, but only that he had been convicted of *a* felony. Bosanquet, J., "I think an admission of the prisoner is sufficient; but I think this evidence is not sufficient; it must be proved to be the same felony as that mentioned in the certificate." (*b*)

If a prisoner cross-examines to show that he has a good character, the previous conviction may be proved.

Whether a prisoner calls witnesses to his character, or cross-examines the witnesses as to his character, he "gives evidence" of his character within the meaning of the 6 & 7 Wm. 4, c. 111, and the previous conviction may be proved in the first instance. Where on an indictment charging a previous conviction, a question was asked on cross-examination which might have been asked with a view to show that the prisoner had borne a good character; Parke, B., said, "in his opinion, if a prisoner's counsel cross-examined the witnesses for the prosecution, in order to shew that the prisoner had borne a good character, it would be the duty of the court to direct that the evidence of the previous conviction should be given in the first instance; but as he was in doubt whether the object of the prisoner's counsel was such in the present case, he had not thought it right to do so." (*c*)

An indictment for a subsequent felony need not conclude "against the form of the statute," as the charge of the former conviction is merely in the nature of a suggestion in order to warrant the higher punishment. (*d*)

Restitution of stolen property.

The 57th section of the 7 & 8 Geo. 4, c. 29, for the purpose of encouraging the prosecution of offenders, enacts, "that if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on the behalf of the owner of

(*a*) Reg. *v.* Crofts, 9 C. & P. 219. *Sed quære*, whether this evidence showed that the prisoner was imprisoned for the same felony as that mentioned in the certificate? It showed, indeed, that he was in gaol for *some* offence, but it might be another felony or a misdemeanor. C. S. G.

(*b*) Rex *v.* J. and T. Goodman, Stafford Sum. Ass. 1830, MSS. C. S. G.

(*c*) Reg. *v.* Gadbury, 8 C. & P. 676.

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the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court, before whom any such person shall be so convicted, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided always, that if it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof; or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security."

Except in certain cases.

Where a prisoner was convicted of stealing a bill of exchange for 100*l.*, and a considerable sum of money in specie, and the evidence tended to show that he must have purchased a horse with part of the proceeds of the bill, the court ordered the horse to be delivered to the prosecutor. (*e*)

Where a prisoner was indicted for stealing a 10*l.* Bank of England note, it was held that an order could not be made to restore it after it had been paid and cancelled by the Bank. (*f*)

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CHAPTER THE TENTH.

OF STEALING FROM THE PERSON.

1 Vict. c. 87, s. 5.

With respect to such stealing from the person as does not amount to robbery, the 1 Vict. c. 87, s. 5, enacts, "that whosoever shall rob any person, or shall steal any property from the person of another, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years." (*a*)

By sec. 12, The word property shall throughout this act be deemed to denote everything included under the words "chattel, money, or valuable security" used in the 7 & 8 Geo. 4, c. 29, s. 5, (*b*) and 9 Geo. 4, c. 55, (Irish Act.)

By sec. 9, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree, and accessories after the fact (except receivers) are liable to be imprisoned for not exceeding two years; and by sec. 10, offenders may be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year (*c*)

Repealed stat. 48 Geo. 3, c. 129, s. 2.

By the repealed statute 48 Geo. 3, c. 129, s. 2, it was enacted, "that any person who should feloniously steal, take, and carry away any money, goods, or chattels, from the person of any other, whether privily without his knowledge, or not, but without such force, or putting in fear, as is sufficient to constitute the crime of robbery, should be liable to the punishments therein mentioned." In a case upon this repealed statute it was holden that the indictment need not negative the force or fear necessary to constitute robbery, and that, though it should appear upon the evidence that there was such force or fear, the punishment imposed by that statute might be inflicted. The prisoner was indicted for stealing from the person: the indictment did not state that there was no such force or fear as is necessary to constitute robbery; and it appeared in evidence that such force and fear existed. Lord Ellenborough, before whom the prisoner was tried, saved the point whether he could go beyond the common law punishment; and, upon conference, all the Judges held

Held that the indictment upon the repealed statute 48 Geo. 3, c. 129, need not negative force or fear, and that the existence of force or fear was no answer to the charge.

(*a*) This offence was once capital by the 8 Eliz. c. 4, ss. 1 & 2.

(*b*) *Ante*, p. 73.

(*c*) See these sections, *ante*, vol. 1, p. 868.

that he might; and that, where force or fear were not charged in the indictment, the existence of force or fear would not exempt the party from the statutable punishment; and as all that the indictment charged was proved, the proving what made the offence greater would not entitle the prisoner to a smaller punishment. (*d*)

A more recent case upon the same repealed statute was to the same effect. The indictment was for stealing from the person, and it did not negative force or fear; and, upon the evidence, the facts amounted to a clear case of highway robbery. The learned Judge, before whom the prisoner was tried, doubted whether he ought not to direct an acquittal, and detain the prisoner to be indicted for the robbery; but he let the trial proceed, and, on conviction, sentenced the prisoner to transportation for life: but he made a case upon the questions, first, Whether the indictment should not have negatived force and fear; secondly, Whether the existence of force and fear was not an answer to the charge as laid; and, thirdly, Whether the statutable punishment could be inflicted: And the Judges were unanimous that the indictment need not, and ought not to negative force or fear, that the existence of such force or fear was no answer to the charge, and that the statutable punishment was rightly inflicted. (*e*)

The thing stolen must be completely removed from the person.

To constitute a stealing from the person, the thing taken must be completely removed from the person. In a case where, upon the evidence of the prosecutor, it appeared that his pocket-book was drawn from his waistcoat-pocket an inch above the top of the pocket, but was returned immediately again into the pocket, probably by the quick motion of the prosecutor's arm upon the hand and arm of the thief, with whom and his accomplices the prosecutor had a severe struggle before he was secured, it was held by a majority of the Judges, that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor. But the Judges all agreed that the simple larceny was complete, and sentence of transportation for life having been passed, a pardon, on condition of transportation for seven years, was recommended. (*f*)

We have seen that where a man went to bed with a prostitute, leaving his watch in his hat, on the table, and the woman stole it whilst he was asleep, it was held not to be stealing from the person, but stealing in the dwelling-house. (*g*)

By the 1 Vict. c. 87, s. 13, any felony, punishable under that act, committed within the jurisdiction of the admiralty of England or Ireland, "shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction." (*h*)

(*d*) Rex *v.* Pearce, East. T. 1810, MS. Bayley, J., and Russ. & Ry. 174.

(*e*) Rex *v.* Robinson, *cor.* Wood, B., and considered by the Judges, Hil. T. 1817, MS. Bayley, J., and Russ. & Ry. 321.

(*f*) Rex *v.* Thompson, Hil. T. 1825, Ry. & Mood. C. C. 78.

(*g*) Rex *v.* Hamilton, 8 C. & P. 49, *ante*, vol. 1, p. 855, and see other cases there.

(*h*) The act does not extend to Scotland, sec. 14.

CHAPTER THE ELEVENTH.

OF STEALING HORSES, COWS, SHEEP, &c.

We have already seen that larceny may be committed of such domestic creatures as are fit for food; (*a*) and it remains only to notice in this place the statutable provision, which, for the better protection of some of the more valuable domestic animals, makes persons, found guilty of stealing them, liable to transportation.

7 & 8 Geo. 4, c. 29, s. 25.

The 7 & 8 Geo. 4, c. 29, s. 25, enacts, "that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcase, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon."

The 2 & 3 Wm. 4, c. 62, recited this section, and repealed the punishment of death, and enacted, that "every person convicted of any of the felonies hereinbefore specified, or of counselling, aiding, or abetting the commission thereof, shall be transported beyond the seas for life."

The 3 & 4 Wm. 4, c. 44, s. 3, enacted, that all persons punishable by transportation for life under the 2 & 3 Wm. 4, c. 62," shall be liable, previously to their being transported, to be imprisoned with or without hard labour, in the common gaol or house of correction, or to be confined in the penitentiary, for any term not exceeding four years nor less than one year."

1 Vict. c. 90, s. 1, present punishment.

The 1 Vict. c. 90, s. 1, recites the 2 & 3 Wm. 4, c. 62, and 3 & 4 Wm. 4, c. 44, and repeals so much of them as relates to the punishment of persons convicted of offences, for which they are liable, under the said act of 2 & 3 Wm. 4, c. 62, to be transported for life, and enacts, that after the commencement of this act, (1st of October, 1837) "every person convicted of such offences, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

By sec. 3, "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard

(*a*) *Ante*, p. 82.

labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

The 7 & 8 Geo. 4, c. 29, s. 61, enacts, that "every accessory after the fact to any felony *punishable under this act*, (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years." (*b*)

Points relating to horse-stealing arise as in larcenies of other property.

The various points upon the definition of larceny, which have been considered in the chapter treating generally of that offence, (*c*) relate as well to the stealing of horses as of other property; and we may remember a case of considerable nicety, where, upon a finding by the jury that the prisoners took some horses, merely with intent to ride, and afterwards to leave them, and not to return, or make any further use of them, it was holden that such taking amounted to a trespass only, and not to larceny. (*d*)

Rawlins's case. The prisoner was indicted for stealing lambs, and the evidence was that the carcases were found in the ground of the owner, and the skins only taken away: and a conviction upon this evidence was holden good.

The doctrine that any the least removal of the thing feloniously taken, will constitute larceny, (*e*) applies to the stealing of sheep, though part of the animal only be taken. The prisoner was indicted for stealing six lambs, without any count for killing with intent to steal the carcase or any part thereof, the evidence was that the carcases of the lambs, without their skins, were found upon the premises where they had been kept, and that the prisoner had sold the skins on the morning after the offence was committed, upon which the jury were directed to find the prisoner guilty, on the ground that the lambs must have been *removed from the fold.* But a doubt having occurred whether, as the 14 Geo. 2, c. 6, (now repealed), specified feloniously driving away, and feloniously killing with intent to steal the whole or any part of the carcase, as well as feloniously stealing in general, (although there must, in such cases, be some removal of the thing,) it did not intend to make these different offences; the case was submitted to the consideration of the Judges; who held the conviction right: as any removal of the thing feloniously taken constitutes larceny. (*f*)

But this decision has been doubted.

But this decision has been questioned, if not overruled, in the following case, where it was held that upon a count for

(*b*) As cattle stealing is no longer punishable under the 7 & 8 Geo. 4, c. 29, it may be doubted whether accessories after the fact are punishable under section 61. If they are not, it should seem that they are punishable under the following provisions as for a felony, for which no punishment is specially provided. By the 7 & 8 Geo. 4, c. 28, s. 8, "Every person convicted of any felony not punishable with death, shall be punished in the manner described by the statute or statutes specially relating to such felony; and that every person convicted of any felony for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment." By sec. 9, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet. But by the 1 Vict. c. 90, s. 5, "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year." C. S. G.

(*c*) *Ante*, p. 1, *et seq.*

(*d*) Rex *v.* Phillips and Strong, *ante*, p. 8.

(*e*) *Ante*, p. 5.

(*f*) Rawlins's case, Sarum Sum. Ass. 1800, and Mich. T. 1800. 2 East. P. C. c. 16, s. 48, p. 617.

removal while alive is necessary to prove a charge of stealing a sheep. An indictment laying an intent to steal the whole, is supported by an intent to steal part of the carcase.

stealing a sheep it must be shown that the sheep was removed whilst it was alive, and that upon a count for killing a sheep with intent to steal the whole of the carcase, evidence of killing with intent to steal part of the carcase, is sufficient. The first count charged the prisoner with stealing three sheep, and the second with killing the sheep with intent to steal the whole of the carcases. It appeared that the sheep were found killed and cut open, and the inside and entrails taken out, and the tallow and inside fat taken away, and the fat cut off the backs of two of them, and also taken away, but the fat on the back of the third was left. The carcases of the sheep were left, and were found lying in the gripe of the hedge, in the same field where the live sheep had been; the entrails and guts, which remained after the tallow and inside fat had been cut out were also left, and were found in the adjoining field. There was evidence to satisfy the jury that the prisoner had killed the sheep and stolen the fat; but as the carcases of the sheep, and the entrails and guts, after cutting away the tallow and fat, were left, the learned Judge thought the second count, which was for killing the sheep with intent to steal the whole of the carcases, could not be supported, and that the intent ought to have been stated to steal part of the carcases; inasmuch as the 14 Geo. 2, c. 26, specifies both intents, *i. e.*, stealing the whole of the carcases, or any part of the carcases; and the cutting out the inside fat is one of the offences stated in the recital of the clause in the statute. (*g*) The count for stealing, the learned Judge also, in the absence of any case to the contrary, was disposed to think was not supported; for the before mentioned statute having taken away clergy from such as drive away or steal sheep, and having, in the same clause, made it a capital offence to kill sheep with intent to steal the whole, or any part of the carcase, the driving away or stealing, mentioned in the statute, does not appear such a removal of the sheep as is made merely for the purpose of killing on the spot, but it must be such a removal as is made for the purpose of actually getting the sheep in a live state into a man's complete possession and dominion; for if it were otherwise, the clause in the act of Parliament about killing would have been quite unnecessary; and so would also the practice, which has generally prevailed, of inserting counts in indictments for killing with intent to steal the whole, or part of the carcase. In the cases in which a slight removal of the article has been held to amount to larceny, there has always been an intent to steal the article itself, but the thief has been prevented from getting the complete possession of, and dominion over it; and if it was not held larceny, there would be a failure of public justice. But here there was no intention in the removal to drive away, or steal the living sheep; but the intent in the removal was to commit another offence of which he might be capitally convicted, and there would be no failure of public justice, if persons were not held to be guilty of stealing the live animal, because if the indictment was properly prepared they might still be convicted of a capital offence. In all the cases where a slight removal has been held larceny, there was evidence given of an actual removal, and how it was done; but here

(*g*) *Vide* the cases of Rex *v.* M'Dermot, Russ. & Ry. 356. Rex *v.* Duffin, Russ. & Ry. 365, and Rex *v.* Horwell, R. & M. C. C. R. 405, that if a statute uses words in the alternative, so as to distinguish between them, the distinction must be attended to in the indictment.

there was no evidence of the removal of the sheep in a live state, and the removal after their death would not support a count for stealing sheep, which must be intended to be live sheep. (*g*) As there was very sufficient evidence of the killing with intent to steal the fat, the learned Judge directed the jury to find the prisoner guilty, but desired them to say, whether they were of opinion that he killed the sheep with intent to steal the whole, or part of the carcases; and the jury found him guilty, and also found that he killed the sheep with intent to steal part of the carcases only, and not with intent to steal the whole of the carcases. But the question of removal under the first count was not put to the jury to find particularly. The learned Judge respited the judgment, as the doctrine in *Rawlins's case*, (*h*) as applicable to sheep killed with the intent mentioned in the act of Parliament, was not satisfactory to his mind, and he thought it required to be re-considered, and therefore reserved the points upon both counts of the indictment for the consideration of the Judges; who were of opinion that the second count was supported, and not the first; a removal whilst alive being essential to constitute larceny; and nine of the Judges held that the offence of intending to steal a part, was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole or only to part. (*i*)

Cutting off part of a sheep whilst alive, with intent to steal, is sufficient if death must ensue.

It was decided upon the repealed statute 14 Geo. 2, c. 6, that cutting off part of a sheep whilst it was alive with intent to steal such part would support an indictment for killing with intent to steal, if the cutting off must occasion the death of the animal, especially if the offender hid the part cut off, and meant to fetch it away at a future time. The indictment was for killing a lamb with intent to steal part of the carcase; and it appeared that the prisoner cut off a leg from the animal whilst it was alive, and carried it away before the animal died; but that the cutting necessarily caused the death of the animal. The learned Judge before whom the prisoner was tried thought the giving the death wound before the larceny sufficient, and that the animal might be considered as killed by relation from that time, or if not, that the intention to fetch away the leg was an intent to continue the larceny thereof, but he saved the point for the opinion of the Judges, who were unanimous, principally upon the first point, that the conviction was right. (*j*)

(*g*) Rex *v.* Edwards, Russ. & Ry. 497.

(*h*) *Supra*, note (*f*).

(*i*) Rex *v.* Williams, R. & M. C. C. R. 107. In Reg. *v.* Marley, Monmouth Spring Ass. 1842, Cresswell, J., held on the authority of this case that proof of stealing part of the carcase supported an indictment for killing with intent to steal the whole carcase. MSS. C. S. G. Upon an indictment for stealing a lamb, it should seem that it must be proved that the lamb was alive when it was stolen, in order to warrant the statutory punishment; for although it has been held that upon an indictment for receiving a lamb, it is no variance if the proof is that the lamb was dead when it was received, Rex *v.* Puckering, R. & M. C. C. R. 242, yet that decision proceeded on the special ground that the punishment was the same whether the lamb was alive or dead when it was received; but in the case of stealing a live lamb the punishment may be fifteen years' transportation, &c., while it can only be seven for stealing a dead lamb. But, as stealing a lamb is felony at common law, it should seem that if it appeared on such an indictment that the lamb was dead the prisoner might be convicted and punished for the common law felony. See the observation of Patteson, J., in Reg. *v.* M'Culley, *post*, note (*s*), p. 139, and Rex *v.* Beaney, Russ. & Ry. 416. And it should seem that that punishment would be under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5: see my note, *ante*, p. 135. C. S. G.

(*j*) Rex *v.* Clay. The prisoner was

Upon an indictment for killing a sheep with intent to steal the carcase, it appeared that the prisoner was interrupted by the prosecutor while in the act of killing the sheep, which was wounded in the throat, the jugular vein being cut on one side, but not altogether through. The wound was sewn up, but the sheep died in two days. The jury having found that the prisoner gave the sheep a deadly wound, of which it died, with intent to steal the carcase, were directed to find the prisoner guilty. And, upon a case reserved, the Judges were unanimously of opinion that the prisoner was rightly convicted. (*k*)

Cook's case. An indictment for stealing a *cow* held not to be supported by evidence of stealing a *heifer*.

In a case where the prisoner was indicted for stealing a *cow*, it appeared, upon the evidence, that the animal stolen was a female beast only two years and a half old that had never had a calf; and that a female beast of the cow kind, how old soever, if she have never had a calf, is always called a *heifer*. An objection was therefore taken, by the counsel for the prisoner, that the charge in the indictment was not supported by the evidence; and, the prisoner being found guilty, the question was referred to the consideration of the twelve Judges, who were of opinion, that as the statute 15 Geo. 2, c. 34, (now repealed), mentioned both *heifer* and *cow*, it must be considered as using one term in contradistinction to the other, in describing the several animals intended to be protected; and that, as the beast stolen was not therefore such as was described in the indictment, the prisoner was entitled to an acquittal. (*l*)

So where the prisoners were indicted under the same repealed statute for stealing five sheep, and upon the evidence they appeared to be lambs, and the prisoners were found guilty; the Judges, upon a case reserved, held the conviction wrong. (*m*) So where the prisoner was indicted for stealing a sheep, and it appeared that the animal stolen was a ewe, and the prisoner was found guilty; the Judges, upon a case reserved, held the conviction wrong; inasmuch as the statute specifies both ewe and sheep, and therefore the one really meant should be stated. (*n*) So where the prisoner was indicted for stealing one sheep, and it appeared that the animal stolen was under a year old, and the prosecutor said he should call it a lamb teg; Bolland, B., said, "Upon this evidence I must direct an acquittal. In this indictment, the animal in question ought to have been called a lamb. Animals of this kind are lambs, and not sheep till they are a year old. There was a case (*o*) lately before the twelve Judges, in which a man had been indicted at the Old Bailey, and tried before Mr. J. J. Parke for stealing "one sheep," and it appearing at the trial that the animal was a ewe, the twelve Judges held, that the prisoner could not be convicted, as the statute used the words "ram, ewe, sheep," &c., and that if the animal was in fact a ewe, the indictment must so describe it; and it was not enough to use the general term sheep. If a ewe is stolen, it must be called a ewe in

tried before Bayley, J., and the point was considered by the judges (eleven being present) in East. T. 1819, MS. Bayley, J., and Russ. & Ry. 387.

(*k*) Reg. *v.* Sutton, 2 Moo. C. C. R. 29, 8 C. & P. 291.

(*l*) Cook's case, Warwick Lent Ass. 1774, and Serjeants' Inn Hall, 1774. 1 Leach, 105. 2 East, P. C. c. 16, s. 48, p. 616.

(*m*) Rex *v.* Loom, R. & M. C. C. R. 160.

(*n*) Rex *v.* Puddifoot, R. & M. C. C. R. 247.

(*o*) Probably Rex *v.* Puddifoot.

the indictment; and so a lamb must be called a lamb; but a wether should be described as a sheep." (*p*)

An indictment for killing a sheep is supported by evidence of killing a ewe or wether.

But it has been recently held that an indictment for killing a sheep is supported by proof of killing a ewe or wether, although it cannot be proved which it was. On an indictment for killing a sheep with intent to steal the carcase, the prosecutor and his man swore that he had forty-one sheep, ewes and wethers, but neither of them could tell how many of each. One was missed, but they could not tell the sex, and no person by inspection of the skin and mutton could tell the sex. It was contended that the word "sheep" in the statute meant "wether," and that it lay on the prosecutor to prove that the sheep was a wether. (*q*) That as proof of stealing a ewe would not support an indictment for stealing a sheep; so proof of stealing a ram would not support such an indictment; the only proof therefore, which would support an indictment for stealing a sheep, would be stealing a wether. It was replied, that the word "sheep" would include either sex, until it was proved either to be a ewe or ram; and that the distinctive appellation of ewe and wether are not used till the animals are three years old, and that this animal was much younger; but the jury found that the distinctive appellation is used at any time after weaning, and found the prisoner guilty. (*r*) And, upon a case reserved on the question whether it was incumbent on the prosecutor upon this indictment to prove that the sheep stolen was a wether, the Judges all held that the word sheep in the statute was a generic term, including ram, ewe, and wether, and that the two former words might be rejected; except Parke, B., Vaughan, J., and Coleridge, J., who were of a contrary opinion. (*s*)

(*p*) Rex *v.* Birket, 4 C. & P. 216.

(*q*) Rex *v.* Puddifoot, *supra*, and Rex *v.* Chalkley, Russ. & Ry. 258, were cited and relied upon.

(*r*) Patteson, J., also pointed out that the first act which made sheep-stealing a capital offence, *viz.*, 14 Geo. 2, c. 6, enacted, that if any person shall feloniously steal one or more sheep or other cattle, or shall wilfully kill one or more sheep or other cattle with a felonious intent, &c., he shall suffer death, &c. In the subsequent year an act was passed, 15 Geo. 2, c. 34, which recited the clause in the former act, and that it was doubtful to what kind of cattle besides sheep the said act was meant to extend, and enacts, "that the said act was meant and intended, and shall be construed, deemed, and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, or lamb, as well as sheep, and to no other cattle whatsoever." No doubt seems to have arisen at any time that the word "sheep," in the act 14 Geo. 2, c. 6, extended to sheep of all sexes, rams, ewes, and wethers; but that act, and 15 Geo. 2, c. 34, are expressly repealed by 7 & 8 Geo. 4, c. 27, which received the royal assent on the 21st of June, 1827; and, on the same day, the 7 & 8 Geo. 4, c. 29, received the royal assent, sec. 25 of which containing the words "ram, ewe, sheep, or lamb," gives rise to the present question. It may be observed, that in Puddifoot's case, if it was for stealing a sheep it might have been possible to treat the indictment as one at common law, but in this case it cannot be so treated, as it contains but one count, which is for killing with intent to steal the carcase.

(*s*) Reg. *v.* M'Culley, 2 Moo. C. C. R. 34. 2 Lew. 272. With the greatest possible respect for the learned judges who decided this case, it is submitted that it may admit of some doubt whether this decision be not at variance with several well established rules in the construction of statutes. First, it is a general rule that effect is to be given to every word in a statute if that can be done by any reasonable construction. Now here the words "ram" and "ewe" are rejected, although by construing the word sheep as "wether," every word has a fitting and full effect. Secondly, the words of a statute are to be construed in their grammatical and natural sense. Rex *v.* Ditcheat, 9 B. & C. 176; Rex *v.* Great Bolton, 10 B. & C. 520; Williams *v.* Roberts, 5 Tyrw. 421; and it may be asked how a construction, which renders two out of four words entirely inoperative, can be construing the clause in its grammatical and natural sense. Thirdly, an expression which has precedence in the order of the words must be taken to have been used with reference to things and persons of a higher order or rank. Dwarr. on stat. 704, citing the Warden of St. Paul's *v.* The Dean, 4

Where on an indictment for stealing a sheep it was doubtful on the evidence whether the animal stolen was a rig sheep or a wether; Alderson, B., held that it was quite immaterial whether the sheep was a rig or a wether, as the prisoner was equally liable to be convicted on this indictment whether it was one or the other. (*t*) But it has been held that an indictment for stealing a filly is not supported by evidence of stealing an animal more than three years old, as at three years of age it ceases to be a filly and becomes a mare. (*u*)

26 Geo. 3, c. 71, as to slaughtering cattle.

As the statute 26 Geo. 3, c. 71, was passed in order to remedy (according to the recital of the act) the facilities afforded to the stealing of cattle by persons of low condition, who kept houses or places for the purpose of slaughtering horses and other cattle, its provisions may be shortly mentioned in this place. It contains many enactments for the regulation of slaughter-houses; requires persons keeping them to take out a license, and to give notice, previous to the slaughtering and flaying of any cattle, to an inspector appointed as mentioned in the act, and to kill and flay the cattle only within certain hours. The eighth section enacts, that if any person keeping or using any slaughtering-house or place mentioned in the act, shall slaughter any cattle for any other purpose than for butcher's meat, or shall flay any cattle brought dead to such slaughtering-house or other place without a license, or without giving notice, or shall slaughter or flay at any time except within the hours limited by the act, or shall not delay slaughtering or killing according to the direction of the inspector properly authorized, such person so offending in either of these cases and being convicted shall be adjudged and taken to be guilty of felony, and shall be punished by fine and imprisonment and such corporal punishment by public or private whipping, or shall be transported for any term not exceeding seven years, as the court before whom the offender shall be tried and convicted, shall direct. (*v*)

Slaughtering cattle without a license, or giving proper notice, &c., made felony.

Destroying or burying hides, misdemeanor.

The ninth section enacts, that persons keeping or using such slaughtering-house or place, and throwing into lime, or rubbing therewith or with any other corrosive matter, or destroying, or burying hides of cattle slaughtered or flayed by them, shall be guilty of a misdemeanor, punishable by fine, imprisonment, and whipping. The statute also creates other offences of a smaller degree, and imposes penalties recoverable by summary proceedings before justices of the peace. (*w*) The fourteenth section provides, that the act

Exceptions.

Price, 65. According to this rule the word ram is of a higher order than sheep: and this is strengthened by the fact that the two clauses immediately preceding, *viz.*, "horse, mare," &c., "bull, cow," &c., clearly place the animal of the higher order first. It may be observed, also, that in this section in every other instance the terms used are the names of the species and not of the genus; and particularly that in each of the two preceding classes the order is first, masculine; second, feminine; third, emasculated, and fourth, young animals; and the same order is evidently followed in the last class in the first, second, and last instance; which affords a very strong argument that it was intended to be followed in the third also. The only ground, on which the decision seems to rest, is that the term "sheep" was one of known signification, as including ram, ewe, and wether, and that it must therefore be taken to have been used in that sense in the statute; the answer is that the rule is that where a word has a known signification, and such word is used *generally* in a statute, it shall be taken to be used in such sense. Smith *v.* Harman, 6 Mod. 142. Here the word is used not generally, but in connection with other words, which show that it was not intended to be used generally. C. S. G.

(*t*) Rex *v.* Stroud, 6 C. & P. 535.

(*u*) Reg. *v.* Edward Jones, Stafford Sum. Ass. 1839, Williams, J.

(*v*) See a precedent of an indictment against the keeper of a slaughter-house, for slaughtering a horse without giving the proper notice, 3 Chit. Crim. L. 721.

(*w*) See the statute, and 2 Burn's Just. tit. *Horses*, sec. 1.

shall not extend to any currier, felt-maker, tanner, or dealer in hides, who shall kill any distempered or aged cattle or purchase any dead cattle for the *bonâ fide* purpose of selling, using or curing the hides thereof, in the course of their respective trades; nor to any farrier employed to kill aged and distempered cattle; nor to any person who shall kill any of their own or other cattle, or purchasing any dead horse or other cattle, to feed their own hounds or dogs, or giving away the flesh for the like purpose. But it is further enacted, that if any collar-maker, currier, &c. or other person shall, under colour of their trades, knowingly or willingly kill any sound or useful horse gelding, mare, foal, or filley or boil or otherwise cure the flesh thereof for the purpose of selling it, such person shall be deemed an offender within the meaning of the act, and for every offence, forfeit any sum not exceeding twenty, nor less than ten pounds. (*x*)

(*x*) 26 Geo. 3, c. 71, s. 15. See also the 5 & 6 Wm. 4, c. 59, ss. 7 & 8, which impose penalties for keeping or using places for slaughtering horses not licensed under the 26 Geo. 3, and also for employing at work, and not properly feeding horses or cattle intended to be slaughtered.

CHAPTER THE TWELFTH.

OF STEALING AND DESTROYING DEER.

THE former statutes upon this subject are repealed by the 7 & 8 Geo. 4, c. 27.

7 & 8 Geo. 4, c. 29, s. 26. Stealing, &c., deer in any inclosed ground, felony.

The 7 & 8 Geo. 4, c. 29, s. 26, enacts "that if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*a*) and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, he shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and if any person, who shall have been previously convicted of any offence relating to deer, for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences hereinbefore last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." (*a*)

The like in certain uninclosed ground punishable summarily.

Deer-stealing in uninclosed ground after any other offence as to deer, felony.

Where a prisoner was indicted under this section for a second offence, and the previous conviction was made by two justices, it was held good. And where such a conviction, after stating the venue in the margin in the usual way, set forth that on a certain day at a certain place in the county of Oxford, the prisoner was convicted for that he did on a certain day unlawfully use an engine for the purpose of killing deer in the forest of Wychwood, but omitted to state where or in what county the offence was committed, but proceeded to direct the penalty to be paid to the overseers of D. in the said county, "where the said offence was committed," it was held that this sufficiently shewed the offence to have been committed in the county of Oxford. (*b*)

Upon an indictment for a second offence against the 42 Geo. 3, c. 107, (now repealed) by killing deer, objections might be taken to the validity of the previous conviction. An indictment on that statute stated that the prisoner was convicted by a justice for the

(*a*) *Ante*, p. 1.

(*b*) Rex *v.* Weale, 5 C. & P. 135, Park, J. A. J. The second point decided in this case is directly contrary to the decision in Rex *v.* Johnson, 1 Str. 261, and seems to have been wrongly decided. C. S. G.

county of Essex for unlawfully carrying away a deer, and that afterwards he feloniously and unlawfully did offend a second time by feloniously aiding in killing a deer. The conviction was made by a magistrate of Essex at a place in Middlesex, and was a conviction of the prisoner and three other persons. The offence was committed in Essex. It was objected, 1st, that the indictment did not state that the prisoner was duly convicted; 2ndly, that he was not duly convicted, as the conviction was in Middlesex; 3rdly, that the conviction was of four, whereas it was stated in the indictment as of the prisoner only. And, on a case reserved, the Judges held that the prisoner ought not to have been convicted of the felony. (*b*)

Sec. 27. Suspected persons found in possession of venison, &c., and not satisfactorily accounting for it

The 27th section of the same statute enacts, "that if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall by virtue of a search warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not, under the provisions aforesaid, be liable to conviction, then for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice, at his discretion, as the evidence given, and the circumstances of the case shall require, to summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned."

In case they cannot be convicted, how the justice may proceed.

Sec. 28. Setting engines for taking deer, or pulling down park fences.

By sec. 28, "if any person shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet."

Sec. 29. Deer-keepers may seize the guns, &c., of offenders who, on demand, do not deliver up the same.

By sec. 29, "if any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places,

(*b*) Rex *v.* Allen, Russ. & Ry. 513. The reporters add the second objection was probably considered fatal.

Resistance to keepers, &c., in the execution of their duty.

or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." (*b*)

By the express words of this section a demand must be made of the gun, &c., before a seizure; the 16 Geo. 3, c. 30, s. 9, (now repealed) authorized persons entrusted with the care of deer to seize any gun, &c., brought by any person with intent unlawfully to shoot deer, without making a previous demand necessary; but it was held upon that statute that an assistant keeper had no right to seize the person of one so armed, in order to get his gun, without having first demanded the gun. On an indictment under the 16 Geo. 3, c. 30, s. 9, for assaulting one Barrett in the execution of his office as assistant keeper of Cranbourne Chase, it appeared that Barrett saw the prisoner in the Chase with a gun in his hand running; he pursued him, and called out that if he did not stop he would knock him down, and threw a stick at him, but it did not appear that the stick hit him. When he arrived within twenty yards of the prisoner he turned round, and presenting his gun at Barrett threatened to blow his brains out if he came any nearer. On Barrett still advancing the prisoner ran on, until Barrett came within four or five yards of him, when he again put his gun to his shoulder, pointed it towards Barrett, and threatened as before. Barrett, however, still advanced, and put out his hand to catch hold of the prisoner, his intention being to take both his gun and his person, when the prisoner, seizing the barrel of his gun, struck Barrett with the butt end a violent blow on the head, which knocked him down and stunned him. Upon a case reserved, the Judges were unanimous that as the keeper had no right to seize the person in order to get the gun, unless he had first demanded the gun, he was not duly in the execution of his office, when the prisoner beat him, and that the conviction was therefore wrong. (*c*)

Apprehension of offenders. Summary convictions.

The 63rd section of the same statute contains a general provision for the apprehension and discovery of offenders punishable under this act, and the 64th and following sections regulate the proceedings in respect of a summary conviction.

Principals and accessories.

By the 61st section, in cases of felony, principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are, on conviction, liable to be imprisoned for any term not exceeding two years, and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By section 62, abettors in offences punishable on summary conviction, are made punishable as principal offenders. (*d*)

Abettors in misdemeanors and in minor offences.

(*b*) *Ante*, p. 1.

(*c*) Rex *v.* Amey, Russ. & Ry. 500. A further question, not decided, was whether an assistant keeper, not appointed or confirmed by the owner of the chase, had authority to seize guns unless the head keeper were present: the words "any of his assistants, whether in his presence or not," in sec. 29, seem introduced to meet this point. C. S. G.

(*d*) *Ante*, p. 2, as to hard labour and solitary confinement.

CHAPTER THE THIRTEENTH.

OF TAKING OR KILLING HARES OR CONIES IN A WARREN, &c.

But the statutes formerly existing upon this subject are repealed by the 7 & 8 Geo. 4, c. 27.

7 & 8 Geo. 4, c. 29, s. 30. Killing hares or conies in a warren, &c., in the night, or in the day-time.

But the 7 & 8 Geo. 4, c. 29, s. 30, enacts "that if any person shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly; (*a*) and, if any person shall unlawfully and wilfully in the day-time, take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such a sum of money not exceeding five pounds, as to the justice shall seem meet; provided always that nothing herein contained shall affect any person taking or killing in the day-time any conies on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of such bank."

Proviso.

Glover's case. *Taking* a coney in a wire held sufficient to constitute the offence, though the animal was not killed, and the party did not take it away.

With respect to what shall be deemed a *taking* of a hare, &c. it may be observed, that in a case upon the repealed statute, 5 Geo. 3, c. 14, in which the prisoner was indicted for entering a warren in the night-time, and there *taking* a coney against the will of the occupier of the warren, it appeared in evidence that he set wires in the warren at about six o'clock in the evening of a day towards the latter end of December; that a coney was caught in one of the wires; and that he came again before six o'clock the next morning, when he was surprised and seized by the warrener just as he was about laying hold of the wire in which the coney was caught; the coney being then alive: and, upon a case reserved, the Judges thought that the taking by the wire was a taking by the prisoner

(*a*) The 7 & 8 Geo. 4, c. 29, s. 4, "with regard to the place and mode of imprisonment for all indictable offences punishable under this act," enacts that "where any person shall be convicted of any felony or misdemeanor punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet." But by the 1 Vict. c. 90, s. 5, it is enacted that "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

within the meaning of the statute, and that he had been properly convicted. (*b*)

Apprehension, &c., of offenders.

The 63rd section contains a general provision for the apprehension and discovery of offenders punishable under the act, and the 64th and following sections regulate the proceedings in respect of summary convictions.

Abettors.

By the 61st section abettors in misdemeanors are liable to be indicted and punished as principal offenders: and by the 62nd section abettors in offences punishable on summary convictions are made punishable as principal offenders.

What places are within the statute.

The act applies to places which are either warrens, or which are similar to warrens, where rabbits are commonly kept, and not to places where a few rabbits may be kept. On an indictment for destroying conies in the night-time in a ground lawfully used for breeding them, it appeared that the prosecutor kept rabbits, which ran about loose in his rick yard, and that the rabbits were destroyed by poison in the night-time; it was submitted that the statute only applied to warrens, and to places similar to warrens, but which could not legally be called warrens. Patteson, J. "This place was not used exclusively for rabbits; and it appears that the prosecutor merely kept some rabbits in his rick yard. If the yard had been kept exclusively for rabbits, I should have doubted it; but I think that this case is clearly not within the act of Parliament. The act applies to places commonly called rabbit-warrens, and not to places where a few rabbits may be kept." (*c*)

(*b*) Glover's case, *cor.* Bayley, J., Somerset Spr. Ass. 1814, and East. T. 1814, MS. Bayley, J., and Russ. & Ry. 269.

(*c*) Rex *v* Garratt, 6 C. & P. 369.

CHAPTER THE FOURTEENTH.

OF UNLAWFULLY TAKING OR ATTEMPTING TO TAKE FISH.

Offence at common law.

It is admitted, that larceny at common law may be committed of fish, when confined in a trunk or net; (*a*) but doubts have been raised, whether it may be committed in like manner of fish in a pond. It should seem, however, upon principle, and according to the better opinions, that larceny may be committed of fish in a pond, if the pond be private enclosed property, and of such kind and dimensions that the fish within it may be considered as restrained of their natural liberty, and liable to be taken at any time, according to the pleasure of the owner. (*b*) But clearly larceny at common law cannot be committed of fish at their natural liberty in rivers or great waters. (*c*)

Offences by statutes.

Many statutes were passed at different times for the better preservation of fish, and for regulating the fisheries in various parts of the kingdom; but some of them became obsolete, and the others were repealed by the 7 & 8 Geo. 4, c. 27.

Taking fish in any water situate in land belonging to a dwelling-house.

The 7 & 8 Geo. 4, c. 29, s. 34, enacts, "that if any person shall unlawfully and wilfully take (*d*) or destroy any fish in any water which shall run through or be in any land adjoining (*e*) or belonging to the dwelling-house of any person, being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; (*f*) and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water, not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender,

In any private fishery elsewhere.

(*a*) *Ante*, p. 83. 2 East, P. C. c. 16, s. 43, p. 610.

(*b*) Staundf. 25 *b*. 3 Inst, 109. Lamb. 274. 1 Hawk. P. C. c. 33, s. 39. 2 East, P. C. c. 16, s. 43, p. 610, 611. But the indictment should describe the pond, so that it may appear on the face of it, that taking fish out of such a pond is felony, 2 East, P. C. 611.

(*c*) 3 Inst. 109. 1 Hawk. P. C. c. 33, s. 39.

(*d*) If fish were enclosed in a net, or hooked on a line, it would seem that the case would come within this clause by analogy to Glover's case, *ante*, p. 146, although there had been no actual removal of them by the hands of the prisoner. C. S. G.

(*e*) See Rex *v.* Hodges, *ante*, p. 67, as to the meaning of the term adjoining.

(*f*) That is by fine or imprisonment, or both; the imprisonment may be with or without hard labour, in the common gaol or house of correction, and the offender may be kept in solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year as to the court shall seem meet, under the 7 & 8 Geo. 4, c. 29, s. 4, and 1 Vict. c. 90, s. 5. See my note, *ante*, p. 145. C. S. G.

being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the fish taken or destroyed, (if any,) such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided always, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person shall by angling in the day-time unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum, not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill, shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill, named in the indictment or information, or in any parish, township, or vill, adjoining thereto."

Provisions respecting anglers.

The tackle of fishers may be seized.

By sec. 35, "if any person shall at any time be found fishing against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery, where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: provided always, that any person angling in the day-time against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

Angler, on seizure of his tackle, exempt from penalty.

Stealing oysters or oyster brood from oyster-beds.

By sec. 36, "if any person shall steal any oysters or oyster brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and, being convicted thereof, shall be punished accordingly; (*f*) and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or shall, with any net, instrument, or engine drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed twenty pounds, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment or information to describe, either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided always, that nothing herein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only."

Dredging for oysters within the limits of any oyster fishery.

Proviso.

Apprehension

The 63rd section contains a general provision for the apprehension

(*f*) For the punishment of larceny see *ante*, p. 1.

of offenders punishable under the act, except only as to the offence of angling in the day-time: and the 64th and following sections regulate the proceedings in respect of summary convictions.

of offenders. Summary convictions.

The 61st section as to cases of felony, makes principals in the second degree and accessories before the fact punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are on conviction liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By section 62, abettors in offences punishable on summary conviction are made punishable as principal offenders. (*g*)

Principals in the second degree and accessories.

Where an indictment charged the prisoner with unlawfully entering a garden adjoining a dwelling-house, and with a certain net stealing out of a pond in the said garden a certain quantity of live gold and silver fish of the goods and chattels of S. T.; the Judges held the indictment good, the case being brought within the 5 Geo. 3, c. 14 (now repealed), without the allegation that the fish were the goods and chattels of any person, and therefore that part of the indictment was surplusage. (*h*)

Indictment.

An indictment on the same repealed statute was good, although it did not state the means by which the fish were taken or stolen, and although it alleged them to have been feloniously stolen. An indictment stated that the prisoner unlawfully did enter into a certain park, through which there ran a river, and "feloniously did steal, take, kill, and carry away certain fish," specifying them: it was objected that the ways and means by which the fish were taken ought to have been specified, and that the fact was alleged to be done feloniously, and the offence was not a felony; but, on a case reserved, the Judges thought there was nothing in these objections. (*i*)

(*g*) See *ante*, p. 2, as to hard labour and solitary confinement.

(*h*) Hundson's case, 2 East, P. C., c. 16, s. 43, p. 611.

(*i*) Rex *v.* Carradice, Russ. & Ry. 205. The Judges held the conviction wrong on the ground that the fish were not "bred, kept, or preserved" in the river, as the river ran in its natural course, and there was nothing to keep or preserve the fish within the park.

CHAPTER THE FIFTEENTH.

OF STEALING IN ANY VESSEL IN PORT, OR UPON ANY NAVIGABLE RIVER, &C. OR IN ANY CREEK, &C. AND OF PLUNDERING SHIPWRECKED VESSELS.

Stealing goods from a vessel in a port, river, canal, &c.

The 7 & 8 Geo. 4, c. 29, s. 17, enacts, "that if any person shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned."

The 1 Vict. c. 90, s. 2, after reciting the preceding section repeals so much of it "as relates to the punishment of persons convicted of any of the offences" therein contained, and enacts, that "every person convicted after the commencement of this act (1st October 1837) of any such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years:" and by sec. 3, the court may "direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year."

Plundering vessels in distress.

The 1 Vict. c. 87, after by sec. 1 repealing sec. 18 of the 7 & 8 Geo. 4, c. 29, as to principals in the first and second degree, and accessories before and after the fact respectively, by sec. 8 enacts, "that whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, (*b*) and be convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years."

By sec. 9, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first

(*b*) The 18th section of the 7 & 8 Geo. 4, c. 29, was similar to sec. 8 of 1 Vict. c. 87, but contained a proviso that where things of small value were cast on shore, and stolen without circumstances of violence, the offender might be prosecuted for simple larceny.

degree, and accessories after the fact (except receivers) are liable to be imprisoned for not exceeding two years; and by sec. 10, the court may sentence offenders to be imprisoned, or to be imprisoned with hard labour, in the common gaol or house of correction, and also to be kept in solitary confinement for any portion or portions of such imprisonment, or imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year. (c)

Persons in possession of shipwrecked goods not giving a satisfactory account.

The 7 & 8 Geo. 4, c. 29, s. 19, enacts "that if any goods, merchandise, or articles of any kind, belonging to any ship, or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search-warrant, to be granted as hereinafter mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet."

If any person offers shipwrecked goods for sale, the goods may be seized, &c.

By sec. 20, "if any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or reasonably suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being duly summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender, on conviction of such offence by the justice, shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet."

Apprehension of offenders. Summary convictions.

The 63rd section contains a general provision for the apprehension and discovery of offenders punishable under the act: and the 64th and following sections regulate the proceedings in respect of summary convictions.

Principals and accessories.

By the 61st section, in cases of felony, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers) are on conviction liable to be imprisoned for any term not exceeding two years; and abettors in misdemeanors are liable to be indicted and punished as principal offenders. By section 62, abettors in offences punishable on summary conviction, are made punishable as principal offenders.

Abettors in misdemeanors and in minor offences.

(c) See the sections, *ante*, vol. 1, p. 868.

As to the meaning of goods, &c.

It may be observed that in a case upon the repealed statute 24 Geo. 2, c. 45, the words "goods, wares, and merchandise" were considered as restrained to such goods, &c. as were usually lodged in vessels, or on wharfs or quays. (*d*) So that where the prisoner was indicted upon that statute for stealing a considerable sum of money out of a ship in port, the case was holden not to be within the statute, though great part of the money consisted of Portugal money not made current by proclamation, but commonly current. (*e*)

Luggage of passengers.

The luggage of a passenger going by a steamer is within the words "goods or merchandise" in sec. 17. The prisoners were indicted for stealing a portmanteau, two coats, and various other articles, in a vessel upon the navigable river Thames. The property in question was the luggage of a passenger going on board the Columbian steamer from London to Hamburgh; and it was held that the object of the statute was to protect things on board a ship, and that the luggage of a passenger came within the general description of goods. (*f*)

We have seen that where the master and owner of a ship took some of the goods delivered to him to carry, it was held not to be larceny, as he did not take the goods out of their package: and it was also held that even if under the circumstances it had amounted to larceny, it would not have been an offence within the repealed statute of the 24 Geo. 2. (*g*)

Where the prisoner was indicted for stealing a quantity of deals "in a certain barge on the navigable river Thames," and it appeared that the barge had been brought into Limehouse dock, and there moored; and by the efflux of the tide it was left aground, and in the night the deals were stolen; it was held that the offence laid was not proved within the meaning of the 24 Geo. 2, c. 45, as the evidence proved that the offence was not committed on the navigable river Thames, but upon the banks of one of its creeks. (*gg*)

By the 1 Vict. c. 87, s. 13, any felony punishable under that act committed within the jurisdiction of the Admiralty of England or Ireland "shall be dealt with, inquired of, tried and determined in the same manner as any other felony committed within that jurisdiction." (*h*)

(*d*) 2 East, P. C. c. 16, s. 85, p. 647.

(*e*) Grimes's case, Maidstone Lent Ass. 1752. Fost. 79, in the note, S. P. in Leigh's case, O. B. 1764. 1 Leach, 52.

(*f*) Rex *v.* Wright, 7 C. & P. 159. Park, J. A. J., and Alderson, B.

(*g*) Rex *v.* Madox, Mich. T. 1805. Russ. & Ry. 92. *Ante*, p. 60.

(*gg*) Pike's case, 2 East, P. C., c. 16, s. 85, p. 647.

(*h*) By sec. 14, the act does not extend to Scotland.

CHAPTER THE SIXTEENTH.

OF LARCENY BY SERVANTS, AND PERSONS WHO HAVE THE CUSTODY OF GOODS AS SERVANTS, AND NOT THE LEGAL POSSESSION.

Offences at common law.

SOME statutes upon this subject were repealed by the 7 & 8 Geo. 4, c. 27, having been for a long time but little resorted to, as the common law applies to the fraudulent conversion by a servant, to his own use, of the goods of his master. The punishment for a felonious stealing by a servant from his master, is made more severe than in an ordinary case of larceny by the 7 & 8 Geo. 4, c. 29, which will be more fully mentioned at the close of this Chapter.

The clear maxim of the common law established by a variety of cases, is, that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. (a) And this rule appears to hold universally in the case of servants, whose possession of their master's goods, by their delivery or permission, is the possession of the master himself. (b)

In support of this maxim of the common law here laid down, it will be proper to cite some of the more modern cases in which it has been recognized.

Eastall's case. Sheriff's officer clandestinely selling goods levied.

A sheriff's officer clandestinely selling for his own use part of the goods which he has seized under a writ of *fieri facias*, is guilty of larceny. The prisoner, a sheriff's officer, under a writ of *fieri facias* against one Bell, seized the goods in Bell's house, amongst which were some engravings in a locked closet. He removed a bead from the door of that closet, took out the engravings, and sold them for his own use. Upon an indictment against him for larceny, it was urged that this was a breach of trust only; but upon the point being saved, the Judges held it a larceny; on the ground that the officer had the custody of the goods only, like a servant, and not the legal possession; and the conviction was held to be right. (c)

Paradice's case. The prisoner who was employed as a foreman and book-keeper, not re-

The prisoner was indicted for stealing a bill of exchange of the value of 100*l.* the property of the prosecutor. It appeared in evidence, that he was foreman and book-keeper to the prosecutor, who was a mercer at Devizes, at a yearly salary, and paid and received money for him, not living in the house, but going there every day to transact his business. The prosecutor delivered bills to him to the

(a) 2 East, P. C. c. 16, s. 14, p. 564, *et seq.* and the authorities there cited. And see as to a bare charge or custody, *ante*, p. 21.

(b) 2 East, P. C. ibid. *Ante*, p. 21.

(c) Rex *v.* Eastall, Mich. T. 1822, MS. Bayley, J.

siding in the house of his master, embezzled a bill of exchange, which he received from his master to be transmitted to a correspondent, in the usual course of business, and it was holden to be larceny.

amount of 1500*l.*, and amongst them the bill in question, with directions to enclose them in different covers, and send them by that day's post, as he had often sent bills before, to his correspondent in London, as cash to be carried to the credit of the prosecutor's account. The prisoner did not send the bills as he was directed; and the next day, having obtained the prosecutor's leave to go to visit some relations in the neighbourhood, he went to Salisbury, got cash for the bill in question, which had been indorsed by the prosecutor, and was also indorsed by the prisoner, and then went off; but was afterwards apprehended at Exeter, with part of the bills and the money. It was contended on behalf of the prisoner at the trial, that the prosecutor, having delivered the bills to him, had thereby parted with the possession of them, so that the prisoner could not be guilty of felony in taking them away; and the case was resembled to that of a carrier intrusted to carry goods. (*d*) But the prisoner was convicted; and judgment was respited, in order to take the opinion of the Judges, whether the case amounted to felony, or was only a breach of trust. They were all of opinion (with the exception of Lord Camden, who was absent,) that the case amounted to larceny; upon the principle that the possession still continued in the master. (*e*)

Robinson's case.

A carter going away with his master's cart was holden to have been guilty of felony. (*f*)

Bass's case. The prisoner, a servant of the prosecutor, had goods delivered to him by his master to carry to a customer, which he sold, and converted the money to his own use: and this was holden to be larceny; the possession of the goods not being out of the master by such delivery.

The prisoner was convicted of stealing gauze of the value of eighty pounds, the property of the prosecutor: and the case was referred to the consideration of the twelve Judges, upon the following facts. The prisoner was servant and porter in the general employ of the prosecutor, who was a gauze-weaver, and was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men, who invited him into a public-house to drink with them, and then persuaded him to open the package, and sell the goods to a person whom one of the men brought in; which he accordingly did, by taking them out of the package, putting them into the man's bag, and receiving to his own use, part of the money for which they were sold. All the Judges held this to be felony, on the ground that the possession of the goods still remained in the master. (*g*)

In a case where the master of a captured vessel got property from the vessel clandestinely under particular circumstances, it seems to have been held not to amount to larceny. The vessel was Prussian, sent in by a British cruiser, and at first ordered to be restored, but afterwards, hostilities breaking out with Prussia, condemned as prize to the king, as having been taken before hostilities. The captain of the vessel lodged on shore, but went occasionally to the ship; the shipkeeper, who was appointed when the ship was brought in, kept the keys of the hatches, and two custom-house officers and nine of the original crew remained on board. The property in question was secretly conveyed from the ship, and found at the master's, or at a place to which he had sent it, and it appeared that a bulk-head had

(*d*) *Ante*, p. 59, *et seq.*

(*e*) Paradice's case, *cor.* Gould, J., Sarum Lent Ass. 1766. East. T. 1766. 2 East, P. C. c. 16, s. 15, p. 565, and cited by Gould, J., in Wilkins' case, 1 Leach, 523, 524. See Rex *v.* Metcalf, *post*, p. 160.

(*f*) Robinson's case, O. B. 1755. 2 East, P. C. c. 16, s. 15, p. 565.

(*g*) Bass's case, 1 Leach, 251, 524. 2 East, P. C. c. 16, s. 15, p. 566.

been broken to get at part of such property. But the learned Judge before whom the prisoner was tried, doubted whether this regaining the possession of what had belonged to the master's owners, and had been entrusted to his care, amounted to a larceny, and saved the point. And ultimately the prisoner was recommended for a pardon. (*h*)

Spears's case. A cornfactor having purchased a cargo of oats on board a ship, sent his servant with his barge to receive part of the oats in loose bulk; and the servant ordered some of them to be put into sacks, which he afterwards embezzled: this was holden to be larceny.

In a case where the prisoner had been convicted for stealing forty bushels of oats, a question, whether the facts amounted to felony, was reserved for the opinion of the Judges. The prosecutors, who were cornfactors, had purchased a cargo of oats on board a ship, lying in the river Thames; and they sent the prisoner, who was employed in their service as a lighterman, with their barge, to one Wilson, a corn-meter, for as much oats, in loose bulk, as the barge would carry. The prisoner proceeded to the ship, and received from Wilson two hundred and twenty quarters of oats in loose bulk, and five quarters in sacks. The five quarters were put into sacks by order of the prisoner; and were afterwards embezzled by him. The question submitted to the Judges was, whether this was felony, as the oats had never been in the possession of the prosecutors; or whether it was not like the case of a servant receiving charge of, or buying, a thing for his master, and never delivering it. And the Judges held that it was larceny in the prisoner; and a taking from the actual possession of the owner, as much as if the oats had been in his granary. (*i*)

Abrahat's case. The prosecutors, being cornfactors, purchased corn on board a vessel, and sent their barge to receive it in bulk; when their servant, who was employed by them to superintend the delivery, separated a part from the rest, while on board the vessel, and embezzled it: and it was holden to be larceny.

The following is a case of a similar nature. The prisoner was indicted (as in the former case) upon the 24 Geo. 2, c. 45, for stealing five quarters of oats from a vessel on the navigable river Thames. The prosecutors, in whom the property was laid, were cornfactors; and the prisoner was their servant; and had been employed by them many years in superintending the unloading of their corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on board a Dutch vessel, lying in the river Thames; and while the corn-meters were in the act of unloading the oats from the Dutch vessel into the prosecutors' barge, the prisoner, with another person, came alongside in a boat, handed ten empty sacks on board the Dutch vessel, and desired that the sacks might be filled with oats, and tied, as they were going to be put into an up-country lug-boat. He also desired that the account of the oats, put into the sacks, might be carried to the score, and no separate account be made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded, in loose bulk, into the prosecutors' barge. After the sacks were filled, a person, by the prisoner's direction, took them away from the vessel to a place where they were delivered to the person who purchased them of the prisoner. The prisoner had never been em-

(*h*) Rex *v.* Vanmuyer, *cor.* Chambre, J., and before the Judges in Mich. T. 1806, MS. Bayley, J., and Russ. & Ry. 118. In MS. Bayley, J., it is observed that there was no evidence to show that the master took the property for *himself* in opposition to the intention of his owners: and that most of the Judges seemed to think it would have been larceny if he had, and *contra* if he had not.

(*i*) Spear's case, Kingston Spring Ass. 1798. 2 Leach, 825. 2 East, P. C. c. 16, s. 16, p. 568. The ground of the determination mentioned by Heath, J., in Walsh's case, 4 Taunt. 276, was that the corn was in the prosecutor's barge, and it was a taking from the master's possession as much as if it had been from the master's granary.

ployed by the prosecutors to sell corn for them; nor was he authorized so to do. Upon these facts the jury found the prisoner guilty; and, the case being saved for the opinion of the Judges, they were of opinion that the conviction was right. (*k*) It is observed that in this case there appears to have been a tort committed by the servant in the very act of the taking; that the property of his masters in the corn was complete before the delivery to him; and that, after the purchase of it in the vessel, they had a lawful and exclusive possession of it as against all the world, but the owner of the vessel. (*l*)

Where property which the prosecutors had bought was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart, and dispose of the property for his benefit jointly with that of the other persons, the carter's servant, as well as the other persons, was held to be guilty of larceny at common law. [Upon an indictment for larceny of barilla, laid in one count as the property of J. Bryant, in another as that of the prosecutors, it appeared that] the prosecutors contracted for some barilla lying at the London docks; their clerk went to see it weighed, and after having been weighed in his presence, it was delivered to one of the prisoners, Harding, a carman's man, to cart, [in the cart of Bryant, who was his master]. By contrivance between Harding and the other prisoners, he left the cart on his way to the prosecutors', and the others drove it away and disposed of the barilla. The learned Judge told the jury that if Harding was to receive any benefit from the disposition, he was equally guilty with the other prisoners; and the jury found all the prisoners guilty; and, upon the point being saved, whether as the barilla was delivered to Harding to cart, the taking amounted to a larceny, the Judges held that it did, [whether the goods were considered as the property of the prosecutors or of Bryant.] (*m*)

Money in possession of the master by the hands of a clerk.

So if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, this is larceny. The prisoner was a clerk in the employ of A. and received 3*l.* of A.'s money from another clerk, that he might pay for inserting an advertisement, &c. He paid 10*s.* and charged A. 20*s.*, fraudulently keeping back the difference; and, upon a case reserved, it was held that this was not embezzlement, because A. had had possession of the money by the hands of the other clerk. (*n*)

Larceny of sheep by a person hired to drive them to a certain place, and intending to

It is larceny if a person, hired for the special purpose of driving sheep to a fair, convert them to his own use; having an intention of doing so at the time of receiving them from the owner. The prosecutor saw the prisoner at Bristol fair on a *Thursday*, and hired him to drive fifty sheep for him to Bradford fair, and he was to meet the prosecutor on the following *Sunday* evening, with the sheep, at the

(*k*) Abrahat's case, Surrey Spring Ass. 1796. 2 Leach, 824. 2 East, P. C. c. 16, s. 16, p. 569. Although it is not expressly so stated in the reports, yet it is clearly to be inferred that the sacks of oats were not put into the prosecutor's barge, and the marginal note in Leach, shows that this was the case. C. S. G.

(*l*) 2 East, P. C. c. 16, s. 16, p. 570.

(*m*) Rex *v.* Harding and others, tried before Lawrence, J., and considered by the Judges, Hil. T. 1807, MS. Bayley, J., and Russ. & Ry. 125. I have inserted the words between brackets from Russ. & Ry., as they seem to me important to be added. C. S. G.

(*n*) Rex *v.* Murray, R. & M. C. C. R. 276. 5 C. & P. 145. *Ergo*, it was larceny. C. S. G.

turnpike-gate nearest to Bradford. The prisoner had no authority to sell the sheep; he was merely to drive them to Bradford, and for doing so to receive 2*s.* 6*d.* per day. He did not come to the turnpike-gate on the Sunday, nor to Bradford fair, which was held on the following day. The prosecutor afterwards found forty of his sheep in a field at a place quite in an opposite direction to Bradford; and it appeared that the prisoner had sold the remaining ten of the fifty on the same morning on which he had received them from the prosecutor, and had never gone at all towards Bradford. He never was a servant of the prosecutor, but had occasionally been employed to drive sheep for him. Though he had no authority to sell, he represented to the person who purchased the ten sheep of him, that he had such authority, and that he had frequently sold cattle for the prosecutor, and that he had sold thirty ewes for him that morning. Upon this evidence the jury found the prisoner guilty, and in answer to a question put by the learned Judge, they said they were of opinion that the prisoner *at the time he received the sheep* intended to convert them to his own use, and not to drive them to Bradford. The prisoner had no counsel; but a doubt occurred to the learned Judge whether, as the delivery to the prisoner was not at his desire, or at his request, he being hired by the owner to take charge of them for a special purpose, his not carrying that purpose into execution, but converting them to his own use, and intending so to do (as found by the jury) at the moment of receiving them from the owner, amounted to felony: and he therefore respited the sentence, in order to take the opinion of the Judges upon the point. After considering the case, the Judges were unanimously of opinion that the conviction was right. (*o*)

convert them to his own use at the time he received them from the owner.

So if a person is hired by the day to drive cattle to a particular place, and has no authority to sell them, if he sell them, he is guilty of larceny, although at the time he took them into his possession he had no intention to steal them, but such intention came into his mind afterwards. Upon an indictment for stealing 118 sheep it appeared that the prosecutor had employed the prisoner in his service as a drover off and on for nearly five years, but not as a regular servant. He was a general drover, and agreed with the prosecutor for three shillings a day. The prosecutor gave the prisoner orders and money to bring 119 sheep from Grantham to Smithfield market. The prisoner had no authority from the prosecutor to sell the sheep. When the prosecutor came to Smithfield he found 118 of his sheep in the possession of different salesmen, into whose hands they had been put by one Shelton, who had purchased them of the prisoner, who said they were his own. The jury found that the prisoner did not intend to steal the sheep at the time he took them into his possession. And, upon a case reserved, the Judges were unanimously of opinion that as the owner parted with the custody only, and not with the possession, the prisoner's possession was the owner's and that the conviction was therefore right. (*p*) And a similar decision was come to where the prisoner was hired to take a heifer to a particular place for a certain sum, although he was not hired by the day, or for any particular time. Upon an indictment for stealing a heifer it

If a person hired to drive cattle to a particular place dispose of them to his own use, it is larceny, although he had no intent so to do when they were delivered to him.

(*o*) Rex *v.* Stock, *cor.* Park, J., Taunton Lent Ass. 1825, and East. T. 1825. R. & M. C. C. R. 87.

(*p*) Rex *v.* M'Namee, R. & M. C. C. R. 368.

appeared that the prosecutor hired the prisoner to take a heifer from York to Kirby Misterton; the prisoner was to receive two shillings for taking the heifer the same day to Spittle Beck, ten miles from York, which was paid when he took the heifer in charge, and he was to receive two shillings more for taking her to Kirby Misterton, where the prosecutor lived, the next morning. The prisoner having received the heifer, soon after and without authority sold the heifer as his own, and embezzled the proceeds. The jury negatived the existence of any fraudulent intention previous to the delivery of the heifer to the prisoner, but found him guilty: and, upon a case reserved, the Judges held the conviction right, the possession of the prisoner being that of a servant only. (*q*)

The prisoner must dispose of the property while in his possession.

But in these cases the prisoner must dispose of the property while he has it in his possession, for if he deliver it to another person, who holds it with the owner's consent, it is not larceny, although the prisoner afterwards sell it, and dispose of the money to his own use. Upon an indictment for stealing a pig, it appeared that the prosecutor had employed the prisoner, on the 18th of December, to drive six pigs from Cadiff to Usk fair on the 20th, and paid him six shillings for so doing; the prisoner had never before been employed by the prosecutor, and had no authority to sell any of the pigs. On the 19th of December the prisoner left one of the pigs in his way at Mr. Matthews', of Coedkernew, to be kept till the night of the 20th, saying it was too tired to walk any further. On the 20th the prisoner met the prosecutor at Usk fair with the other five pigs, and told him that he had left the pig with Matthews because it was tired; the prosecutor then desired him to call at Matthews', and ask him to keep the pig for him till the Saturday following, and he would pay him for the keep. The prisoner called at Matthews' on the 21st, but instead of asking him to keep the pig for the prosecutor, he sold it to him for a guinea; and on the Thursday following told the prosecutor he had seen the pig at Matthews', and that he would keep it till the Saturday; and it was held that the prisoner was not guilty of larceny, on the ground that the prosecutor had consented to Matthews being the keeper of the pig, and therefore his custody was the custody of the prosecutor. (*r*)

The distinction is, that if the owner parts merely with the custody and not with the possion, larceny will be committed by converting the chattel, *secus* if he parts both with the custody and possession.

The correct distinction in cases of this kind appears to be, that if the owner parts with the custody only and not with the possession, and the prisoner converts the chattel to his own use, it is larceny, although he had no felonious intent at the time he received it; but if the owner parts not only with the custody, but also with the possession of the chattel, and the prisoner converts it to his own use, it will not be larceny, unless the prisoner had a felonious intent at the time he received the chattel. Thus where a person sent some pigs to a lady to be looked at, and the prisoner sold the pigs, and did not take them to the lady, we have seen that the first question left to the jury was, whether the prisoner had a felonious intent from the commencement of the transaction; the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor

(*q*) Reg. *v.* Jackson, 2 Moo. C. C. R. 32.

(*r*) Reg. *v.* Charles Jones, Monmouth Spring Ass. 1842, Cresswell, J. MSS. C. S. G.

meant the prisoner to leave the pigs, and bring back the money or make a bargain for the sale of them, then he would be in the situation of a bailee, and not guilty of larceny; but if they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily, then he had only the custody and not the possession, and was guilty of larceny. (*s*)

If a person employed to drive cattle has not only the custody but the possession, he is not guilty of larceny if he disposes of them to his own use.

But if a person employed to drive cattle has not only the custody of them, but also the possession, and he disposes of them to his own use, he is not guilty of larceny. If, therefore, a person be not merely employed to drive cattle, but has also authority to sell them, he will not be guilty of larceny, although he sell them and apply the money to his own use. Upon an indictment for stealing six oxen, it appeared that the prosecutor had employed the prisoner once or twice as a drover, and that he put eight oxen into the hands of the prisoner to drive to London; the prosecutor's directions to the prisoner were, if he could sell them on the road he might, and those he did not sell on the road he was to take to the prosecutor's salesman in Smithfield, for him to sell for the prosecutor there: the prisoner was at liberty to drive other cattle as well as the prosecutor's on this occasion; there is a regular charge for drovers, so much a head; so much for cattle driven and so much for cattle sold. The prisoner sold two of the oxen in his way to London, and took the other six to Smithfield, where he sold them: the money was paid into a bank in Smithfield for the prisoner, and he received it there. A witness stated that the prisoner was a salesman as well as a drover; and the prosecutor's salesman proved that he never received the beasts. That when a person was employed to bring beasts to him, he sometimes deposited them at Islington at the layer's at the Goose yard, or somewhere. That it was the duty of the drover to deliver them to the salesman's drover in the evening, and next morning to come and give him information, and see that he had them; that it was no part of his duty to sell them in Smithfield. The prisoner had brought beasts from the prosecutor before, and delivered them to the salesman's drover. It was submitted that there was no felonious taking in the first instance; that the prisoner was not the servant of the prosecutor at all; and that the prosecutor had parted with the right of possession as well as the custody of the cattle, by giving the prisoner the right of selling them if he pleased. It was answered that although the original ownership of the prisoner was a lawful one, yet that ownership ended as soon as he reached the layer's at Islington, and that his driving them beyond that place was exceeding his commission, and such an illegal assumption of the property as would support the charge of felony. The prisoner was also guilty in another view of the case, as the servant of the prosecutor, having after his arrival in London only the custody, and not the property of the cattle, and having therefore no right to dispose of them. But, it was held that there was no proof that the prisoner was the servant of the prosecutor, and that there was no felonious taking in the first instance, as the prosecutor had given the prisoner a lawful ownership for a particular purpose. (*t*)

(*s*) Reg. *v.* Harvey, 9 C. & P. 353. See this case more fully stated, *ante*, p. 23.

(*t*) Reg. *v.* Goodbody, 8 C. & P. 665. Littledale, J., and Parke, B., who observed, "If the case had rested on the question of whether the prisoner was the servant of the prosecutor in the first instance, I should have reserved it for the further considera-

Lavender's case. A servant going off with money which his master had given him to carry to another, and applying it to his own use, is guilty of larceny.

A servant going off with money, given to him by his master to carry to another, and applying it to his own use, has been holden guilty of larceny. The master of the prisoner delivered to him a sum of money to carry to a person of the name of Flawn, and to leave it with Flawn, who had agreed to give the master of the prisoner bills for the money in the course of a few days. The prisoner did not carry the money to Flawn, as he was directed, but went away with it, and, with part of it, purchased a watch and some other articles, the other part remaining in his possession when he was apprehended. The jury having found the prisoner guilty, sentence was respited, in order to take the opinion of the Judges, whether this was felony, or only a breach of trust; and all the Judges held that it was felony. (*u*)

So where the prisoner, who was occasionally employed by the prosecutors as a clerk, having received from them a cheque on their bankers, payable to a creditor with directions to deliver it to the creditor, appropriated it to his own use, it was held to be larceny. (*v*)

So where on an indictment for stealing a shilling, it appeared that the prisoner, who was the servant of the prosecutor, was ordered by him to go for twelve cwt. of coals; and that the prisoner received from the daughter of the prosecutor six shillings, which six shillings she had received from her father to give to the prisoner to pay for the coals; and the prisoner, instead of getting twelve cwt. of coals, got only nine cwt., the price of which was 3*s.* 3*d.*, and gave 4*s.* to pay for the coals, and received 9*d.* in change; and on his return he gave the prosecutor's daughter 1*s.*, and made a false statement as to the quantity of coals he had brought; Patteson, J., held that the prisoner

tion of the judges; as I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent. There is one case in which it was held that a man may be the servant of several at one time, but I wish to have that question further considered by the judges." In a note the Reporters say, "We presume his lordship referred to the case of Rex *v.* Carr, Russ. & Ry. 198, *post*, p. 170. If the prisoner had merely been employed by the prosecutor to drive the oxen to London, instead of having the authority to dispose of them by sale on the road, the question mentioned by Mr. Baron Parke would have arisen in the case, *viz.*, whether the fact of his being at liberty in the regular exercise of his business, to drive for other graziers as well as the prosecutor, would not place him rather in the character of an agent than a servant. But as the delivery of the oxen in the first instance was accompanied by a power of sale, and was made to the prisoner to a certain extent, in the character of a salesman, which business, it appeared from the evidence that he carried on, the judges were both of opinion that he was not a servant, so as to make him responsible in a criminal point of view, but that his conduct amounted only to a breach of trust. This decision, though questioned by some at the moment, appears to be quite consistent with the modern doctrine upon the subject. It was said, "If a man sends his servant with his horse from the country to London, and directs him to sell it if he can upon the road, but if he cannot to leave it at a particular place in London, and the servant, instead of doing either, sells the horse in London and absconds with the money, is he not guilty of larceny?" The answer is, undoubtedly "Yes;" but the distinction is, that in the case supposed the relation of master and servant existed at the time when the horse was delivered, whereas in the present case there was nothing else to create that relation but the fact of the delivery, accompanied by a power of sale. And with respect to the argument used by the counsel for the prosecution, that it was larceny in the prisoner to drive the cattle beyond the place at which he ought to have left them, after the authority to sell was at an end; whatever might have been the case formerly on the subject, such is not the state of the law now." Rex *v.* Banks, Russ. & Ry 441, *ante*, p. 57.

(*u*) Lavender's case, Huntingdon Lent Ass. 1793, twice considered by the judges, East. T. 1793, and Trin. T. 1793. In this case all the judges also held that the last point in Watson's case, 2 East, P. C. p. 562, was not law.

(*v*) Rex *v.* Metcalf, R. & M. C. C. R. 433, *ante*, p. 34, and see Reg. *v.* Heath, 2 Moo. C. C. R. 33, ibid., and Paradice's case, *ante*, p. 154.

ought to have returned to his master any money that was left, and if, instead of doing so, he appropriated it to his own use, he was guilty of larceny. (*w*)

A servant obtained ten guineas from her mistress, under a pretence that she knew a person who would give silver for them; and then ran away with them, held larceny.

In a case where the prisoner was indicted for stealing ten guineas, it appeared that she was the menial servant of the prosecutor, who was a manufacturer, and frequently in want of silver to pay his workmen; that she went to the wife of the prosecutor, and told her that she was acquainted with a person who could give her ten guineas' worth of silver, upon which the wife of the prosecutor gave her ten guineas for the purpose of getting them changed into silver by the person she had mentioned, when, instead of getting the guineas changed, she immediately ran away with them, and never returned; and it also appeared that her clothes had been previously taken away. Upon this evidence she was found guilty of larceny. (*x*)

Chipchase's case. A clerk who had the management of the cash concerns of the prosecutors, and had authority to get their bills discounted, as occasion required, discounted a bill, and absconded with the money; and it was holden to be larceny.

It has also been holden to be larceny for the confidential clerk of a merchant to take a bill of exchange, unindorsed, from its proper repository, discount it, and convert the proceeds to his own use, though he had the general management of his master's cash concerns, and authority to get his bills discounted. The indictment against the prisoner was for stealing a bill of exchange for one hundred and twenty-two pounds twelve shillings, the property of the prosecutors, Messrs. Burkit and Fothergil. Upon the evidence it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns, that he received bills and money remitted to them, took bills to be discounted whenever he wanted cash, made payments for freight and other things of a similar nature, and settled the balance with the prosecutors at the end of every week. On the 14th September, 1795, the bill in question was remitted to the prosecutors, by the post, when one of them opened the letter, and gave the bill, which was not due till the 17th September, to a clerk to get it accepted, which the clerk accordingly did, and then laid it amongst other bills on the desk of the prosecutors. On the 16th September the prisoner carried the bill in question, together with another bill, to the prosecutors' bankers, when the bankers' clerk, observing that neither of them were indorsed by the prosecutors, asked him whether they were to be entered short or discounted, upon which he said that he wanted small notes and money for them, and that the money must be full weight, and good, as it was for the particular use of the prosecutors. On the same day he absconded with the monies he had so received, and was taken, under a feigned name, from on board a ship at Falmouth. It was contended, on behalf of the prisoner, that the bill having come legally into his possession like any other bill of the prosecutors over which he had a disposing power, he had a right to receive the money for it, though not to convert the money, when received, to his own use; and that, the first taking of the bill not being tortious, his receiving

(*w*) Reg. *v.* Beavan. Salop Spring Ass. 1842. The indictment, it must be observed, was for stealing the shilling only, not the change, and the ruling of the very learned judge of course applies only to the shilling. C. S. G.

(*x*) Rex *v.* Atkinson, 1 Leach, 302, 303, note (*a*). There is subjoined, *Sed quære* if the case was not saved? The doubt in this case would be whether the property in the guineas was not so parted with by the wife of the prosecutor, as to exclude the idea of felony, (*ante*, p. 24). But it should seem that it might be well contended that the property in the guineas was not parted with to the prisoner; and that she had only the possession of them upon a bare charge, or special trust, to get them changed. *Ante*, p. 21, *et seq.*

the money for it at the bankers, and going away with the money, was a mere breach of trust, and no felony. But Heath, J., was clearly of opinion that this was felony, the bill having been once decidedly in the possession of the prosecutors, by the clerk, who got it accepted, putting it amongst the other bills on the prosecutors' desk, and the prisoner having feloniously taken it away from that possession. (*y*)

Hammon's case. A banker's clerk falsely informed a customer of the house that he had paid in money to his credit, and thereby induced the customer to give him a check for the amount, and received the money; and then to prevent a discovery, made fictitious entries in the books. This was holden to be larceny, the check being drawn by the customer not to pledge his own credit, or to draw out money of his own, but to draw out the money so falsely pretended by the prisoner to have been paid in by him.

A case of modern occurrence requires to be noticed in the same class. The prisoner was indicted for stealing two bank notes of fifty pounds each, in the dwelling-house of the prosecutors. The facts given in evidence were, in substance, that the prisoner was a clerk in the banking-house of the prosecutors, and was intimate with a gentleman named Vale, whom he had induced to open his cash account at the house. On the 19th December, 1811, he made a fictitious entry in the banking book of Mr. Vale, to his credit, for two hundred pounds, which sum he told Mr. Vale that he had that morning paid in on Mr. Vale's account. On the belief that this false entry and false assertion were true, Mr. Vale, on the 10th January, 1812, gave him a check on the prosecutors, dated, by the prisoner's desire, on the day before, for one hundred pounds, for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutors' bank-note drawer, in the shop, the two notes stated in the indictment, depositing the check among the other paid checks of the day, and making in the waste-book an entry of such payment. By this contrivance and other previous practices of the like kind, Mr. Vale's real balance was turned against him to the amount of several hundred pounds; and, in order to prevent the discovery which must have immediately ensued if the accounts had been suffered to continue in this state, the prisoner made other false entries, to the credit of Mr. Vale, in the ledger of the house. Upon these facts the jury found the prisoner guilty, (*z*) and they also found that at the time he made the false entries in the ledger, and in the customers' book, he did it fraudulently, with the design of enabling himself to get the money of the prosecutors. The question whether the offence was a felony, or amounted only to a fraud, was afterwards submitted to the consideration of the Judges, and eleven of them who met held that the offence was felony, that the taking was felonious, and that the depositing the check was not intended to pledge Vale's security, but to prevent detection, as Vale did not give the check to pledge his own credit, or to enable the prisoner to get money of his, Vale's, but to enable the prisoner to get away (as he supposed) money of his own. And Grose, J., in delivering the opinion of the Judges, said, "The true meaning of larceny is the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker. (*a*) The facts of the case answer every part of this definition. The taking of the property is clear, and that it was taken against the will of the owner, and with a felonious intent, is equally

(*y*) Chipchase's case, *cor.* Heath, J., O. B. 1795. 2 Leach, 699. 2 East. P. C. c. 16, s. 15, p. 567. The prisoner was accordingly convicted, and sentenced to be transported for seven years.

(*z*) The jury said that as the prisoner had the check he had a right to pay himself, but, Bayley, J., before whom the prisoner was tried, told them that this was matter of law. Their opinion, however, was stated in the case, MS. Bayley, J.

(*a*) *Ante*, p. 2.

clear, from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it." (*b*)

By the cases which have been now cited, the maxim of the common law, already mentioned, relating to the fraudulent conversion by a servant to his own use of the goods of his master, appears to be sufficiently explained and established. But it should be observed that in all these cases it was considered that the property stolen was sufficiently received into the possession of the master before the taking by the servant. And this leads to the consideration of a material distinction respecting the possession of the master, namely, that the property will not be considered as sufficiently received into his possession, where it has merely been delivered to the servant for the master's use. Upon which subject it is well laid down that "if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting such goods to his own use." (*c*) The ground of which doctrine appears to be that in such case there can be no tortious taking in the first instance, and consequently no trespass: and we have seen that without a trespass there can be no larceny. (*d*)

In the foregoing cases the property was received into the possession of the master before the taking. But property is not sufficiently received into the master's possession, where it has merely been delivered to the servant for the master's use; and, therefore, if a servant purloins such property it is not larceny.

Upon this principle, in a case prior to the 15 Geo. 2, c. 13, s. 12, (*e*) where it appeared upon an indictment for stealing East India bonds, the property of the governor and company of the Bank of England, that the bonds in question, having been taken to the bank for the purpose of being deposited there, were not carried to the usual place for such deposits, namely, a chest in the cellar of the bank, but were received by the prisoner, who was a cashier there, and placed by him in his own desk, it was ruled that the prisoner was not guilty of larceny in afterwards selling the bonds, and putting the money into his own pocket. And the ground of the decision appears to have been that as the bonds were never put into the cellar, in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner. (*f*)

Waite's case. Before the 15 Geo. 2, c. 13, s. 12, a cashier of the Bank of England, to whom a bond was delivered was not guilty of felony in converting it to his own use before it had been deposited in the proper place.

In another case where the prisoner was indicted for stealing a half-crown and three shillings, the property of his master, the same principle was recognized. The master of the prisoner was a confectioner; and the prisoner was his servant, employed to attend the shop. The master, having some suspicion that the prisoner had occasionally purloined the money paid by persons dealing at the shop, procured a customer to come there on pretence of buying something, having previously given to such customer some marked silver of his

Bull's case. A servant attending the shop, received some money from a customer, which he did not put into the till, but purloined it, it was holden

(*b*) Hammon's case, O. B. Feb. 1812, and May, 1812. 2 Leach, 1083. S. C. 4 Taunt. 304, MS. Bayley, J., and Russ. & Ry. 221. Lawrence, J., who was absent, doubted.

(*c*) 2 East, P. C. c. 16, s. 16, p. 568.

(*d*) *Ante*, p. 5.

(*e*) *Post*, Chap. XX.

(*f*) Waite's case, *cor.* Carter and Dennison, Js., O. B. 1743. 1 Leach, 28. 2 East, P. C. c. 16, s. 17, p. 570. Dennison, J., said, that though this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution.

not to be larceny; the money not having been in the possession of the master.

own. The customer accordingly came to the shop in the absence of the master, and bought some articles of the prisoner, paying for them with the marked silver. Soon afterwards the master (who was waiting for the purpose) came in and examined the till, in which the prisoner ought to have deposited the silver when it was received; and finding only some of the marked silver there, he procured the prisoner to be immediately apprehended and searched, when the rest of the marked money was found upon him. The jury found the prisoner guilty; but the point being saved for the consideration of the twelve Judges, they were of opinion that the prisoner was not guilty of larceny, but only a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master, as against the prisoner. (*g*)

Bazeley's case. A banker's clerk, entrusted to receive bank-notes and money at the counter, instead of putting a note into the proper drawer, converted it to his own use: and this was holden to be only a breach of trust, and not larceny; the note never having been in the banker's possession.

Both these cases were much relied upon, in a subsequent case, on behalf of the prisoner, a bankers' clerk, who was indicted for stealing a bank-note of the value of one hundred pounds, the property of the bankers. The evidence was, in substance, that a gentleman, who kept cash with the bankers, sent, by his servant, the one hundred pound bank-note in question, together with twenty-two pounds in other bank-notes, and fifteen pounds in money; and that the servant delivered the whole into the hands of the prisoner. The prisoner, in his capacity of clerk to the bankers, was *authorized to receive and give a discharge for the same*, and it was his duty to put the money received into a till, and to place in another drawer the several bank-notes, which he might receive during the day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgment to the servant of having received the full sum of one hundred and thirty-seven pounds, and put the money into the till; but instead of placing the remaining sum of one hundred and twenty-two pounds, which he received in bank-notes, into the drawer, according to his duty, he kept back the one hundred pound note in question, and only delivered over those to the amount of twenty-two pounds. The jury found the prisoner guilty, subject to the opinion of the Judges, whether the taking could be considered as felonious, or only as a breach of trust? When the case came to be argued, an additional fact was stated and admitted, namely, that the prisoner had given his employers security to account for what he received and against embezzlements. The case was argued at considerable length before nine of the Judges, who, at first, entertained some doubt on the case, but ultimately agreed that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner; but that it would have been otherwise if the prisoner had deposited it in the drawer, and had taken it afterwards. (*h*)

In consequence of the foregoing decision the 39 Geo. 3, c. 85, was

In consequence of this decision (of which, however, it should be observed, that it was perfectly in unison with the due administration of criminal justice, in adopting the merciful construction of a doubtful point of law) it was thought necessary forthwith to make

(*g*) Bull's case, *cor.* Heath, J., O. B. Jan. 1797; Hil. Term, 1797, cited in Bazeley's case, 2 Leach, 841. 2 East, P. C. c. 16, s. 17, p. 572.

(*h*) Bazeley's case, O. B. 1799. East. T. 1799. 2 Leach, 835. 2 East, P. C. c. 16, s. 17, p. 571. See also Rex *v.* Sullens, R. & M. C. C. R. 129, and Rex *v.* Hawtin, 7 C. & P. 281, *post*, p. 181.

some provisions for the better protection of masters against embezzlements by their clerks and servants, many of whom, employed in commercial transactions, are unavoidably entrusted with the receipt of monies to a large amount. The 39 Geo. 3, c. 85, was accordingly passed, and though that statute is now repealed, the 7 & 8 Geo. 4, c. 29, provides for the punishment of such embezzlements, and will be considered in the succeeding chapter.

passed, for protecting masters from the embezzlements of their clerks and servants.

In order to bring a prisoner within the 7 & 8 Geo. 4, c. 29, s. 46, it must be proved that he was the servant of the prosecutor. Upon an indictment charging the prisoner as the servant of the prosecutrix with stealing her purse containing forty sovereigns, it appeared that the prisoner was the driver of a glass coach, which had been hired by the day by the prosecutrix, and that he stole her purse from the coach; it was held that the relation of mistress and servant did not exist between the prosecutrix and the prisoner, and that he could only be convicted of simple larceny. (*i*)

We have seen that it has been doubted by a very learned Judge, whether a person can be the servant of several persons at the same time. (*j*)

Servants of the crown.

It has also been doubted whether the 7 & 8 Geo. 4, c. 29, s. 46, applies to larceny by a clerk employed in a public office under the crown. The prisoner, who was indicted as a clerk to the queen for stealing her money, and also for embezzlement under the 2 Wm. 4, c. 4, was the first clerk to the Collector of Customs at the Port of Falmouth, and as such it was his duty to receive and place in the collector's box each day monies received in payment of customs; the facts were clear to prove that he had taken money out of the box. The prisoner was appointed by the commissioners of customs under the 3 & 4 Wm. 4, c. 51. It was objected that the 7 & 8 Geo. 4, c. 29, s. 46, did not extend to public servants. Coleridge, J., "The great doubt I have had is, whether or no the 7 & 8 Geo. 4, c. 29, s. 46, was meant to include public servants of the crown such as the prisoner. It would seem intended to protect private dealings of the subjects only against their clerks and servants, and the terms of the 2 Wm. 4, c. 4, seem to confirm this view of it, by specially providing for such a case as this." (*k*)

Indictment.

An indictment, which alleges that the prisoner, being the servant of the prosecutor, on a certain day and year, stole his property is sufficient. An indictment charged that Mary Somerton, on the 1st of March, 1827, "being then and there the servant of J. Hellier" on the same day and year, one ring of the said J. H., did steal; and it was objected, first, that there was no positive averment that the prisoner was the servant of J. H.; 2ndly, that it was not sufficiently averred that she was his servant at the time she stole the goods; but it was held, 1st, that "being the servant of J. H.," was a description of the person of M. S., and that that was a sufficient allegation that she bore that character; 2ndly, that reading and understanding the language used in the indictment as the rest of mankind would understand the same language, if it were used in other instruments, there

(*i*) Rex *v.* Haydon, 7 C. & P. 445, Patteson, J., and Gurney, B. See Quarman *v.* Burnett, 6 M. & W. 499.

(*j*) Parke, B., in Reg. *v.* Goodbody, 8 C. & P. 665. See this case, *ante*, p. 159. and Rex *v.* Carr, Russ. & Ry. 198, *post*.

(*k*) Reg. *v.* Lovell, 2 M. & Rob. 236. The prisoner was convicted on the counts for embezzlement, so that it became unnecessary to decide this point.

could be no doubt that it imported that M. S. was the servant of J. H. at the time she stole the property. (*l*)

Punishment of larceny by servants, &c.

It is only necessary further in this place to notice the 7 & 8 Geo. 4, c. 29, s. 46, which "for the punishment of depredations committed by clerks and servants, in cases not punishable capitally," enacts, "that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years; and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment." (*m*)

Principals and accessories.

The 61st section of the act making principals in the second degree, and accessories before the fact, punishable in the same manner as principals in the first degree, applies to every felony punishable under the act, as does the provision also by which accessories after the fact (except receivers of stolen property) are made liable to imprisonment for any term not exceeding two years. (*n*)

(*l*) Rex *v.* Somerton, 7 B. & C. 463. The indictment was on the 3 Geo. 4, c. 38, s. 2. See Reg. *v.* Page, 9 C. & P. 756, *ante*, vol. 1, p. 84.

(*m*) As to the present punishment, see note (*a*), p. 167.

(*n*) See the clause, *ante*, p. 2, tit. *Larceny*.

CHAPTER THE SEVENTEENTH.

OF EMBEZZLEMENT BY CLERKS AND SERVANTS.

THE 7 & 8 Geo. 4, c. 29, s. 47, "for the punishment of embezzlements committed by clerks and servants," declares and enacts, "that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned." (a)

7 & 8 Geo. 4, c. 29, clerks or servants receiving any money, &c. on their masters' account, and embezzling it, shall be deemed to have feloniously stolen it.

The 48th section "for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders," enacts, "that it shall be lawful to charge in the indictment, and proceed against the offender, for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party

Distinct acts of embezzlement may be charged in the same indictment.

As to allegation and proof of the property embezzled.

(a) The punishment for this offence is now regulated by the 7 & 8 Geo. 4, c. 29, s. 4, *ante*, p. 128, and s. 46, *ante*, p. 166, and the 1 Vict. c. 90, s. 5, *ante*, p. 2, and may be transportation for not exceeding fourteen nor less than seven years, or imprisonment for not exceeding three years, with or without hard labour, in the common gaol or house of correction, and the offender may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, and not exceeding three months in the space of one year; and if a male may be once, twice, or thrice, publicly or privately whipped in addition to such imprisonment.

delivering the same, and such part shall have been returned accordingly."

These provisions are substituted for the repealed statute 39 Geo. 3, c. 85, and those contained in the 48th section are intended to remove the very considerable difficulties which so often prevented a prosecution under the repealed statute from being effectual. The full case, upon which the master had arrived at the conclusion of his servant's guilt, and determined to prosecute, could hardly ever be laid before the jury, on account of the rule, which forbids evidence to be given of two distinct and independent felonies upon one indictment; it repeatedly occurred that the person from whom the prisoner had received the money could not specify the mode of payment; and it happened not unfrequently that the prisoner had received a piece of coin or a note of a larger amount than the sum which was to be paid on account of his master, and had given change. (*b*) In the former of these cases the jury often acquitted, from an impression that the prisoner had acted by mistake, and unintentional error, an impression which would have been removed, if the facts upon which the master proceeded could have been fully laid before them; and in the two latter cases the prosecution necessarily failed, as being unsupported by the evidence. It is conceived that a better remedy for these defects would have been applied by making the offence a misdemeanor, as the anomalous averments and evidence introduced, by the 48th section, upon a prosecution for *felony*, would have been avoided.

This statute is similar in its effect to the repealed statute 39 Geo. 3, c. 85.

This enactment of the 7 & 8 Geo. 4, c. 29, s. 47, like the repealed statute of the 39 Geo. 3, has the effect it should seem of constituting the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have *feloniously stolen*. First, he must be a clerk or servant; then he must by virtue of his employment receive or take into his possession some chattel, money, &c.; and that must be for or in the name or on the account of his master; and he must fraudulently embezzle the same. But probably this statute like the 39 Geo. 3, would be considered not to apply to cases which amount to larceny at common law. (*c*)

Some of the points decided upon the construction of the repealed statute, may properly be noticed here.

Cases decided upon the repealed statute 39 Geo. 3, c. 85. Servants within the act.

It was held that a female servant was within that statute. (*d*) And that statute was held not to be confined to the clerks and servants of persons in trade, but to extend to the clerks and servants of all persons whomsoever, if such clerks or servants were employed to receive money, &c.: so that it was decided by the Judges on the point being reserved for their consideration, that a person employed at a yearly salary under the appellation of accomptant and treasurer to the overseers of a township, and whose duty it was to receive all monies receivable or payable by them, was a clerk and servant within that statute. (*e*)

(*b*) See Rex *v.* Ward, Gow, N. P. R. 168.

(*c*) Rex *v.* Headge, Russ. & Ry. 160. Rex *v.* Murray, R. & M. C. C. R. 276, *post*, p. 181.

(*d*) Rex *v.* Elizabeth Smith, Hil. T. 1814, MS. Bayley, J., and Russ. & Ry. 267.

(*e*) Rex *v.* Squire, York Spring Ass. 1818, 2 Stark. C. 349, and Russ. & Ry. 349.

So where upon an indictment under the 39 Geo. 3, c. 85, for embezzling the monies of his master, it appeared that the prisoner was hired as a journeyman miller, and not in any respect as a clerk or accountant, or to collect monies; he was however in the habit of selling small quantities of meal on his master's account, and of receiving the money for them; no written account was ever kept of such sales and receipts; his habit and duty was to pay over on each successive day what money he had received on the preceding day. It was objected that the prisoner was not a servant within the meaning of the statute. Richards, C. B., "There is nothing at all in the objection. It is by no means a new one; it has been overruled again and again, and convictions have taken place in much slighter cases than the present. I have no doubt that the statute was intended to comprehend masters and servants of all possible kinds, whether originally connected in any particular character or capacity or not." (*f*)

Servants of all kinds are within the act.

If a person is employed as the servant of a corporation, he is a servant within the statute, although not duly appointed, nor even appointed at all under the common seal of the corporation. Upon an indictment for embezzling the monies of the guardians of the poor of parishes in the town of Shrewsbury, who are incorporated by statute, written appointments of the prisoners, as steward and clerk to the corporation, were produced: they bore date in 1816, and were "for one year next ensuing," and it did not appear that either of them had been re-appointed. It was objected, that although they were servants of the corporation for the first year, yet as they were neither re-appointed under the common seal, nor according to the statute, they ceased to be servants of the corporation at the end of the first year; but it was held that it was sufficient; for if a person be employed as servant, he may be guilty of embezzlement, though not duly appointed. (*g*) And a person employed upon commission to travel for orders, and to collect debts, was held to be a *clerk* within that act, though he was employed by many different houses on each journey, and paid his own expenses out of his commission each journey, and did not live with any of his employers, nor act in any of their counting-houses. In the case in which this point was decided, it appeared that the prisoner was employed by many houses as a traveller to get orders, and to receive debts, and had a commission on such orders and debts; and further, that he paid his own expenses, and did not live with any of his employers, or act in any of their counting-houses. Stanley and Co. were amongst his employers. He had embezzled part of the money which he had collected for them, and was indicted under this statute; and the indictment stated that he was employed by Stanley and Co. in the capacity of a *clerk*, and by virtue of his said employment received, &c. The

Servants of corporations.

A clerk employed by different persons was within the repealed statute.

(*f*) Rex *v.* Barker, Dow. & R. N. P. R. 19.

(*g*) Rex *v.* Beacall, 1 C. & P. 457, Park, J. A. J. Rex *v.* Wellings, ibid. See Williams *v.* Stott, 3 Tyrw. 688, where Vaughan, B., said, "It is singular that the words 'body corporate or politic,' in the 39 Geo. 3, c. 85 should have been omitted in the existing act; however, there is no doubt that clerks or servants to such bodies would be held to be included in its general words." If the learned Baron had referred to the 7 & 8 Geo. 4, c. 28, s. 14, he would have seen that the words of the 7 & 8 Geo. 4, c. 29, do include "bodies corporate as well as individuals." See the section, *ante*, p. 116. C. S. G.

prisoner having been convicted, a case was reserved, upon which the Judges thought the conviction right. (*h*)

But the preceding case has been doubted.

But where a drover and salesman was employed by a farmer to drive oxen to London, and was at liberty to drive the cattle of other persons, and was to receive so much per head for cattle driven and so much for cattle sold, Mr. Baron Parke said, "I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent; there is one case, in which it was held that a man may be the servant of several at the same time, but I wish to have that question further considered by the Judges." (*i*)

The servant of several partners is the servant of each partner.

It has been held that a servant in the employ of two partners is the servant of each, and that if he embezzled the private money of one, he might be charged as the servant of that partner. The prisoner was indicted as servant of T. R. Bridson, for embezzling his money. T. R. Bridson and J. Ridgway were partners in trade, and the prisoner was employed by them as their book-keeper, and whilst he was so employed received and embezzled some notes the private property of Bridson; it was objected that he could not be considered the servant of Bridson, being the servant of Bridson and his partner jointly: but Bayley, J., held that he was the servant of both; and said that it had been decided by the Judges that where a traveller is employed by several houses to receive money, he is the individual servant of each. (*j*)

Servants receiving certain portions of the profits of goods sold.

In another case, it was held that a servant employed to carry out goods in his employer's barge, to sell them and to bring back the price came within the statute, by embezzling the money for which the goods sold, although he was to have a certain part of such money for his pay. The prosecutor had a colliery, and barges, and employed the prisoner as captain of one of his barges to carry out and sell coals, and his duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery, and duties. He received twenty waggon loads to take down the river to the best market, and he sold them at Gainsborough, at eighteen shillings per chaldron, the value, when he received them, having been fourteen shillings the chaldron. He embezzled the money, but it was urged that he was not a servant within the statute, and that he had a joint interest with the prosecutor in the money he received. A majority of the Judges held that he was a servant within the statute, and that so much of what he received as equalled the value at the colliery, and duties, was received solely for the use of the prosecutor, and that the embezzlement of it was an offence within the statute. (*k*)

A clerk receiving one-third of the profits of one partner.

Where a clerk to a banking firm was to receive one-third of one of the partner's profits, being the fifteenth share of the whole profits of the house, to which the other partners assented, but they considered the prisoner not liable to them for losses; it was held that the prisoner was not a partner. He was to receive only a sort of per centage, and the agreement was assented to by the partners merely as a private agreement between the one partner and the prisoner.

(*h*) Rex *v.* Carr, Mich. T. 1811, MS. Bayley, J., and Russ. & Ry. 198, and Rex *v.* Leach, 3 Stark. N. P. C. 70.

(*i*) Reg. *v.* Goodbody, 8 C. & P. 665, per Parke, B. See this case, *ante*, p. 159.

(*j*) Rex *v.* Leach, 3 Stark. N. P. R. 70.

(*k*) Rex *v.* Hartley, Hil. T. 1808, MS. Bayley, J., and Russ. & Ry. 139.

He was to receive a share of the *particular* profits of the one partner and not of the *general* profits of the firm, and therefore he might be guilty of embezzling money received on behalf of the firm. (*l*) So where a prisoner was employed by the master of a coal vessel, who sent him with a cargo of coals: and the custom of the trade was for the person who superintended the business to receive two-thirds of the freight, and the owner one-third: the prisoner took the whole; whereupon he was indicted and convicted. It was objected that he and the master were joint proprietors of the freight, but a large majority of the Judges held the conviction right. (*m*)

A driver of a coach described as the servant of one of the proprietors.

Where the prisoner was indicted for embezzling money received on account of his master, Bricknell, who was part proprietor of a coach from Birmingham to Hereford, and horsed it from Hereford to Malvern, living himself at Worcester, and had been in the habit of driving the coach himself from Worcester to Hereford, and employed the prisoner to drive for him when he did not go himself. The prisoner had all the gratuities, both when he drove himself, and when Bicknell drove. All the proprietors were interested in the monies received throughout the line, but Bricknell received and held the money taken on that part of the road between Worcester and Hereford, and was accountable to the other proprietors for it. On arriving at Malvern from Hereford the prisoner's duty was to inform the book-keeper what money he had received. The book-keeper then used to deliver to the prisoner what money he had received, and the aggregate amount was inserted in a book kept at the Malvern office, and also on the way-bill as a debt against the prisoner. The prisoner's duty was to pay that amount to Bricknell on his arrival at Worcester, (*o*) but the way-bill went on to Birmingham. On the 23rd of November, the book-keeper at Malvern delivered to the prisoner 8*s*. and the prisoner stated that he had received 2*s*. 6*d*. Accordingly, 10*s*. 6*d*. was put down as a debt from him in the book, and on the way-bill. On his arrival at Worcester, he told Bricknell that the sum was 10*s*. and paid him 10*s*. only. It was objected that there was a joint interest in the money in Bricknell and the other proprietors, therefore that the money was received to the use of all, and that the prisoner was the servant of all. Mr. Justice Patteson thought that, as between the prisoner and Bricknell, the money was received to the use of Bricknell, and that he was his servant. It was also objected that there was no embezzlement, as the debt appeared truly in the books at Malvern and on the way-bill; but the learned Judge thought that that made no difference, especially as the entries were not made by the prisoner, but by the book-keeper. And, upon a case reserved, the Judges present all thought the conviction right. (*p*)

Apprentices within the act.

An apprentice, though under the age of eighteen, was held to be within the statute: but it was considered as extending only to such servants as were employed to receive money, and to instances in which they received what they embezzled by virtue of their employment. A butcher's apprentice, under eighteen, carried a bill for seventeen shillings and ten-pence to a customer, from whom he

(*l*) Holme's case, 2 Lewin, 256, Chambre, J.

(*m*) Anonymous, ibid., cited by Chambre, J.

(*o*) It is Hereford by mistake in the report in Moody, C. C. R.

(*p*) Reg. *v.* White, 2 Moo. C. C. R. 91; 8 C. & P. 742. Other instances of embezzlement were stated, but the one stated sufficiently raises the points.

obtained the money, and embezzled it, but it appeared that he had never been employed to receive money for his master. Upon a case reserved for the purpose of taking the opinion of the Judges whether the act extended to apprentices, the Judges seemed to think that it did, there being no exception; but on the ground that the prisoner was never employed to receive money, and therefore did not receive this by virtue of his employment, the conviction was held wrong. (*q*)

A person occasionally employed is within the act.

It was however decided that a person was sufficiently a servant within this act, though he was only occasionally employed when he had nothing else to do. And that it was sufficient if he was employed to receive the money he embezzled, though receiving money were not his usual employment, and though it was the only instance in which he was so employed. The prisoner applied to a carrier to give him some employment, and the carrier agreed to let him carry out parcels and go with messages when he had nothing else to do. On the fourth day of his employment, the carrier gave him an order on which he was to receive 2*l.*, which money he received and embezzled: and the Judges, upon a case reserved, held that his conviction was right. (*r*)

But the person must be in the employ of the prosecutor.

A prisoner cannot be convicted of embezzlement unless he be the servant of the prosecutor at the time he receives the money, and merely sending the prisoner to a bank to get money, is not sufficient to make him the servant, although he be paid for going. Upon an indictment for embezzlement, it appeared that the prosecutor had given the prisoner a check to get cashed at a bank, and to bring back the money to the prosecutor. The prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a rounds-man, for a day at a time, and had several times before been sent to the bank for money. The prisoner however, on the day in question, was not working for the prosecutor; but was to be paid 6*d.* for fetching this money from the bank: and it was held that the prisoner was not the servant of the prosecutor within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47. (*s*)

The clerk of a church is not the servant of the minister, churchwardens, or poor of the district.

The clerk of a chapelry who receives the Sacrament money is not the servant either of the minister, churchwardens, or the poor of the chapelry. The prisoner was charged in different counts as the servant of R. C. Wilmot, who was the curate of a perpetual curacy; of Morley and Goodwin, who were the churchwardens; and of the poor of the township; and it appeared that the prisoner was the clerk of the chapelry, and on a Sacrament Sunday he collected the alms in a plate from the several communicants, and then took the plate to the altar, and delivered it to Mr. Wilmot, who then put in his own donation: and the prisoner purloined two half-crown pieces from the plate, and secreted them in his pocket for his own use; and, upon a case reserved, the Judges were of opinion that the prisoner was not the servant of any of the persons alleged in the indictment. (*t*)

Nettleton's case.

So where a prisoner was charged as the servant of Blades in some counts, and as the servant of Blades "and others" in other counts, and

(*q*) Rex *v.* Mellish, East. T. 1805, MS. Bayley, J., and Russ. & Ry. 80.

(*r*) Rex *v.* Spencer, East. T. 1815, MS. Bayley, J., and Russ. & Ry. 299, and see Rex *v.* Smith, *post*, p. 178.

(*s*) Rex *v.* Freeman, 5 C. & P. 534, Parke & Taunton, Js.

(*t*) Rex *v.* Burton, R. & M. C. C. R. 237.

it appeared that the prisoner was the school-master of a charity school, supported by voluntary contributions. The appointment of the prisoner, and the funds of the charity, were vested in the power and control of a committee, and Blades was the treasurer and a member of the committee. There was a collector appointed to receive the subscriptions of the contributors to the charity; who was paid by a commission upon the total sum collected. The sole duty of the prisoner was confined to the instruction of the charity children; and he had never, in any instance, been employed or requested to receive any of the contributions, and never did apply for or receive any but in this single instance; and was not to have any the least emolument from this single act of receipt of money; nor was it the least part of the duty of his office of school-master. The money in question was a voluntary contribution from some charitable fund in the possession of the Ironmongers' Company, applicable to any object they might approve of, and not limited to this charity. Blades had for two or three years received this money with a view to avoid the payment of any commission for collecting it; but being confined to bed by illness, he had left a written direction for the prisoner to go to Ironmongers' Hall to receive the money. The direction was his individual direction, not an order from the committee of management of the funds of the company. The prisoner never stood in the relation of servant to Blades, unless this single act created such relation. And, upon a case reserved, the Judges held that the prisoner did not stand in such relation to the treasurer, or committee, as to bring him within the act. (*u*)

Drover with authority to sell.

Where a drover was employed by a grazier to drive some oxen to London, and his instructions were that if he could sell them on the road he might, and those he did not sell on the road he was to take to a salesman in Smithfield, who was to sell them for the grazier; and the drover sold two of the oxen on the road, and instead of taking the remainder to the salesman, drove them into Smithfield, and sold them there, and applied the money which he received for them to his own use, it was held that he was not a servant, and could not, therefore, be convicted of embezzlement. (*v*)

Drover employed only to drive in a single instance.

But where a drover was employed in a single instance to drive a cow and calf to a person to whom they were sold, and to bring back the money they were sold for, he was held to be a servant within the meaning of the act. Upon an indictment for embezzlement it appeared that a farmer had some beasts in Smithfield, which the prisoner was keeping for him as a drover, and he was employed to drive a cow and calf to a person, to whom they were sold, and bring back 16*l.* He was not in the service of the farmer, but merely the drover; he had, however, been employed by the farmer at different times; but it was not proved that he had any extra reward beyond what was his due for driving and delivering the cattle to the purchaser. Upon a case reserved the Judges present were unanimously of opinion that the prisoner was a servant within the meaning of the act. (*w*)

(*u*) Rex *v.* Nettleton, R. & M. C. C. R. 259. The recorder thought that the prisoner was perfectly free to have refused to receive the money without any violation of duty either to Blades or the committee, and also adverted to there being no remuneration contracted for or expected or promised to the prisoner.

(*v*) Reg. *v.* Goodbody, 8 C. & P. 665, Littledale, J., and Parke, B. See this case stated at length, *ante*, p. 159.

(*w*) Rex *v.* Hughes, R. & M. C. C. R. 370. The Recorder thought Rex *v.* Nettleton, *supra*, strongly applied to this case.

So where it appeared on an indictment for embezzlement that the prosecutor employed the prisoner to take some bark to Mr. Morris to be weighed, and he was directed to bring back a written account of the weight, and of the price bark was selling at, and if Mr. Morris offered to pay for the bark the prisoner was to receive the money, and bring it to the prosecutor: the prisoner received 1*s.* 6*d.* for his day's work; he had been employed many times before by the prosecutor, but not regularly; and on this occasion he was only employed for this one day, and he had never been employed for the purpose of receiving money before. Littledale, J., held that this case was distinguishable from *Rex* v. *Nettleton*, (*x*) as in that case the prisoner was not a servant at all, but only employed on a single occasion to receive money. (*y*)

A clerk to a savings' bank may properly be described as the clerk of the trustees, though elected by the managers.

A clerk of a savings' bank may properly be described as clerk to the trustees, although he was elected by the managers. Upon an indictment for embezzlement, stating the prisoner to be clerk in some counts to all the trustees by name, and in others to one of them by name "and others," it appeared that the prisoner was the clerk to a savings' bank, by the regulations of which the institution was to be conducted by managers, a treasurer, and clerk. The managers were to include patrons, presidents, and trustees; the clerk, with one of the managers, was to attend to receive deposits and conduct the business of the institution, and in case the manager of the day was unavoidably prevented from attending, and unable to find a substitute, the clerk might act for him, upon the said manager's responsibility to the institution. There were about 200 managers over and above the trustees, patrons, and presidents, who were managers *ex officio*. The clerk was elected every year by ballot at a meeting of the managers, at which meeting, if no trustees attended, the appointment by the other managers would be good; or if no managers attended the appointment by the trustees would be equally good. The manager of the day was absent at the moment a depositor entered the bank and paid the money, which the prisoner appropriated to his own use. It was objected, 1st, that the prisoner was not clerk to the trustees, but to the managers; 2ndly, if the word "others" might include the managers, that the money was not received to their use, but to the use of the trustees, in whom alone it is vested by the 9 Geo. 4, c. 92, s. 8; and, lastly, that the clerk had no authority to receive the money, for he and a manager ought to have received it together. But it was held, upon a case reserved, that the prisoner was properly described as clerk to the trustees, and that the conviction was good. (*z*)

A member of a society may be stated to be the servant of the trustees, and the money may be stated to be their property, though the

A member of and secretary to a society may be stated to be the clerk and servant to the trustees, and the money may be stated to be their property, though the society be not enrolled, and though the money ought in the ordinary course to have been received by a steward. Upon an indictment for embezzling the monies of Barber, Allport and Haycock, it appeared that the prisoner was secretary and clerk to a society held at his house called "The One Hundred Pounds and Fifty Pounds Society," and a member of the society. The

(*x*) *Supra*, note (*u*).
(*y*) Rex v. Jones, Monmouth Spring Ass. 1832. MSS. C. S. G.
(*z*) Rex v. Jenson, R. & M. C. C. R. 434.

articles of the society were not enrolled. By the first article the members were to pay their monies to the stewards for the time being, which were to be paid by the clerk and one of the stewards into the bank of the Messrs. Atwoods, as treasurers to the society. Barber Allport and Haycock were the trustees of the society. Two stewards had been regularly appointed from time to time from the commencement of the society till within a few months before April, 1834; but no stewards had been appointed in the year 1834, the prisoner having neglected to summon the committee as he ought to have done, according to his duty. No money was receivable from the members, according to the regulations of the society, except upon club nights; and when there were stewards, the course of business was for the members to pay their contributions to the junior steward, and for him to hand it over to the secretary, who took an account of it and made an entry, and then carried the money, accompanied by one of the stewards, to the bank; one entry only of the amount was made by the secretary, signifying both the money received from the members and paid into the bank. The only account kept at the bank stood in the names of the trustees. During the time there were no stewards, the secretary had been in the habit of receiving the money from the members on the club nights, and carrying it to the bank. On the 8th of April, 1834, being one of the club nights, the prisoner received from the members of the society the sum of 134*l.* 9*s.* 4*d.*, and made an entry of it in the usual way; of this sum he paid into the bank 73*l.* 18*s.* 6*d.* only, and embezzled the remainder, 60*l.* 10*s.* 10*d.* It was objected, 1st, that as no stewards had been appointed, the money had not been received by the prisoner by virtue of his employment; 2ndly, that the trustees were not properly described as his masters and employers; 3rdly, that the property in the money received could not properly be laid as the property of the trustees, especially as the articles had not been enrolled. The objections were overruled, and the prisoner convicted; and, upon a case reserved, the Judges were of opinion that this case was governed by the preceding case, and that the conviction was right. (*z*)

society be not enrolled.

So where the prisoner was appointed under the 10 Geo. 4, c. 68, collector of the poor, church, and improvement rates by the vestry of St. Paul, Covent Garden, it was held that he might be indicted as *servant* of the committee of management of the affairs of the parish for embezzling *their* monies, for it was no objection that he was appointed under the act of Parliament, as it was quite immaterial how he was appointed; and section 2nd provides that the monies shall be the monies of the committee, and the act means that though the collectors are to be appointed by the vestry, yet they are to be clerks or servants to the committee of management; and *Rex* v. *Jenson* (*a*) shews that a person may be the clerk of one though appointed by another. (*b*)

Collectors of rates.

Upon an indictment against the prisoner under the 39 Geo. 3,

(*z*) Rex *v.* Hall, R. & M. C. C. R. 474.

(*a*) *Supra*, p. 174.

(*b*) Reg. *v.* Callahan, 8 C. & P. 154, Vaughan & Patteson, Js. The indictment also contained counts charging the prisoner as servant to Walker and others the churchwardens, and he had embezzled the rector's rate, and on objection taken the judges held that the prosecutor should elect on which he would proceed, which he did.

c. 85, for embezzling the property of the churchwardens and overseers of a parish, it appeared that the prisoner was appointed as an extra collector of poor-rates by the parish, and that he was paid out of the parish funds; his remuneration, however, was not by a fixed salary, but by a per centage on his collections, and it was contended that he was not a clerk or servant within the meaning of the statute, but the objection was overruled. (*b*)

The chamberlain of the commons of a corporation is not a servant within the act.

In an action for slander the declaration stated that the plaintiff was the servant of the mayor, alderman, and burgesses of the borough of Warwick, and alleged the words uttered by the defendant to mean that the plaintiff had feloniously embezzled money received by virtue of his said employment; it appeared that the plaintiff was one of the four chamberlains of certain commonable lands belonging to the borough of Warwick; the chamberlains are chosen at the court leet, and sworn in by the steward. Their duties consist in keeping the commons in a good state as to sowing, fencing and draining, &c., and generally superintending them. Their funds arise from pounding the commoners' cattle twice a year till a certain rate per head is paid, and from sums paid by proprietors of booths, &c., set up at the races, &c., usually had there. Their accounts are audited annually by two borough magistrates, and any balance in hand is paid over to their successors. Bayley, B. The 7 & 8 Geo. 4, c. 29, s. 47, "appears to me to apply to ordinary clerks or servants having masters to account to for the discharge of their duties. Now, can this plaintiff be said to be such a clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury at the court leet held annually by the corporation as lords of the manor, and was sworn in there as many other persons are. Then can the mayor and corporation be said to be his masters within this act? In the cases cited for the plaintiff (*c*) the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers, *e. g.*, the party appointed by the overseers to receive money. The parish clerk who received and misapplied the Sacrament money was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the act, for he filled a distinct office of his own, in respect of which he received money which he was entitled to keep till the year ended, and was not bound to pay over at any time, as a mere clerk or servant would have been." (*d*)

Accountant of Greenwich Hospital.

An accountant of Greenwich Hospital, who was sworn into that office, having embezzled money to a great amount, was indicted under the 39 Geo. 3, c 85, (now repealed) which expressly comprehended servants of bodies corporate, and Burrough, J., held that the prisoner did not fall within that statute, on account of its being proved that he was a sworn officer, and not employed as an ordinary servant. (*e*)

Servant of an illegal society.

But a person cannot be convicted for embezzlement as clerk or

(*b*) Rex *v.* Ward, Gow, N. P. R. 168, Richardson, J.

(*c*) Rex *v.* Squire, *ante*, p. 168. Rex *v.* Tyers, *post*, p. 187. Rex *v.* Beacall. *Ante*, p. 101.

(*d*) Williams *v.* Stott, 3 Tyrw. 688, 1 Cr. & M. 675.

(*e*) Anonymous, stated as in the text by Bolland, B., in Williams *v.* Stott, *supra*.

servant to a society, which is illegal. Upon an indictment for embezzling the money of a society it appeared that the members of the society, when they were admitted into it, had an oath administered to them, which was clearly an unlawful oath within the 39 Geo. 3, c. 79, and 57 Geo. 3, c. 19, s. 25; and it was held that the prisoner could not be convicted of embezzling the money of this society. (*f*)

A servant entitled to a proportion of the price of an article.

Where a servant received money for his master for an article made out of his master's materials, and embezzled such money, the offence was held to be within the repealed statute, although the servant made the article, and was to have a given proportion of the price for making it. A turner's man received an order on his master's account for six dozen coffee-pot handles, his business being to receive orders, take the necessary materials from his master's stock, work them up, deliver out the articles, receive the money for them, and pay over the whole money to his master: but at the end of the week he was entitled to receive a proportion of the money back for his work upon the articles. In the present case he had taken the materials from his master's stock, made the coffee-pot handles on his premises, delivered them to the customer, and received the money; but he had concealed the transaction from his master, and kept the money, which was three shillings, and of which his share would have been one shilling. Upon an indictment for embezzling the three shillings, the learned Judge doubted whether it was not rather a fraudulent concealment of the order, and an embezzlement of the master's materials; but upon a case reserved, all the Judges who met thought it was an embezzlement of the money, and that the conviction was right. (*g*)

By virtue of the employment.

Receiving immediately from a customer that which in the ordinary course the servant would have received through the medium of another servant employed to collect from customers, was held to be a receipt by virtue of the employment of the servant, who so received immediately from the customer, in a case where the servant, being intrusted to receive at home from out-door collectors, received abroad from an out-door customer. The prisoner was servant to a carcase butcher, and part of his business was to receive every evening from the out-door porters the money they had received from customers in the course of the day, and to pay it over to another clerk. He went himself to an out-door customer and received of him at the customer's house 11*l.* 8*s.* 7*d.*, which he embezzled. A case was saved for the opinion of the Judges, on the ground that this receipt was not within the prisoner's regular trust and employment, but the Judges thought that as the prisoner was intrusted to receive from the porters, who would have collected from the customer, the receiving *immediately* from the customer instead of mediately through the porter, was such a receipt as the act was intended to protect, and the conviction was held right. (*h*)

A servant employed to

It was also decided upon the repealed statute, that where a servant generally employed by his master to receive sums of one description

(*f*) Reg. *v.* Hunt, 8 C. & P. 642, Mirehouse, C. S., after consulting Bosanquet and Coleridge, Js.

(*g*) Rex *v.* Hoggins, *cor.* Bayley, J., and before nine of the judges, East. T. 1809, MS. Bayley, J., and Russ. & Ry. 145.

(*h*) Rex *v.* Beechey, *cor.* Knowlys, C. S. at the Old Bailey, and before the Judges, Hil. T. 1817, MS. Bayley, J., and Russ. & Ry. 319.

receive money of one description and at one place, employed to receive money of a different description and at a different place.

and at one place only, was employed by him in a particular instance to receive a sum of a different description and at a different place, this latter sum should be considered as received by him by virtue of his employment, because he filled the character of servant, and it was by being employed as servant that he received the money. The lessees of two toll-bars employed the prisoner to collect the tolls at one, and in a particular instance ordered him to receive the money collected by another person at the other; which he received accordingly, and embezzled it. A case being reserved upon the question whether he received that money by virtue of his employment, Abbott, C. J., Holroyd, J., and Garrow, B., thought he did not, because it was out of the course of his employment to receive that money; but Park, J. A. J., Burrough, J., Best, J., Hullock, B., and Bayley, J., thought otherwise, because, though this was out of the ordinary course of his employment, yet as he was servant to the lessees, and in his character of servant to them had submitted to be employed by them to receive this money, and had received it by virtue of his being so employed, the case was within the statute, and the conviction right. (*h*) But in a case precisely similar in its circumstances to the preceding case Mr. B. Parke directed an acquittal, observing that he had never approved of that decision. (*i*)

Where, however, upon an indictment for embezzlement the prosecutor stated that he never employed or authorized the prisoner to receive money from any persons who were regular customers, and that the persons from whom he had received the sums embezzled were of that description; it was held that as the customers made the payment to the prisoner as the servant of the prosecutor, it was sufficient to sustain the allegation that the money was received by the prisoner for and on the account of his master. (*j*)

Where the money is received contrary to the terms of the employment, it is not within the act.

To constitute embezzlement the prisoner must have received the money by virtue of his employment; and if the money be received contrary to the terms of his employment, it is not embezzlement. The prisoner was hired to lead a stallion round the country during the season, and he was to charge for each mare 30*s.* and not to take less than 20*s.* It was proved that he had received a sum of 6*s.* which was the whole charge he had made, for covering one mare, and had not accounted for it. It was held that this was not an embezzlement. To constitute an embezzlement the prisoner must have received the money by virtue of his employment; and as it was his duty to take 30*s.* and not less than 20*s.*, this sum of 6*s.* was not received by him by virtue of his employment. (*k*)

If a servant has no authority to receive money he cannot be guilty of embezzlement, though the money is paid to him on the supposition that he has such authority.

If a servant has no authority to receive any money, he cannot be guilty of embezzlement, although the money is paid to him on the supposition that he has authority to receive it, and he gives a receipt for it on behalf of his master. The prisoner was a servant of Brown and Sons, carriers, and his employment was to look up goods to be carried by his masters' waggons, but he had no authority to receive money; all monies were collected and received by a collecting clerk; a debtor to Brown and Sons went into their counting-house, and seeing the prisoner there standing at the desk, with some books near

(*h*) Rex *v.* Smith, Tr. T. 1823, MS. Bayley, J., and Russ. & Ry. 516.

(*i*) Crow's case, 1 Lew. 88.

(*j*) Rex *v.* Williams, 6 C. & P. 626. Arabin, Serjt., after consulting Gaselee, J., Alderson, B., and Gurney, B.

(*k*) Rex *v.* Snowley, 4 C. & P. 390, Parke, J., and Littledale, J.

him, and supposing him to be a clerk authorized to receive monies, paid him 8*l.* 4*s.* 10*d.*; for which the prisoner gave a receipt in his own name for Brown and Sons, and embezzled the money; and, upon a case reserved, the Judges were unanimously of opinion that, as the servant had no authority to receive the money, the case was not within the statute. (*l*) So where the prisoner was in the service of the prosecutor but not authorized to receive money, and a person who owed the prosecutor 5*l.* paid it to the prisoner, supposing him to be a servant of the prosecutor and authorized to receive it, and the prisoner never accounted for the money; it was held not to be embezzlement on the authority of the preceding case. (*m*)

Whittingham's case. The 39 Geo. 3, was held to apply to a servant who embezzled money received from a customer, to whom his master had given it for the purpose of trying the servant's honesty.

Shortly after the 39 Geo. 3, c. 85, was passed, it was ruled, that it was an offence within its provisions for a servant to embezzle money received from a customer of his master's, though the money had been given to the customer by the master in order that it might be paid in the course of business to the servant, for the purpose of trying the servant's honesty. The indictment charged the prisoner, as a servant of one John Gregory, with receiving the sum of seven shillings from one Hannah Morris, for and on account of his master, and afterwards feloniously embezzling the same. On the evidence it appeared that Gregory, who was a potatoe-merchant, having reason to suspect the prisoner of dishonesty, procured Morris to come to his shop with a marked seven-shilling piece of his own money, there to purchase potatoes, and to pay for them with the seven-shilling piece. She came accordingly, bought potatoes to the amount of one shilling and three pence, and paid the marked seven-shilling piece to the prisoner, who gave her out of his own pocket five shillings and nine pence in change, though he might have given the change out of monies belonging to his master which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box. Upon this evidence it was contended, on behalf of the prisoner, that the case was not within the act; and that the act applied only to cases where the monies had been paid to the servant by other persons than the master, and not, as in this case, where the monies had come intermediately from the hand of the master: but the court was perfectly satisfied that there was nothing in the objection, and that if a servant received the money, either from the master, or from a third person on the master's account, it was sufficient. (*n*)

Headge's case. A servant secreting money which the master had marked and sent by a person to be used in making a purchase at his shop, with a view of trying the

The same objection was, however, again taken in a case which occurred some years afterwards, and was submitted to the consideration of the twelve Judges, who were of opinion, that it was not well founded. The prisoner was indicted for embezzling three shillings, the property of his masters, James Clarke and John Gyles. The evidence was, in substance, that Messrs. Clarke and Gyles, whom the prisoner served in the capacity of shopman, having reason to suspect that he embezzled some of the monies received by him in the shop, one of them, Mr. Gyles, on the day mentioned in the indictment, formed a plan for detecting him. In pursuance of it, he

(*l*) Rex *v.* Thorley, R. & M. C. C. R. 343.

(*m*) Rex *v.* Hawtin, 7 C. & P. 281, Alderson, B. It was also held not to be larceny of the prosecutor's money, as the money had never come to his hands.

(*n*) Whittingham's case, O. B. 1801, 2 Leach, 912. The prisoner was acquitted upon another objection. *Sed quære* the correctness of this decision. C. S. G.

honesty of the servant, committed an offence within that statute.

first took an account of the money at that time in the till, and marked it; and then went to the house of a neighbour where he took three shillings from his pocket, marked them also, and then gave them to his neighbour's servant, one Frances Moxen, who by his desire, and also by the order of her mistress, went with them to the shop of Messrs. Clarke and Gyles, and purchased of the prisoner, who was then serving in the shop, articles exactly amounting to three shillings, and paid for them with the three shillings given her by Mr. Gyles. It was clearly proved that the prisoner embezzled these three shillings. Upon this evidence it was submitted to the court, on the behalf of the prisoner, that as the three marked shillings were the property of the prosecutors, and had been taken out of Mr. Gyles's own pocket for the sole purpose of trying the fidelity of the prisoner, the delivery of them to Frances Moxon had not changed the possession of them, which, it was contended, remained constructively with the prosecutors up to the moment when the embezzlement took place; and therefore that the charge should have been for a larceny at common law, and not for an embezzlement under the statute. The court overruled the objection; but, upon the prisoner being found guilty, saved the point for the consideration of the twelve Judges; who were of opinion that the case was clearly within the statute, and the conviction proper. Grose, J., who delivered their opinion, referred to Bull's case, (*o*) as in point; and said, that from that case it appeared that the present, which was precisely similar in its circumstances, was not a case of larceny at common law, but a breach of trust, and as such within the terms and operation of the statute. (*p*)

The repealed act, 39 Geo. 3, c. 85, was held not to apply where the property taken was delivered to the servant by his master.

But where the property taken was delivered to the servant by the master himself, it was decided that the case was not within the repealed statute. Thus, where the evidence was that the prisoner received from her master two five pound notes, and some other money to pay amongst other things 5*l.* 3*s.* to the overseer, and the overseer proved that she had never paid him, the Judges held a conviction upon these facts to be wrong. (*q*) In a later case the indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzling the same; and upon the evidence it appeared, that having two shillings and sixpence of his master's money, to pay on account of his master, he only paid one shilling and sixpence, and converted the other shilling to his own use; upon which the learned Judge directed the jury to acquit the prisoner. (*r*)

If property has been in the possession of the master or another of his servants, it is not within the statute.

So if the property embezzled has been in the possession of the master or any of his other servants, the case is not within the 7 & 8 Geo. 4, c. 29, s. 47. Upon an indictment for embezzlement the prisoner was proved to be the clerk of A. and he had received from another clerk 3*l.* of A.'s money that he might pay (among other things) for inserting an advertisement in the *Gazette;* he paid 10*s.* for the insertion, and charged A. 20*s.* for the same, and fraudulently converted the difference to his own use; and, upon a case reserved,

(*o*) *Ante*, p. 164.

(*p*) Headge's case, O. B. 1809. 2 Leach, 1033. Russ. & Ry. 160. It seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law.

(*q*) Rex *v.* Eliz. Smith, Hil. T. 1814, MS. Bayley, J., and Russ. & Ry. 267.

(*r*) Peck's case, *cor.* Park, J., Stafford Sum. Ass. 1817, MS. But it was usual in indictments upon this statute to add a count for larceny at common law.

the Judges thought the case not within the statute, because A. had had possession of the money by the hands of his other clerk. (*s*)

The statute applies to cases where the master has never had possession of the money.

The statute properly applies to those cases where the money has never been in the possession of the master or any other person whose possession can be considered as the possession of the master. Upon an indictment for stealing a 5*l.* note, and certain silver coin, it appeared that the prisoner's master gave him the 5*l.* note to get change; he got the change, said it was for his master, and that his master sent him. He never returned to his master. The prisoner was found guilty of stealing the silver coin; but, upon a case reserved, the Judges held that the conviction was wrong, because as the master had never had possession of the change, except by the hands of the prisoner, he was only amenable under the 39 Geo. 3, c. 85, (now repealed.) (*t*)

Not where the master's goods are sold without authority, and their price embezzled.

Where an indictment charged Edmund W. with embezzling and Michael W. as accessory after the fact, it appeared that Edmund was the town traveller and collector of the prosecutor, and Michael his carman. Edmund's duty was to go round and take orders from customers, and to enter them, on his return to the shop in the evening, in the day or the order book, and also to receive monies in payment of such orders, but he had no authority whatever to take, or direct, the delivery of any goods from the shop. A customer gave Edmund an order for two gallons of mixed pickles, and fourteen pounds of treacle, which order was entered by him in the order book as for the pickles only. An invoice for the pickles, pursuant to the entry was made out by the prosecutor's brother, and given to Michael, but he delivered the pickles and fourteen pounds of treacle. The sum charged for the pickles was 6*s.* 6*d.* and Michael entered the treacle at the foot of the invoice at 4*s.* 6*d.* Edmund afterwards received the whole amount, but paid the prosecutor 6*s.* 6*d.* only. Mr. Recorder Law (after consulting Patteson, J.,) held that this was not embezzlement but larceny, saying "Edmund does not receive the 4*s.* 6*d.* for or on account of his master, but contrary to and in breach of his duty towards that master. I may also liken the case to that of two servants, one of whom has authority to sell, and the other not, but merely to receive money; if the one, who has no authority to sell, introduces himself behind the counter, and sells his master's goods, putting the money into his own pocket, that is clearly a stealing, for he sells and receives the money contrary to his authority; and he cannot be said to have been employed or intrusted as clerk and servant, and to have received the money by virtue of such employment, where the act is done contrary to such employment. Here the servant having authority to send out goods to the amount of 6*s.* 6*d.* puts up goods to the amount of 11*s.* his intention being to put 4*s.* 6*d.* (*u*) into his own pocket. The time never arrives when he receives that on account of his master, for all that he does is adverse to, and in fraud of, the interest of the master." (*v*)

qu. Larceny of the treacle! —

The mere non-payment of money is not embezzlement,

If a person duly enters in his books all sums of money that he has received, the mere fact of not paying over the money does not amount to embezzlement. Upon an indictment for embezzlement, it appeared

(*s*) Rex *v.* Murray, R. & M. C. C. R. 276.

(*t*) Rex *v.* Sullens, R. & M. C. C. R. 129.

(*u*) The invoice was for the pickles only.

(*v*) Reg. *v.* Wilson, 9 C. & P. 27.

where the accounts are correct.

that the prosecutor to whom the prisoner had acted as clerk was one of the proprietors of a mail; and it was the duty of the prisoner to receive money for passengers and parcels, and to enter the same in a book and to remit the amount weekly to Liverpool; the prisoner had made no false entry, and had charged himself in the book with all monies that he had received, but he had not sent three sums to Liverpool as he ought to have done; and it was held that this was not embezzlement; it was only default of payment. If the prisoner regularly admits the receipt of the money, the mere fact of not paying it over is not felony. It is but matter of account. (*w*)

It is not sufficient to prove the receipt of money, and that it is not entered in account; a denial of the receipt or a false account must be shown.

So it is not enough to prove that a clerk has received a sum of money, and not entered it in his book, unless there be also evidence that he has denied the receipt of it or the like. Upon an indictment for embezzlement it appeared that Mr. Bettis, a slate merchant, by means of the prisoner as his clerk, carried on the slate trade at a wharf at Gloucester: the course of business was for the prisoner to sell the slates and to convey them to the customers in his own boats, as Mr. Bettis had no boats, the prisoner being also a coal merchant on his own account; the prisoner had received the sums in question, but he and the prosecutor had had no adjustment of accounts for two years, and on Mr. Bettis calling for the prisoner's books, he could not find three sums entered; he had never specifically asked the prisoner to account for either of the sums, and the accounts of the prisoner amounted to ten or twelve thousand pounds. Bolland, B., "There is not a felonious conversion; I will take it that the prisoner put the money into his own pocket, and has made no entry; that is not sufficient. Had he denied the receipt of the money the case might have been different. If the mere fact of not entering a sum was enough to support an indictment for embezzlement, every clerk who, through carelessness, omitted an entry, would be liable to be convicted of felony. The prisoner must be acquitted." (*x*)

Upon a second indictment against the same prisoner the evidence of the mode of dealing was the same as in the last case, and it appeared that Mr. Ellis owed 5*l.* to Mr. Bettis for slates, and paid 3*l.* 14*s.* 6*d.* in cash, 1*s.* 6*d.* being allowed to Ellis as discount, and the remaining 1*l.* 4*s.* being set against a cyder account due from the prisoner to Ellis, and the prisoner had credited Ellis in his ledger to the amount of 5*l.*, and had entered 3*l.* 14*s.* 6*d.* in the cash book. Mr. Bettis had never called upon the prisoner to account as to this sum of 5*l.* Bolland, B., "It appears to me that this does not amount to embezzlement. In cases of this sort the thing alleged to be embezzled should not be laid out of the question. If goods are taken an intent may more clearly appear than in the case of money, as the same pieces of coin may, in many cases, not be paid over. There is nothing in this case to bring the prisoner within the statute. He never denied the receipt of the money, and was never called upon for it. I think it essential that there should be a denial of having received the money, or else that some false account should be given. The prisoner must be acquitted." (*y*)

(*w*) Rex *v.* Hodgson, 3 C. & P. 422. Vaughan, B. It does not appear that the prisoner had ever been called upon to account for the sums in question. C. S. G.

(*x*) Rex *v.* E. O. Jones, 7 C. & P. 833.

(*y*) Rex *v.* E. O. Jones, 7 C. & P. 834. In this case it was objected that there was no embezzlement, as the prisoner had ac-

Where there is a general deficiency, but no proof of any particular sum received and embezzled.

A case has been decided which would seem to shew that an indictment for embezzlement may be supported by proof of a general deficiency of money, without shewing any particular sum received and not accounted for. The 1st count charged the prisoner with embezzling 500*l.* on the 28th of August; the 2nd, 10*l.* on the 29th; the 3rd, with stealing a note, a sovereign, a half sovereign, &c., as clerk; and the 4th, like the 3rd, omitting to state that he was clerk. The prisoner was cashier in the bank of Messrs. Masterman, and his duty as cashier was to take charge of the cash when any payment was made into the bank, in money and paper, and the course was for the cashier to hand over the paper to a clerk, and to enter the cash received in a book kept by him (the cashier) called the money-book. It was the duty of the cashier, at the close of the business of each day, to see that the cash in hand agreed with the money-book, and to strike a balance, denoting the sum in cash which the cashier had in his charge, and which ought to have been kept either in the drawer in the counter, of which he had the key, or in a box in the banking-house, of which he had the key and the charge. On the 28th of August, 1835, the cash in the money-book at the close of business was 1762*l.*, and a fraction, which sum was by the prisoner carried forward, as in due course it ought to have been, and formed the first item of the account in the said book for the 29th. On the latter day, at the close of business, the prisoner, after crediting himself with money paid by him (it being part of his duty to pay away as well as receive money), and debiting himself with cash received, made the balance in the money-book 1309*l.* and a fraction, and that sum the prisoner ought to have had in one or the other of the above-mentioned places of deposit on the same day (29th of August.) Soon after the close of business Mr. Oxley, one of the partners, sent for the prisoner, and after intimating his suspicions required him to produce his money. The prisoner thereupon said, that he was short, and being asked how much replied about 900*l.*, and threw himself upon the mercy of his employers. Upon examination, it was found that the prisoner, instead of 1309*l.* in his hands, had only 345*l.* and a fraction, leaving the actual deficiency 964*l.* and a fraction. Mr. Oxley, who proved the whole case, had no knowledge of the facts whatever, except what has been above stated, and could not say when the money, or any part of it, had been purloined, from what person or persons it had been received, what sort of money had been abstracted, and whether from the till, or upon its receipts from customers. It was proved that there were two or three other cashiers besides the prisoner, who were stationed close to him, and that there must be at least two cashiers present during the hours of business. It was objected that there was no case to go to the jury, 1st, because the evidence, such as it was, applied equally to the charges of embezzlement and larceny, and not particularly to either; 2ndly, that there ought to have been

counted for all the money he had actually received; if no money at all had passed, and it had been entirely a credit transaction on both sides, it would not have been embezzlement, for that crime was merely a statutory larceny, and could only be proved by showing the actual receipt of the money, and as all that was received was accounted for, the case was the same as if it had been entirely a credit transaction: and this seems to have been a good objection, but it was not decided, as the prisoner was acquitted on the ground above stated. C. S. G.

some proof of some sum or sums of money having been abstracted, when, from whom, and what sort of money. Williams, J., however, (in concurrence with Gurney, B.) refused to stop the case, but reserved the points. And accordingly, the jury having been told that taking money from the till would amount to larceny, and that abstracting money paid to him (the prisoner), before it reached the till or possession of his masters, would be embezzlement, it was left to them to say whether both, or either of the charges which were stated to them, were established by the proof. The jury found the prisoner guilty of embezzlement to the amount charged, and not guilty of stealing. Upon a case reserved, it was contended that in order to enable the jury to convict either of larceny or embezzlement there must be proof of some specific sum abstracted, and the time when. That the only evidence in this case was of a deficiency in accounts, but how that arose was not shewn. There was considerable difference of opinion amongst the learned Judges, and the case was discussed at different meetings, and ultimately eight of the learned Judges (*z*) were of opinion that the conviction was good, but the other seven (*a*) were of opinion that the conviction was wrong. (*b*)

There must be proof that some specific sum has been embezzled.

But it should seem that it is not to be inferred from the preceding case that proof of a general deficiency will be sufficient, but there must be proof that some specific sum has been embezzled. Upon an indictment for embezzlement it was opened that the prisoner had been shopman to the prosecutrix, and that it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum. Alderson, B., "Whatever difference of opinion there might be in the case of *Rex* v. *Grove*, (*b*) that proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." (*c*)

Servant's absconding evidence of embezzlement.

If a servant, having received money on account of her master, goes away and never returns to her master's service, that is evidence that she embezzled the money. Upon an indictment for embezzlement it appeared that the prisoner was sent by her master's daughter to receive rent due to him from a tenant, and that having received the rent she went off to Ireland, and never returned to her master's service. Coleridge, J., said, in summing up, "I think that the circumstance of the prisoner having quitted her place and gone off to Ireland, is evidence from which you may infer that she intended to appropriate the money; and if you think that she did so intend, she is guilty of embezzlement." (*d*)

Embezzlement after the service is ended.

Although the receipt of the money must be whilst the prisoner is in the service of the prosecutor, yet it should seem that the embezzlement of the money may be after the prisoner has ceased to be the servant. In a case upon the 2 Wm. 4, c. 4, where it was objected that the indictment did not allege that the prisoner embezzled whilst

(*z*) Lord Denman, C. J., Tindal, C. J., Lord Abinger, C. B., Park, J. A. J., Vaughan, B., Bosanquet, J., Gurney, B., and Williams, J.

(*a*) Littledale, J., Gaselee, J., Parke, B., Bolland, B., Alderson, B., Patteson, J., and Coleridge, J.

(*b*) Rex *v.* Grove, R. & M. C. C. R. 447.

(*c*) Reg. *v.* Lloyd Jones, 8 C. & P. 288.

(*d*) Rex *v.* Williams, 7 C. & P. 338.

he was the clerk; Coleridge, J., said, "It is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the act." (*e*)

Johnson's case. Counts for larceny at common law, and for embezzlement under the 39 Geo. 3, c. 85, held not a ground of error.

Where the prisoner had been convicted upon the 39 Geo. 3, c. 85, (now repealed), upon an indictment, several counts of which charged him with embezzling bank-notes against the form of the statute, and others with stealing bank-notes in the common form of counts for larceny, it was assigned for error that this was a misjoinder, the counts for embezzlement on the statute and the counts for grand larceny being counts, upon which a different judgment ought by law to be given. But the court of King's Bench were of opinion that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of embezzlement described in it a larceny; and that, having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny. And Lord Ellenborough, C. J., said, "If this were an offence of a perfectly different nature, I should have been of opinion that the judgment could not have been sustained. But the act says, that the offender shall be deemed to have feloniously stolen, which is expressly constituting it a felony, and having so done the offender must, as in the like cases of felony, pray the benefit of clergy. But inasmuch as it is larceny, and therefore liable only to the punishment of seven years' transportation, this act goes further, and gives power to transport for fourteen years. The act does not alter the quality of the offence; he is to be deemed a felon, and as such must pray the benefit of clergy, just the same as if this enactment for an extended term of transportation had not been found in the statute. It makes no alteration in the judgment; the judgment is to pass against him as a felon; if he does not pray the benefit of clergy, it must be a judgment of death. And in a variety of cases, though the punishment be different, yet counts may be joined." And he further added, "Here I think it does not appear that there is a misjoinder; because both are clergyable felonies; and the defendant is liable to the punishment incident to such a felony with an extension of it to the term of fourteen years." (*f*)

Election.

But where an indictment contained a count for embezzlement, and a count for larceny, Littledale, J., insisted on the prosecutor electing, on which he would proceed, observing that the counts had a different aspect altogether. (*g*)

Indictment.

Except as the 48th section of the new act of 7 & 8 Geo. 4, may have otherwise provided, it seems that the indictment ought to contain all the requisites of an indictment for larceny at common law.

M'Gregor's case. Held upon the 39 Geo. 3, c. 85, that the indictment ought to contain all the

In a case upon the repealed statute 39 Geo. 3, an indictment was holden to be defective, because it did not expressly aver that the money alleged to have been feloniously stolen, taken and carried away by the prisoner was the money of any particular person. The point was reserved for the opinion of the Judges, and was argued before them at considerable length. It was contended, on behalf of

(*e*) Reg. *v.* Lovell, 2 M. & Rob. 236. See this case, *post*, chap. 20.

(*f*) Rex *v.* Johnson, 3 M. & S. 540. This case merely decides that the joinder of these counts is no objection upon error. C. S. G.

(*g*) Rex *v.* Jones, Monmouth Spring Ass. 1832, MSS. C. S. G. And see 2 Stark. C. P. 456, note, from which it appears that the court, in Rex *v.* Johnson, thought it was a matter for the discretion of the judge whether the prosecutor should be put to his election or not.

requisites of an indictment for larceny at common law.

the prisoner, in support of the objection, that as the statute had not made the sort of embezzlement therein mentioned *eo nomine* a distinct and substantive felony, but had only enacted, that the property received into the possession of the servant, and feloniously converted by him, should be considered as having been by such conversion feloniously taken from the possession of the master, the offence still continued a common law larceny; and that consequently an indictment framed upon the statute must contain all the requisites of an indictment for larceny at common law. And in order to shew that it would not be a sufficient answer to the objection, to say that the indictment had followed the words of the statute, several instances were mentioned of indictments upon particular statutes, 1 Edw. 6, c. 12, s. 10; 8 Eliz. c. 4; 22 Car. 2, c. 5; 3 & 4 W. & M. c. 9, s. 1; 10 & 11 W. & M. c. 23, s. 1; 12 Anne, c. 7; and 24 Geo. 2, c. 45, relating to the stealing of particular goods, or stealing goods under certain circumstances, all of which pursue the same form as to the requisite parts of larceny at common law. On the part of the crown it was argued, that the statute in question made the embezzling by servants, in the manner stated, a substantive felony, which before was only a misdemeanor, or breach of trust, for which the master had a civil remedy. That it was therefore sufficient to follow the words of the act, as in other instances where new offences were created; which differed from indictments on statutes merely ousting the offender from clergy in cases which were before larcenies at common law. That the Legislature, in this instance, meant to include cases where, from the property being, as it were, in transitu, it was difficult to ascertain in whom it was at the time of the offence committed; and that it therefore intended to relieve the prosecutor from the necessity of laying it to be in any particular person. That at any rate no technical form of words was necessary in charging a thing to be the property of another; and that here enough was stated, to shew that it was not the prisoner's own property, being charged to have been received by him on account of his masters; which was tantamount to an allegation of their having a special property in it. It appears that the Judges at first doubted much upon this case, but that ultimately a majority of them were of opinion that the indictment was defective, as it did not aver that the money alleged to have been stolen was the money of the prosecutors; that the statute made the offence a larceny, and made the possession of the servant, under such circumstances, the possession of the master. (*h*)

Allegation as to the property embezzled.

The 48th section of the new statute enacts, "that except where the offence shall relate to any chattel, it shall be sufficient in the indictment to allege the embezzlement to be of money without specifying any particular coin or valuable security; and that such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved." (*i*) This is one of the enactments intended to prevent the difficulties experienced in the prosecution of offenders under the repealed statute of the 39 Geo. 3. Under that statute it had been holden that if the evidence did not

(*h*) M'Gregor's case, O. B. 1801, Feb. 1802. 2 Leach, 932. 3 Bos. & Pul. 106. 2 East, P. C. c. 16, s. 18, p. 576. Russ. & Ry. 23.

(*i*) See the section, *ante*, p. 167.

shew that the prisoner embezzled some part of the property specified the case against him could not be established. An indictment stated that the prisoner received 1*l.* 2*s.* 6*d.* in monies numbered, and 6*l.* in one pound notes, and embezzled part thereof, namely fifteen shillings and seven-pence in monies numbered, and one 1*l.* note: the evidence was that he received at the same time much other money, and many other notes, but that instead of giving credit for 7*l.* 2*s.* 6*d.*, he only gave credit for 5*l.* 6*s.* 10*d.* Upon a case reserved, the Judges held, that as he might have paid over the whole of what he received for the 7*l.* 2*s.* 6*d.*, and have taken the 1*l.* 15*s.* 7*d.* from the other monies he received, he was improperly convicted, there being nothing to shew that he had stolen any part of that money which he was charged with stealing. (*j*) But it was also holden upon that statute, that if a servant immediately on receiving a sum for his master entered a smaller sum in his master's books, and ultimately accounted to his master for the smaller sum only, he might be considered as embezzling the difference at the time he made the entry; at least that the jury might so find. And that it would not alter the case if he received other sums for his master on the same day, and in paying those and the smaller sum to his master together, he might have given his master every piece of money, or every note he had received at the time he made the false entry. The prisoner received for his master from Mrs. W. eighteen one pound notes, and immediately entered in his master's books 12*l.* only: in the course of the day he received, for his master, 104*l.* more, and after that time paid him 116*l.* The indictment charged him with embezzling six of the notes which he received from Mrs. W., and it was urged on his behalf, at the trial, that he might have paid over in the 116*l.* every one of the notes which he received from Mrs. W.; and if so, that he could not be said to have embezzled any of those specific notes. Bayley, J., told the jury that as in what he paid, he paid only 12*l.* as and for all he had received from Mrs. W., and paid the other 104*l.* as and for monies received of other persons, he ought to be considered as having embezzled six of the notes he received from Mrs. W., because he would then have misapplied six of those specific notes to his own benefit, and to his master's prejudice. And upon a case being reserved, nine Judges, (Best, J., being absent,) thought it an embezzlement from the time of making the false entry. Wood, B., rather thought otherwise; and Abbott, C. J., thought that the point should have been left to the consideration of the jury. (*k*)

Where a smaller sum is entered at the time of the receipt the jury may find an embezzlement at that time.

Where an indictment upon the repealed statute 39 Geo. 3, c. 85, charged that the prisoner was employed as a clerk to A., and that, by virtue of his employment, he received from B., on account of his master, 9*l.* 18*s.* 9*d.* without shewing of what monies that sum was made up, and that he fraudulently embezzled and secreted the same,

Where the word "feloniously" was omitted before the word "em-

(*j*) Rex *v.* Tyers, Mich. T. 1819, MS. Bayley, J., and Russ. & Ry. 402. The notes had been in the master's possession, who took them and placed them on a heap with others before the prisoner, and this objection was made by the prisoner's counsel, and seemed to be acquiesced in, and the case confined to the 1*l.* 2*s* 6*d.* only which was in silver. It also appeared that the prisoner at first gave credit for the 7*l.* 2*s.* 6*d.*, and entered it in the proper book in his own hand, but he afterwards erased that sum, and substituted the 5*l.* 6*s.* 10*d.*, and as he might have paid over every note in question, and either paid over or passed away in change every piece of silver in question, the judges thought Rex *v.* Furneaux in point. See the case of Rex *v.* Furneaux, Russ. & Ry. 335.

(*k*) Rex *v.* Hall, Mich. T. 1821, MS. Bayley, J., and Russ. & Ry. 463.

bezzled," but the conclusion was, that the prisoner "feloniously did steal, take, &c.," the indictment was holden good.

omitting the word *feloniously;* and so it concluded that the jurors say that he did "*feloniously* embezzle, steal, take, and carry away, &c.;" objection was made, that in the introductory part of the indictment it was not alleged that he did feloniously embezzle, &c., and that therefore the indictment failed to shew that he had committed a felony, and that, unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The Judges, however, considered it to be sufficient that it was stated in the conclusion; and the indictment was holden good. (*l*)

A count containing three charges of embezzlement, and not alleging that the sums of money were embezzled within six calendar months is bad.

A count containing three charges of embezzlement, and not alleging that the sums of money were embezzled within six calendar months, is bad. The indictment alleged that the prisoner, on the 15th day of November, 5 *Victoriæ*, was servant to H. Hodges, and did then and there by virtue, &c., receive 2*l.* 1*s.* 6*d.* on account of his master; and that the prisoner afterwards and within the space of six calendar months, to wit, on the 16th day of November, in the year aforesaid, did receive the further sum of 2*l.* 3*s.* on account, &c.; and that the prisoner, afterwards and within the space of six calendar months from the day first aforesaid, to wit, on the 17th of November in the year aforesaid, did receive the further sum of 2*l.* 1*s.* on account, &c.: and that the prisoner on the several days aforesaid, in the year aforesaid, the said several sums of money respectively received by him on each of those days as aforesaid, feloniously did embezzle; and so the jurors do say that the prisoner in manner and form aforesaid, feloniously did steal the said several sums of money, against the form of the statute. Upon demurrer, it was objected that the indictment was bad; 1st, because it contained three offences in one count; whereas the statute only authorized the inserting three offences in three different counts. 2ndly, that it did not shew that the three offences were committed within six calendar months; for although the receipt of the money might be within six calendar months, the embezzlement might not be within that period. 3rdly, that the indictment charged a joint stealing on three different days. And lastly that there was only one *contra pacem* to three different offences. And the indictment was held bad. At common law it would have been bad, because the *contra pacem* could not be applied to one more than to another of the offences charged: and it was not rendered good by the 7 & 8 Geo. 4, c. 29, s. 48. Under that section it was necessary to allege that the embezzlements were within six calendar months; now the offence is not the receipt of the money, but the embezzlement of it, and in this case, although there was an averment that the monies were received within six calendar months, there was no allegation that they were embezzled within that period; and therefore the indictment was bad. (*m*)

Description of

We have seen that the 7 & 8 Geo. 4, c. 29, s. 48, provides that in

(*l*) Rex *v.* Crighton, *cor.* Thomson, B., Lancaster Sum. Ass. 1803, and before the judges, Mich. T. 1803, MS. Bayley, J., and Russ. & Ry. 62. Rex *v.* Johnson, 3 M. & S. 540.

(*m*) Reg. *v.* Purchase, Gloucester Spr. Ass. 1842, MSS. C. S. G. Patteson, J., after consulting Cresswell, J. The very learned judge expressed no decided opinion whether or not three offences could be included in one count, but said that the safer course was to have three separate counts. His lordship cited a case of Reg. *v.* Jeyes, where an indictment, exactly the same as the one in this case, except that the words "within six calendar months," were not introduced, had been held bad by Lord Abinger, C. B., and himself, at Warwick. C. S. G.

every indictment, except where the offence relates to some chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin, or valuable security. Where the offence relates to some chattel, the same description as in larceny will be sufficient. (*n*)

the thing embezzled.

As an indictment for embezzlement is so general as to afford no information to the prisoner of the precise sums embezzled, or of the persons from whom they were received, the prisoner is entitled to be furnished by the prosecutor with a particular of the charges intended to be made; and if the prosecutor refuse to give such particular, the court on motion, founded upon affidavit, will order a particular to be given, and such particular should contain the names of the persons from whom the sums of money are alleged to have been received. (*o*)

Bill of particulars.

Where there is only one count, and the prisoner has received different sums on different days, amounting to the sum laid in that count, the prosecutor must elect one sum, and confine his evidence to that sum. Upon an indictment for embezzling 11*s.* 10*d.*, it appeared that the prisoner had received money in different sums, upon different days, amounting in the whole to the sum mentioned in the indictment, and it was held that the prosecutor must select one sum received on one particular day, and confine his evidence to that sum. (*p*)

Two cases occurred upon the repealed statute, 39 Geo. 3, in which questions were raised as to the *county* in which the offence within that statute might be considered as having been so completed as to authorize a trial in such county.

Trial. County in which the offence may be tried.

In the first of these cases the prisoner was indicted in the county of Salop. The residence of the master was at Lichfield, in Staffordshire, where the prisoner served him in his trade. On a Saturday morning, both of them were at Shrewsbury; and the master having authorized a person, named Beaumont, to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont; and bring it to him at Lichfield the same night. The prisoner received the money from Beaumont about noon, and also a letter for his master which had been left at Beaumont's, but which did not relate to the money transaction. He left Shrewsbury soon after, but did not go to his master at Lichfield till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any. A few days after, the master, in consequence of information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on the Saturday, being present, told the prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Some time afterwards, the master, having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following the prisoner went to Beaumont, at his house in Shrewsbury, and desired him to make a search on the left hand side of the room in which they had been;

Hobson's case. A denial by a servant in Staffordshire, of his having received money in Shropshire, is evidence to show that the receipt in Shropshire was with intent to embezzle; and therefore the trial may be had in Shropshire.

(*n*) See *ante*, p. 107, *et seq.*

(*o*) Rex *v.* Hodgson, 3 C. & P. 422, Vaughan, B. Rex *v.* Bootyman, 5 C. & P. 300, Littledale, J. The affidavit should state that the prisoner did not know the charges intended to be brought against him, that it was necessary for his defence to be furnished with the particular charges, and that he had applied to the prosecutor for a particular and been refused.

(*p*) Rex *v.* Williams, 6 C. & P. 626, Arabin, Serjt., after consulting Gaselee, J., Alderson, B., and Gurney, B.

but no search was made, Beaumont telling him it was of no use to search, as he had received the money from him. The jury having found the prisoner guilty, the case was submitted to the consideration of the twelve Judges, upon two questions; first, whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? and, secondly, whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling? A majority of the Judges were of opinion, that the conviction was right. Lawrence, J., thought, that embezzling being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other Judges were of opinion that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property. (*q*)

Taylor's case. If a servant receive money for his master in the county of A., and being called upon to account for it in the county of B., there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

In the other case, which occurred shortly afterwards, the indictment charged the prisoner with embezzling the sum of ten shillings the property of his master James Barker. The evidence was, that the prosecutor Barker, who was a fishmonger in Drury-lane, in the county of Middlesex, sent his servant, the prisoner, with some herrings to a street in Blackfriars-road, in the county of Surrey, to a Mrs. Stevens; telling him that he was to receive the sum of ten shillings for them. He went with the herrings about six o'clock in the evening, and delivered them to Mrs. Stevens, who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money; to which he replied, that he had not, for that Mrs. Stevens had not paid him. His master then paid him his weekly wages (it being on a Saturday,) and he went away, being to return on Monday morning as usual: but did not return, nor did he ever account for the money. Upon this evidence it was contended, on the part of the prisoner, that he was only liable to be indicted in the county of Surrey, where the money was received: and the jury having found him guilty, this point was reserved for the consideration of the Judges. The opinion of the Judges was afterwards delivered by Lord Alvanley, C. J., who first referred to the foregoing case of Hobson, and then proceeded. "In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars-bridge into the county of Surrey, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled

(*q*) Hobson's case, Shrewsbury Lent Ass. 1803, and East. T. 1803. 1 East, P. C. *Addenda*, xxiv., and Russ. & Ry. 56.

ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars-bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute until he refused to account to his master. We are, therefore, of opinion, that the prisoner was properly indicted in the county of Middlesex." (*r*)

7 Geo. 4, c. 64, offence begun in one county and completed in another.

It should be observed, that by the 7 Geo. 4, c. 64, s. 12, where a felony is begun in one county, and completed in another, such felony may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

Principals in the second degree, and accessories.

By sec. 61, of the 7 & 8 Geo. 4, c. 29, principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years. (*s*)

(*r*) Taylor's case, 3 Bos. & Pul. 596. 2 Leach, 974. Russ. & Ry. 63.

(*s*) *Ante*, p. 2, as to hard labour and solitary confinement.

CHAPTER THE EIGHTEENTH.

OF EMBEZZLEMENT BY BANKERS, BROKERS, FACTORS, AND OTHER AGENTS.

SHORTLY after the decision in *Walsh's case*, which has been noticed in a former part of this work, (*a*) the 52 Geo. 3, c. 63, was passed for more effectually preventing the embezzlement of securities for money and other effects, left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attornies, or other agents. This act was repealed by the 7 & 8 Geo. 4, c. 27, but the 7 & 8 Geo. 4, c. 29, contains other enactments upon the same subject.

7 & 8 Geo. 4, c. 29. Agents embezzling money entrusted to them to be applied to any special purpose;

The 7 & 8 Geo. 4, c. 29, s. 49, "for the punishment of embezzlements committed by agents entrusted with property," (*b*) enacts "that if any money, (*c*) or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, (*d*) with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit, such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; (*e*) and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney,

or embezzling any goods or valuable security entrusted to them for safe custody, or for any special purpose,

(*a*) *Ante*, p. 30.

(*b*) The words in the preamble of the 52 Geo. 3, c. 63, were "bankers, merchants, brokers, attornies, or other agents, entrusted by their customers and employers."

(*c*) The word "money," was not in the 52 Geo 3, c. 63.

(*d*) The words in the 52 Geo. 3, c. 63, were, "agent or agents of any description hatsoever."

(*e*) The present punishment, by virtue of this section, and sec. 4 of the same statute, *ante*, p. 145, and the 1 Vict. c. 90, s. 5, *ante*, p. 145, is transportation for not exceeding fourteen, nor less than seven years, or fine or imprisonment, with or without hard labour in the common gaol or house of correction, or both, and the offender may be sentenced to solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, and not exceeding three months in the space of one year.

or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned." (*f*)

guilty of a misdemeanor.

By sec. 50, "nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

Not to affect trustees or mortgagees; nor bankers, &c., receiving money due on securities, or disposing of securities on which they have a lien.

By sec. 51, "if any factor or agent entrusted, for the purpose of sale, with any goods or merchandise, or entrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandise, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandise, or any of the said documents, as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; (*g*) but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandise, or any of the said documents, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent, from his principal, together with the amount of any bill or bills of exchange, drawn by or on account of such principal, and accepted by such factor or agent."

Factors pledging for their own use any goods or documents relating to goods entrusted to them for the purpose of sale, guilty of a misdemeanor.

Not to extend to cases where the pledge does not exceed the amount of their lien.

By sec. 52, "nothing in this act contained, nor any proceeding,

These provi-

(*f*) See the last note for the present punishment.

(*g*) See p. 128, as to hard labour and solitary confinement.

sions as to agents shall not lessen any remedy which the party aggrieved now has.

conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

Abettors punishable as principals.

By sec. 61, every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

The repealed statute only applied to persons, to whom securities were entrusted in the exercise of their business.

It was held that the 52 Geo. 3, c. 63, (now repealed) only applied to persons to whom securities were entrusted in the exercise of their function or business, and not to persons gratuitously engaging to procure the discount of bills, such persons not being in any business within which such an employment regularly falls. The defendant was indicted under the 52 Geo. 3, c. 63, for unlawfully negotiating and applying to his own use a bill of exchange deposited with him as agent for the owners without any authority to pledge, for the purpose of getting it discounted. The defendant was not a bill-broker, and was to receive no commission for discounting the bill; but was in the habit of discounting bills for the owner of the bill, and they were in the habit of doing so for him. The bill had been drawn by the owners by the advice of the defendant, who informed them that he had the means of getting it discounted; and it was delivered to him for that purpose, and he deposited it with a creditor of his own as a collateral security. It was objected that the defendant was not an agent within the meaning of the statute; that his offices were gratuitous, and not performed in his regular business; it was replied that the words included agents of any description whatsoever, and that a gratuitous agency was an agency of some description. Abbott, C. J. "We must endeavour to ascertain the intention and object of the statute; and that appears to have been the punishment of persons who, in the exercise of their functions, receive securities and afterwards embezzle them. It is true that, for certain purposes, a friend is an agent, but can he be called such an agent as the Legislature had here in view? Now here the parties are merely friends, accustomed to accommodate each other, and taking the transaction as one between such friends mutually aiding each other, can it be said to fall within the operation of an act passed with such an intention and object? The words, "any description whatsoever," are certainly very comprehensive, but if it had been intended to comprehend within the enactments of the statute deposits for any purposes (such for instance as safe custody), all the preceding words, "banker, merchant," &c., would have been unnecessary, and

might have been omitted. It was, therefore, intended to confine the operation of the statute to persons acting in the discharge of their functions. I entertain a very clear opinion on the point." (*h*)

What not an agency or keeping for safe custody.

An indictment on the same statute alleged that the defendant had received the sum of 10*l.* 8*s.* as an agent for safe custody, and had embezzled the same. The defendant was the proprietor of a weekly saving bank, in which there were 130 members, each member paid in weekly the sum of 2*s.* 1*d.*, the penny being allowed to the defendant as a remuneration for her trouble; at the end of each week a lottery took place, in which there were 129 blanks and one prize, the holder of which prize received the sum of 13*l.*, the total amount of each weeks' subscription; all parties then went on with their subscriptions until 130 weeks had gone round, and each member had received the 13*l.* prize. The prosecutrix was one of the members, and had paid in subscriptions to the amount of 10*l.* 8*s.*, without ever obtaining the prize, when the defendant suddenly absconded, and the deposit had never been forthcoming. It was objected, first, that the defendant could not be considered as an "agent," within the meaning of the act, no such establishment as the one managed by the defendant being in existence at the time of the passing of the law; second, that the money mentioned in the indictment was not in the keeping of the defendant "for safe custody," within the meaning of the act of parliament; third, that the indictment averred that the defendant had received the sum of 10*l.* 8*s.* of the prosecutrix, whereas the evidence proved that she never had at one time received or had in her possession more than 2*s.* 1*d.* belonging to the prosecutrix. Park, J. A. J., said, that "the three objections were, in his opinion, clearly fatal to this indictment; there did not seem to be any such agency or keeping for safe custody on the part of the defendant, as was contemplated by the statute; and with regard to the receipt of the money, the evidence was decidedly at variance with the averment upon that point." (*i*)

An indictment must correctly specify the direction given to the agent.

It was held on the same repealed statute that the indictment must correctly specify the direction given to the agent; where, therefore, an indictment stated such direction as absolute, and it proved to be conditional, it was held that the defendant must be acquitted. An indictment alleged that Anne Hubert deposited with the defendant two exchequer bills for 500*l.* each, with an order in writing for the defendant to invest the sums of money, to which the said bills related, in the purchase of government funds, and that the defendant unlawfully applied the said bills to his own use. (*j*) The written order was in terms, "for the purpose and with the intent of your investing it or the proceeds, in case of any unexpected accident, in the government funds, at a time when you shall judge it desirable to buy in." Lord Tenterden, C. J., "This direction in writing does not sustain the allegation in the indictment, for the

(*h*) Rex *v.* Prince, M. & M. 21. S. C. 2 C. & P. 517. See notes (*b*), and (*c*), *ante*, p. 192.

(*i*) Rex *v.* Mason, D. & R., N. P. 22. A further point was that the case was not within the statute, as the word "money" was not found in it.

(*j*) There was another count stating the order to be to invest in "government securities."

allegation is that the defendant was directed to invest absolutely and unconditionally; and the direction proved is only to invest, in case of any accident happening to Mrs. Hubert. Now no accident has happened, and under these circumstances the defendant cannot be liable to punishment for not investing. The defendant must be acquitted."(*k*)

(*k*) Rex *v.* White, 4 C. & P. 46.

CHAPTER THE NINETEENTH.

OF EMBEZZLEMENTS OF MINOR IMPORTANCE.

Embezzlements of minor importance.

SEVERAL enactments are to be found amongst the statutes relating to embezzlements of minor importance, and providing for their punishment by a summary mode of proceeding. (*a*)

55 Geo. 3, c. 137. As to embezzlements by poor persons in workhouses, &c.

The 55 Geo. 3, c. 137, reciting that persons received into public workhouses for the relief of the poor, pawn and dispose of their clothes, and the goods belonging to such workhouses, and that poor persons relieved by having clothes and apparel given them by the officers of parishes frequently pawn and sell the same, and that by the laws then in force no punishment could be inflicted on them, or on the persons buying or receiving the same in pawn; first vests the property of such clothes, goods, &c., in the overseers for the time being; and then enacts, that the overseers or other persons appointed for managing or providing for the poor, may cause all goods, clothes, linen, &c., and things belonging to such overseers or other persons, to be marked with the word "workhouse," and such other marks as they shall think proper, for identifying the parish, &c., by which the same shall have been provided; (*b*) and that if any person shall knowingly take in pawn, or receive any goods, &c., provided for the use of the poor in a workhouse, or given to the poor by the overseers, &c., or any goods, &c., or materials belonging to a workhouse; or shall receive or buy any of the provisions provided for the poor of such workhouse, or shall deface the marks, &c., they shall forfeit, for every offence, not exceeding five pounds nor less than one pound, upon conviction before a justice. And it further enacts, that if any persons shall desert, or run away from any workhouse, and carry with them any clothes, &c., or things as aforesaid, such persons being lawfully convicted before any justice of the peace, shall be forthwith committed to gaol or to the house of correction for three calendar months. And it provides that the marks, &c., on such things (being duly authenticated) shall be sufficient evidence of property in the overseers, or other persons appointed as aforesaid. (*c*)

Embezzling, &c., warehoused goods.

An act for the warehousing of goods, the 3 & 4 Wm. 4, c. 57, s. 41, enacts, that "in case it shall at any time happen that any embezzle-

(*a*) The 54 Geo. 3, c. 110, relating to embezzlements by Greenwich pensioners, and inserted here in the last edition, was wholly repealed by the 10 Geo. 4, c. 26 s. 1.

(*b*) By a subsequent part of the section, it is directed that such marks shall not be placed on articles of wearing apparel so as to be publicly visible on the exterior of the same.

(*c*) 55 Geo. 3, c. 137, s. 2.

ment, waste, spoil, or destruction, shall be made of or in any goods or merchandise which shall be warehoused in warehouses under the authority of this act, by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be deemed guilty of a misdemeanor, and shall, upon conviction, suffer such punishment as may be inflicted by law in cases of misdemeanor." (*d*)

Embezzlement by a surveyor of the highways of materials procured for repairing them at the expense of the parish.

In a late publication a precedent is given of an indictment against a surveyor of highways, for using materials obtained for repairing the highways upon his own premises, for employing the public labourers on his own grounds, and for embezzling the gravel and other materials which had been procured for the parish. (*e*) This indictment does not appear to have been framed upon the provisions of any statute; but to have charged the offence against the defendant as a misdemeanor at common law; laying the acts to have been done by colour of his office, and in dereliction of his duty as surveyor of the highways. (*f*)

(*d*) And in case of a conviction the owner is to be repaid for his loss by the commissioners of excise.

(*e*) 3 Chit. Crim. L. 666, where it is said, in note (*p*), that this indictment was procured from the crown office, and was used in 1799 against one Robinson.

(*f*) See vol. 1, p. 135, *et seq.* as to offences by persons in office.

CHAPTER THE TWENTIETH.

OF EMBEZZLEMENT BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND, AND BY PUBLIC OFFICERS.

Embezzlements by officers of the Bank of England.

SUBSEQUENTLY to the transaction in the case of Waite, (*a*) but prior to the decision of the Judges upon it, the 15 Geo. 2, c. 13, was passed; the twelfth section of which relates to embezzlements by officers and servants of the Bank of England.

15 Geo. 2, c. 13, s. 12. Any officer, &c., of the said company being entrusted with or having any bill, &c. or other effects, and secreting the same, guilty of felony.

It enacts, "that if any officer or servant of the said company being entrusted with any note, bill, dividend-warrant, bond, deed, or any security, money, or other effects belonging to the said company, or having any bill, dividend-warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezil, or run away with any such note, bill, dividend-warrant, bond, deed, security, money or effects, or any part of them; every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

The same provisions are repeated in the 35 Geo. 3, c. 66, s. 6, and 37 Geo. 3, c. 46, s. 6, (which makes certain annuities, created by the parliament of Ireland transferrable, and the dividends payable at the Bank of England) with respect to effects deposited in pursuance of those acts. And there is a similar provision in the 24 Geo. 2, c. 11, s. 3, with respect to the officers and servants of the South Sea company.

Certain offences of embezzlement not to be punishable with death.

Punishment.

The 4 & 5 Vict. c. 56, reciting the 15 Geo. 2, c. 13, s. 12, the 35 Geo. 3, c. 66, s. 6, the 37 Geo. 3, c. 46, s. 6, and the 24 Geo. 2, c. 11, s. 3, and that it is expedient that the said several offences should no longer be punishable with death, enacts, "that from and after the commencement of this act, (*b*) if any person shall be convicted of any of the offences herein-before specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said several acts herein-before recited ordered to be given or awarded against persons convicted of the said offences, or any of them respectively, be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any time not exceeding three years."

(*a*) *Ante*, p. 163. (*b*) 1st October, 1841.

Imprisonment may be with or without hard labour.

By sec. 4, "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the court to direct such punishment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, whether the same be with or without hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

By sec. 6, "none of the offences herein-before specified shall be tried or triable before any justices of the peace at any general or quarter sessions of the peace."

It seems that a note once cancelled at the bank is not a note, &c., within the 15 Geo. 2, c. 13, s. 12. The person offending within this act must be a person *entrusted*, &c.

It seems that a note once cancelled by the Bank is not within the 15 Geo. 2, a note, security, or effects of the bank; or at least that a person only employed to call over the sums and numbers from the cash-book, though he has access to the "file" of cancelled notes, cannot be found guilty for taking a note from the file as a person entrusted with such note. The prisoner was indicted as a servant entrusted with a note of the governor and company for embezzling it. It appeared that he took it off a cancelled file, to which he and many other clerks had access, and that he was the person who read from the cash-book the sums and dates to check the cancelled account, and there was evidence that his motive was to get a reward from the bank by shewing how this fraud could be committed. The recorder saved the points whether the cancelled note came within the description in the 15 Geo. 2, of a note, security, or effects of the bank; and also whether, in case it did, the prisoner was so intrusted with the possession of it as to be within the statute. The conviction was held bad, on the ground that it did not appear by the facts, as stated, that the prisoner was a person *entrusted* with the cancelled note, although he had *access* to it. (*d*)

Aslett's (first) case. The indictment charged the prisoner with embezzling "certain bills, commonly called *exchequer bills*;" and it was holden bad, on its appearing that the bills had been signed by a person not legally authorized to sign them.

An indictment on this statute was holden bad in charging the prisoner with embezzling "certain bills, commonly called *exchequer bills*," when the person who signed the bills on the part of government was not legally authorized so to do. It appeared that the bills in question were issued under the 43 Geo. 3, c. 5, which contained a proviso that every such bill should be signed by the auditor of the exchequer, or in his name by any person duly anthorized by him to sign the same with the approbation of three or more of the lords commissioners of the treasury, in writing under their hands; but which proviso had not been complied with, inasmuch as the authority of a Mr. Jennings, by whom the bills were, in fact, signed, had not been properly renewed. Upon this it was objected, on behalf of the prisoner, that the bills in question were not legal exchequer bills; and that, as the indictment in every count, averred the instruments alleged to have been embezzled to be exchequer bills, the allegation was not proved, and the prisoner must be acquitted. And the court were of opinion that the objection was good; that as the formalities required by the statute, by which these bills were created, had not been complied with, they were not good exchequer bills; and that

(*d*) Rex *v.* Bakewell, November, 1802, MS. Bayley, J., and Russ. & Ry. 35. The case is reported in 2 Leach, 943, and noticed by Le Blanc, J., 2 Leach, 962, and there said to have gone off upon another point. The cancelling was effected merely by a punch through.

the circumstances of the Bank of England having purchased them as exchequer bills, and of the bills having in that character answered the purposes for which they were originally created, could have no effect in this case, as they could not alter the nature of the fact. (*e*)

Aslett's (second) case. Exchequer bills purchased by the bank for a good consideration, but signed in the name of the auditor of the exchequer by a person not legally authorized, are "securities," or, at least, "effects," within the meaning of the 15 Geo. 2, c. 13, s. 12, and a servant of the bank embezzling such bills, may be convicted of felony under that statute.

But the prisoner was detained; and shorly afterwards another indictment was preferred against him, upon which he was convicted. This indictment described the exchequer bills in question as *effects* belonging to the governor and company of the Bank of England; stating the effects, in the first count, as paper writings, purporting to be exchequer bills; in the second count, as certain papers upon the credit whereof the bank had advanced a large sum of money; and in the third count, as certain papers, &c. purporting to be bills commonly called exchequer bills; and in other counts, the exchequer bills in question were called *securities* instead of effects. It was objected by the counsel for the prisoner, before any evidence was called on the part of the prosecution, that, as it had been determined, by his acquittal on the former indictment, that the papers he was charged with having embezzled were not exchequer bills at the time of the embezzlement, he could not be again charged with having embezzled the same papers, as being *effects* belonging to the Bank of England; he having committed no other act of embezzlement than that contained in the former indictment; for though by a remedial statute, 43 Geo. 3, c. 60, these defective papers had been rendered good and valid exchequer bills for *civil purposes*, yet, that statute having impliedly declared that these papers were, previously to the passing it, mere waste papers, and of no value at the time the embezzlement of them took place, it could not *ex post facto* make them valuable *effects*, within the 15 Geo. 2, c. 13, s. 12; which word *effects*, it was contended, could apply only to things in themselves of intrinsic value. But Le Blanc, J., observed, that the word "securities" was used in the statute as well as the word "effects;" which shewed that the Legislature intended that the statute should extend to other kinds of property than securites; the word "effects" being of a larger and more comprehensive meaning than the word "securities": and he directed that the trial should proceed. The facts of the case were then proved; and the jury having found the prisoner guilty, the case was reserved for the consideration of the twelve Judges. The important question submitted to them was, whether, on the true construction of the statute 15 Geo. 2, c. 13, s. 12, these papers, which were issued as exchequer bills, did, in point of law, come within the words "effects, or securities," meant to be described in the act of parliament? After able argument by counsel, and much consideration by the Judges, at different conferences, the result of their mature deliberation was communicated by Lord Alvanley, C. J., who stated that the Judges had not been unanimous upon this point, but that a majority of them were of opinion that the bills, or papers, were "effects, or securities," within the true meaning of the act, and that the prisoner was properly convicted. After alluding to the great object of the Legislature, in giving protection and security to the Bank of England, his Lordship proceeded to state that the papers in question were papers of value; that though they might not, on the face of them, be of any descriptive legal value, yet that they

(*e*) Aslett's (first) case, *cor.* Macdonald, C. B., Rooke, J., and Lawrence, J., O. B. 1803. 2 Leach, 954.

carried about them such a consequence, at least as might make their preservation of infinite importance to the bank; that the government of the country was pledged to pay them even as they were, the holders of them having as strong a claim upon the justice of the government for such payment as if they were technically correct in all their parts; and that they were, therefore, in the true meaning of the word, securities which might be rendered available to any persons having the legal right to them. He then observed, that the papers in question were not less to be deemed *effects;* which word was a very large and general term, and confined to no particular description of property, either in specie, or value; and was, therefore, probably inserted in the act, studiously, when the Legislature were placing a special guard around the Bank; and also that the offence of embezzling the effects, or securities, mentioned in the act, was not made larceny, where some value must attach on the thing taken, but was created a felony, which induced no necessity for any value being ascertained. He then put several cases to shew that the papers in question were *effects;* and after stating that the Judges had not found themselves driven to the extreme length of construing the word "effects" to extend to such trifling articles as the stumps of old pens, or a piece of blotting paper (an absurdity which had been supposed in argument); he said that their judgment only determined that the words of the act necessarily extended to such securities, or effects, as were entrusted to the officers and servants of the bank; and that the bills in question came under that description. (*f*)

Of embezzlements of the public monies by public officers, collectors, &c.

Any person embezzling or fraudulently applying money issued to them for the public services, to be guilty of a misdemeanor.

The 50 Geo. 3, c. 59, s. 1, reciting that, "it is most expedient that due provision should be made effectually to prevent the embezzlement of money or securities for money belonging to the public, by any collector, receiver, or other person intrusted with the receipt, custody, or management thereof;" enacts, "that if any person or persons to whom any money or securities for money *shall be issued for public services*, shall embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever except for public services, every such person so offending, and being thereof duly convicted according to law, in any part of the united kingdom, shall be adjudged guilty of a misdemeanor, and shall be sentenced to be transported beyond the sea, or to receive such other punishment as may by law be inflicted on persons guilty of misdemeanors, and as the court before which such offenders may be tried and convicted shall adjudge."

Sec. 2. Any officer, &c., entrusted with the receipt, &c., of the revenues, and furnishing false statements, guilty of a misdemeanor.

By sec. 2, "if any such officer, collector, or receiver *so* intrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or intrusted to his care, or of the balances of money in his hands or under his control, such officer, collector, or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding or enjoying any office under the crown."

(*f*) Aslett's (second) case, O. B. 1803 and 1804, 1 New Rep. 1. 2 Leach, 958, and Russ. & Ry. 67. It was also decided in this case, that the 15 Geo. 2, c. 13, was not repealed by 39 Geo. 3, c. 85.

The 2 Wm. 4, c. 4, s. 1, reciting sec. 1 of the 50 Geo. 3, c. 59, and that "it is expedient that further provision should be made with regard to embezzlement by persons employed in the public service of his Majesty," repeals so much of the said act as is therein recited, except as to any offences against the same committed before the passing of this act, which offences are to be dealt with and punished as if this act had not passed, and enacts, that "from and after the passing of this act (13th February, 1832) if any person employed in the public service of his Majesty, and entrusted by virtue of such employment, with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, every such offender shall be deemed to have stolen the same, and shall in England and Ireland be deemed guilty of felony, and in Scotland of a high crime and offence, and on being thereof convicted in due form of law shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned with or without hard labour, as to the court shall seem meet, for any term not exceeding three years."

2 Wm. 4, c. 4.

Persons in the public service embezzling any money or valuable securities, with which they are intrusted, to be deemed guilty of felony.

By sec. 2, "every tally, order, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, and every debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, and every warrant or order for the delivery or transfer of any goods or valuable thing, shall throughout this act be deemed for every purpose to be included under and denoted by the words "valuable security;" and that if any person so employed and entrusted as aforesaid shall embezzle or fraudulently apply or dispose of any such valuable security as aforesaid, he shall be deemed to have stolen the same within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which such security may relate, or with the money due on such security, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security."

What to be included under the words "valuable security."

By sec. 3, "it shall be lawful to charge in the indictment to be preferred against any offender under this act, and to proceed against him for any number of distinct acts of embezzlement or of fraudulent application or disposition as aforesaid, not exceeding three, which may have been committed by him within the space of six calendar months from the first to the last of such acts; and in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as it regards the description of the property, shall

Different acts of embezzlement may be charged in the same indictment.

As to allegation and proof of the property embezzled.

be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and although such part shall have been returned accordingly."

Property to be described as the king's.

By sec. 4, "in every such case of embezzlement or fraudulent application or disposition as aforesaid of any chattel, money, or valuable security, it shall be lawful in the order of committal by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender to lay the property of any such chattel, money, or valuable security as aforesaid in the King's Majesty."

Venue.

By sec. 5, "every offender against this act may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended, or in the county or place where he shall have committed the offence."

The indictment need not allege the embezzlement to have been whilst the prisoner was in the service of the crown.

An indictment upon this statute is sufficient, although it does not allege that the prisoner embezzled the money whilst he was employed in the public service. A count charged that the prisoner, being at a certain time and place a clerk employed in the public service of her Majesty, and by virtue of such employment entrusted with the receipt and custody of money the property of her Majesty, did then and there receive into his possession, by virtue of such employment as such clerk, certain money, the property, &c., and did then and there feloniously embezzle the same, and so did feloniously steal take and carry away the same; and it was objected that the count was bad, as it did not allege that the prisoner embezzled whilst he was such clerk; the allegation of his being clerk was confined to the fact of receiving the money, and did not necessarily extend to the time of the embezzlement. Coleridge, J., "I am clearly of opinion that the indictment is good; if the fact of the prisoner's continuing clerk be necessary to the offence, the indictment, grammatically taken, would perhaps contain a sufficient averment of that fact. But it is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the act. The statute, in its words, does not necessarily imply that he should embezzle whilst clerk or servant, and if it does so imply it, the indictment which pursues the same terms also implies it." (*g*)

Evidence of acting in the capacity of an officer employed by the crown is sufficient to support an indictment under this statute, and the appointment need not be regularly proved. (*h*)

(*g*) Reg. *v.* Lovell, 2 M. & Rob. 236. See this case, *ante*, p. 165, as to the point whether a servant of the crown be a servant within the 7 & 8 Geo. 4, c. 29, s. 46, 47.

(*h*) Rex *v.* Borrett, 6 C. & P. 124; Rex *v.* Townsend, 1 C. & M. 178. See these cases in the next chapter, p. 213.

CHAPTER THE TWENTY-FIRST.

OF LARCENY AND EMBEZZLEMENT BY PERSONS IN THE POST-OFFICE; OF STEALING LETTERS; AND OF SECRETING BAGS OR MAILS OF LETTERS.

THESE offences were formerly punished under the provisions of the 5 Geo. 3, c. 25; the 7 Geo. 3, c. 50; the 42 Geo. 3, c. 81, and the 52 Geo. 3, c. 143; but the 1 Vict. c. 32, after the 1st of August, 1837, repeals the whole of the 5 Geo. 3, c. 25, "except so much thereof as relates to the postage on letters and packets conveyed by the post within the British dominions in America and the West Indies, and to any felony or other offence committed within such dominions;" the whole of the 7 Geo. 3, c. 50, "except so much thereof as relates to any felony or other offence committed within the British dominions in America and the West Indies;" the whole of the 42 Geo. 3, c. 81; and so much of 52 Geo. 3, c. 143, "as relates to the post-office." And the punishment of these offences is now regulated by the 1 Vict. c. 36, which came into operation on the 1st of August, 1837. (*a*)

1 Vict. c. 36. Opening or delaying post letters a misdemeanor.

That statute, by sec. 25, enacts, "that every person employed by or under the post-office who shall, contrary to his duty, open or procure, or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet: provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland."

Proviso.

(*a*) The previous sections impose penalties on contravening the privilege of the post-office, retaining ship letters, abusing the privilege of newspapers, on masters of ships not taking letter bags, on carelessness and misconduct of persons engaged in conveying or delivering letter bags, letters, &c., on collectors of tolls demanding toll or stopping mails; and provide as to the mode of proceeding for recovery of the penalties, &c.

Embezzlement, &c., of any letter or packet, felony.

By sec. 26, "every person employed under the post-office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

Stealing money, &c., out of letters, felony.

By sec. 27, "every person who shall steal from or out of a post letter any chattel or money or valuable security, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

Stealing letter bags or letters sent by the mail, felony.

By sec. 28, "every person who shall steal a post letter bag, or a post letter from a post letter bag, or shall steal a post letter from a post-office, or from an officer of the post-office or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

Stealing letter bags or letters sent by packets felony.

By sec. 29, "every person who shall steal or unlawfully take away a post letter bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years."

Receiving property sent by the post and stolen or embezzled, felony.

Sec. 30, "with regard to receivers of property sent by the post and stolen therefrom," enacts, "that every person who shall receive any post letter or post letter bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the post-office acts, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be transported beyond the seas for life."

Fraudulently retaining after delivery by mistake, any letter, &c., and wilfully secreting, &c., any letters, &c., that have been lost, a misdemeanor.

Sec. 31, reciting that "post letters are sometimes by mistake delivered to the wrong person, and post letters and post letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward," enacts, "that every person who shall fraudulently retain, or shall wilfully secrete or keep or detain, or being required to deliver up by an officer of the post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same,

or by any other person, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment." (*b*)

Stealing, &c., any printed votes or proceedings in parliament, newspapers, &c., a misdemeanor.

Sec. 32, "for the protection of printed votes and proceedings in parliament and printed newspapers sent by the post," enacts, "that every person employed in the post-office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet." (*c*)

Principal in the second degree, and accessories, how to be punished.

By sec. 35, "in the case of every felony punishable under the post-office acts, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by the post-office acts punishable; and every accessory after the fact to any felony punishable under the post-office acts (except only a receiver of any property or thing stolen, taken, embezzled, or secreted,) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the post-office acts shall be liable to be indicted and punished as a principal offender."

Endeavouring to procure the commission of any crime.

By sec. 36, "every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the post-office acts shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

Venue.

Sec. 37, "for the more effectual prosecution of offences committed against the post-office acts," enacts, "that the offence of every offender against the post-office acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place, and if committed in Scotland either in the high court of justiciary at Edinburgh or in the circuit court of justiciary to be holden by the lords commissioners of justiciary within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody, as if his offence had been actually committed there; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter bag or post letter, or in respect of a post letter bag or post letter, or a chattel or money or valuable security sent by the post, such offence may be dealt with and

(*b*) This provision is similar to the 42 Geo. 3, c. 81, s. 4, (now repealed); and would meet such cases as Rex *v.* Mucklow, R. & M. C. C. R. 160, *ante* p. 58.

(*c*) Sec. 33 relates to forging the handwriting of the receiver-general in England or Ireland, and will be found in chap. 38; and sec. 34 relates to the forgery of franks.

inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter bag or the post letter, or the chattel, or the money, or the valuable security sent by the post in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony or high crime, and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried." (*d*)

Accessories in, felony; and persons aiding and counselling in, misdemeanor.

Admiralty jurisdiction.

By sec. 39, "where an offence punishable under the post-office acts shall be committed within the jurisdiction of the admiralty the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction."

Property sent by the post to be laid in the postmaster-general.

By sec. 40, "in every case where an offence shall be committed in respect of a post letter bag or a post letter, or a chattel, money, or a valuable security, sent by the post, it shall be lawful to lay in the indictment or criminal letters to be preferred against the offender the property of the post letter bag or of the post letter, or chattel or money or the valuable security sent by the post, in the post-master general; and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the post letter bag or any such post letter or valuable security was of any value; and in any indictment or in any criminal letters to be preferred against any person employed under the post-office for any offence committed against the post-office acts, it shall be lawful to state and

(*d*) Sec. 38 relates to bail in Scotland. It was formerly decided that an indictment for robbing a mail bag of letters must be laid in the county where the letters were actually taken, in order to bring the case within the statute 7 Geo. 3, c. 50, s. 2; and that it could not be laid in the county where the prisoner was only in possession of them; the jury having found that the letters were taken from the bag in some other county, through which the mail had passed. Thomas's case, O. B. 1794. 2 Leach, 634. 2 East, P. C. c. 16, s. 39, p. 605. It was argued in this case that there was a new taking and offence in the county where the prisoner had possession of the letters: but upon this it is observed that the statute 7 Geo. 3, c. 50, s. 2, did not make the stealing of letters generally a capital offence, but the stealing them from places particularly specified; which is a definite act, local in its nature, and cannot be extended, by construction, to a new taking in every county into which the thing stolen is conveyed, as in the case of simple larceny. 2 East, P. C. c. 16, s. 39, p. 606.

allege that such offender was employed under the post office of the united kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment."

Punishments.

By sec. 41, "every person convicted of any offence for which the punishment of transportation for life is herein awarded shall be liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every person convicted of any offence punishable according to the post office acts by transportation for fourteen years shall be liable to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years."

Power to award hard labour or solitary confinement.

By sec. 42, "where a person shall be convicted of an offence punishable under the post office acts for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and may also direct that he shall be kept in solitary confinement (*d*) for the whole or any portion of such imprisonment, as to the court shall seem meet." (*e*)

Interpretation clause.

Sec. 47, "for the interpretation of the post office laws," enacts, "that the following terms and expressions shall have the several interpretations herein-after respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found; (that is to say), the term *British letter* shall mean a letter transmitted within the united kingdom; and the term *British newspapers* shall mean newspapers printed and published in the united kingdom, liable to the stamp duty and duly stamped; and the term *British postage* shall mean the duty chargeable on letters transmitted by post from place to place within the united kingdom, or if transmitted to or from the united kingdom, chargeable for the distance which they shall be transmitted within the united kingdom, and including also the packet postage, if any; and the term *Colonial letter* shall mean a letter transmitted between any of her Majesty's colonies and the united kingdom; and the term *Colonial newspapers* shall mean newspapers printed and published in any of her Majesty's dominions out of the united kingdom; and the term *convention posts* shall mean posts established by the postmaster general under agreements with the inhabitants of any places; and the term *double letter* shall mean a letter having one inclosure; and the term *double postage* shall mean twice the amount of single postage; and the term *East Indies* shall mean every port and place within the territorial acquisitions now vested in the East India company in trust for her Majesty, and every other port or place within the limits of the charter of the said company (China excepted), and shall also include the Cape of Good Hope; and the term *express* shall mean every kind of conveyance employed to carry letters on behalf of the post office other than the usual mail; and the term *foreign country* shall mean any country, state, or kingdom not included

(*d*) By the 1 Vict. c. 90, s. 5, "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of a year."

(*e*) Sec. 43 gives a power of distress for the recovery of sums due for postage, not exceeding 20*l.* in the united kingdom or elsewhere in her Majesty's dominions. Sec. 44 provides in what way duties for postage may be sued for. Sec. 45 gives the forms of conviction, &c. Sec. 46 regulates the mode of proceeding in actions.

in the dominions of her Majesty; and the term *foreign letter* shall mean a letter transmitted to or from a foreign country; and the term *foreign newspapers* shall mean newspapers printed and published in a foreign country in the language of that country; and the term *foreign postage* shall mean the duty charged for the conveyance of letters within such foreign country; and the term *franking officer* shall mean the person appointed to frank the official correspondence of offices to which the priviledge of franking is granted; and the term *her Majesty* shall mean *her Majesty, her heirs and successors;* and the term *her Majesty's colonies* shall include every port and place within the territorial acquisitions now vested in the East India company in trust for her Majesty, the Cape of Good Hope, the Islands of Saint Helena, Guernsey, Jersey, and Isle of Man, (unless any such places be expressly excepted,) as well as her Majesty's other colonies and possessions beyond seas; and the term *inland postage* shall mean the duty charged for the transmission of post letters within the limits of the united kingdom or within the limits of any colony; and the term *letter* shall include packet, and the term *packet* shall include letter; and the expression *Lord Lieutenant of Ireland* shall mean the chief govenor or governors of Ireland for the time being; and the expression *lords of the treasury* shall mean the lord high treasurer of the united kingdom of Great Britain and Ireland, or the lords commissioners of her Majesty's treasury of the united kingdom of Great Britain and Ireland, or any three or more of them; and the term *mail* shall include every conveyance by which post letters are carried, whether it be a coach or cart or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term *packet boat;* and the term *mail bag* shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed whether it does or does not contain post letters; and the term *master of a vessel* shall include any person in charge of a vessel whether commander, mate, or other person, and whether the vessel be a ship of war or other vessel; and the expression *officer of the post office* shall include the postmaster general, and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post boy, rider, or any other person employed in any business of the post office, whether employed by the postmaster general, or by any person under him or on behalf of the post office; and the term *packet postage* shall mean the postage chargeable for the transmission of letters by packet boats between Great Britain and Ireland, or between the united kingdom and any of her Majesty's colonies, or between the united kingdom and foreign countries; and the term *packet letter* shall mean a letter transmitted by a packet boat; and the term *penalty* shall include every pecuniary penalty or forfeiture; and the expression *persons employed by or under the post office* shall include every person employed in any business of the post office according to the interpretation given to officer of the post office; and the terms *packet boats* and *post office packets* shall include vessels employed by or under the post office or the admiralty for the transmission of post letters, and also ships or vessels (though not regularly employed as packet boats) for the conveyance of post letters under contract, and also a ship of war or other vessel in the service of her Majesty, in respect of letters conveyed by it; and the term *postage* shall mean the duty chargeable for the transmission of post letters; and the

term *post town* shall mean a town where a post office is established (not being a penny or twopenny or convention post office); and the term *post letter bag* shall include a mail bag or box, or packet or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters; and the term *post letter* shall mean any letter or packet transmitted by the post under the authority of the postmaster general, and a letter shall be deemed a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter carrier or other person authorized to receive letters for the post shall be a delivery to the post office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent or other person considered to be authorized to receive the letter according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed; and the term *post office* shall mean any house, building, room, or place where post letters are received or delivered, or in which they are sorted, made up, or despatched; and the term *postmaster general* shall mean any person or body of persons executing the office of postmaster general for the time being, having been duly appointed to the office by her Majesty; and the terms *post office acts* and *post office laws* shall mean all acts relating to the management of the post, or to the establishment of the post office, or to postage duties, from time to time in force; and the term *ships* shall include vessels other than packet boats; and the term *single postage* shall mean the postage chargeable for a single letter; and the term *single letter* shall mean a letter consisting of one sheet or piece of paper, and under the weight of an ounce; and the term *sea postage* shall mean the duty chargeable for the conveyance of letters by sea by vessels not packet boats; and the term *ship letter* shall mean a letter transmitted inwards or outwards over seas by a vessel not being a packet boat; and the term *treble letter* shall mean a letter consisting of more than two sheets or pieces of paper, whatever the number, under the weight of an ounce; and the term *treble postage* shall mean three times the amount of single postage; and the term *treble the duty of postage* shall mean three times the amount of the postage to which the letter to be charged would otherwise have been liable according to the rates of postage chargeable on letters; and the term *united kingdom* shall mean the united kingdom of Great Britain and Ireland; and the term *valuable security* shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; and the term *vessel* shall include any ship or other vessel not a post-office packet; and whenever the term *between* is used in reference to the transmission of letters, newspapers, parliamentary proceedings, or other things between one place and another, it shall apply equally to the transmis-

sion from either place to the other; and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this act or the schedules thereto, with reference to any person or matter or thing, or to any persons, matters, or things, the singular or plural number or the masculine gender only is expressed, such expression shall be understood to include several persons or matters or things as well as one person or matter or thing, and one person, matter, or thing as well as several persons or matters or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction."

Where provisions of act shall extend to.

By sec. 48, the act extends to "the islands of Man, Jersey, Guernsey, Sark, and Alderney, and all her Majesty's colonies and dominions where any post or post communication is established under the postmaster general of the united kingdom."

The 52 Geo. 3, c. 143, related to the embezzling, &c., of any part of a bank note, &c.

The 52 Geo. 3, c. 143, (now repealed) related expressly to the embezzling and stealing the whole or *any part* of a bank note, &c. The former statute, 7 Geo. 3, c. 50, was not equally extensive; but it was holden that a letter-carrier secreting half a bank-note in one letter on one day, and the other half in another letter on another day, was guilty of a secreting within that statute. (*f*) And the 42 Geo. 3, c. 81, s. 2, extended the provisions of the 7 Geo. 3, c. 50, to the protection of any *parts* of the securities or instruments therein mentioned. (*g*)

Construction of the 7 Geo. 3, c. 50.

Some of the cases decided upon the 7 Geo. 3, c. 50, and 52 Geo. 3, c. 143, may be useful in the construction of the similar provisions of the new statute.

It is sufficient to prove that the prisoner acted in the capacity charged in the indictment.

It was holden upon an indictment on the 7 Geo. 3, c. 50, charging the prisoner, as a servant to the post office, with embezzling a letter containing a bill of exchange, that it was not necessary to prove that he had taken the oath required by the statute 9 Anne, c. 10, s. 41. (*h*) It was objected, that as he had not taken the oath, he could not be considered as a legal servant to the post office; but the objection, being submitted to the consideration of the twelve Judges, was overruled. (*i*)

It has been held in several cases that it is sufficient to prove that the prisoner acted in the capacity charged in the indictment. Thus where husband and wife were indicted on the 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, and it was proved by the postmaster of Carmarthen that he had appointed the husband postmaster of Ferryside, and that that appointment was sanctioned by the postmaster general, and that the husband had been postmaster for three years; it was submitted that to support the indictment against the wife she must be employed by or under

(*f*) Rex *v.* Moore, O. B. 1792, 2 Leach, 575. 2 East, P. C. c. 16, s. 22, p. 582.

(*g*) See the interpretation clause, *ante*, p. 210.

(*h*) That statute enacted, that no person should be capable of exercising any employment relating to the post office, &c., unless he should have first taken an oath therein mentioned. But no penalty was annexed to the omission.

(*i*) Clay's case, York Lent Ass. 1784, East. T. 1784, 2 East, P. C. c. 16, s. 21, p. 580. 1 Leach, 3, note (*a*). The prisoner was acquitted on one indictment, on the supposed validity of the objection, that he had not taken the oath: but other indictments having been preferred against him for similar offences, it was thought necessary to take the opinion of the judges on the point.

the post office, and in this case she merely acted as the assistant of her husband in his absence; and with respect to the husband the written appointment ought to have been produced; but Parke, B., held it was sufficient to shew that the prisoners had acted as servants of the post office. (*j*) So where the prisoner was indicted under the 2 Wm. 4, c. 4, as a person employed in the public service of his Majesty, for embezzling the overcharge of a letter, and no evidence was offered of his appointment, as a letter-carrier, but it was proved that he acted as such; this was held to be sufficient. (*k*) So where the prisoner, who was indicted under the same statute, was a letter-carrier employed by the post office to deliver letters about Gloucester, and had been in the habit of calling at the lodge of the Gloucester Infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the Gloucester post office; but he sometimes omitted to call at the lodge, and then the letters were taken by some person and put in the post office; and during the time he had been ill, another person, who performed his duties, had also called at the lodge and received the letters and the pennies, and delivered them at the post office in the same way as the prisoner. Evidence was also given to shew that the prisoner had embezzled pence received at the lodge to prepay letters. It was admitted that proving that the prisoner acted as a letter-carrier was sufficient to shew that he held that situation, but it was urged that where the charge was of embezzling money received by virtue of his employment, it must be shewn that it was the duty of the prisoner to receive the money, and in this case it was his mere voluntary act, and he was neither bound to go to the lodge nor to receive the letters; but it was held that there was evidence to go to the jury that the pence were received by virtue of the prisoner's employment. (*l*)

Servants of the post office.

It was held that a person, employed as a servant to clean boots and shoes, &c., by a law-stationer at a receiving-house of the general post office in Middle Temple Lane, and who used to assist in tying up and sealing the post office bag, was not a person "employed by or under the post office," within the meaning of the 52 Geo. 3, c. 143. (*ll*)

But where a postmistress employed the prisoner at a salary of 14*s.* a-week to carry the letter-bag from Dursley to Berkeley, and she was allowed by the post office, in her quarterly account, the sums she paid him; but the prisoner never sorted the letters or opened any mail bag; it was held that he was a person in the employ of the post office. (*m*)

Willoughby's case. Holden that a bill of exchange might be laid as a warrant for the payment of money

It was decided on the 7 Geo. 3, c. 50, that a bill of exchange might be laid in the indictment as a warrant for the payment of money. The prisoner, a clerk employed in the post office at Birmingham, was charged in the indictment with stealing from a letter a certain *warrant for the payment of money;* and it was objected on his behalf that the instrument in question was not, according to the true construction of the statute, a warrant for the payment of money,

(*j*) Rex *v.* Rees, 6 C. & P. 606.
(*k*) Rex *v.* Borrett, 6 C. & P. 124.
(*l*) Reg. *v.* Townsend, 1 C. & M. 178. See also Goodwin's case, 1 Lew. 100.
(*ll*) Rex *v.* Pearson, 4 C. & P. 572, Littledale and Bosanquet, J.'s
(*m*) Rex *v.* Salisbury, 5 C. & P. 155, Patteson, J.

within the 7 Geo 3, c. 50.

but a post-bill, note, or bill of exchange. (*n*) The prisoner having been found guilty, this point was submitted to the consideration of the Judges. Three of the Judges doubted, at first, whether the instrument could be considered as a warrant within the meaning of the statute; for as the statute enumerated specific things, and expressly mentioned bills of exchange, they thought that the words "other warrant" must mean something besides a bill of exchange, (such as warrants from some of the public boards for payment of money) but they afterwards admitted that the case could not be distinguished from a case of forgery, where an indictment laid in the same manner was holden good; (*o*) and they ultimately appeared to be satisfied as to the indictment in the present case. The other nine Judges were clear, that the indictment was well laid; as the instrument, though it was a bill of exchange, was also a warrant for the payment of money, that it was a voucher to the bankers, or drawees, if genuine for the payment, and that it might also have been laid as a draft. (*p*)

Pooley's case. Where a draft purporting to be drawn in London, but in fact drawn at Maidstone, without any stamp on it, contrary to a stamp act, was taken by a servant of the post-office out of a letter entrusted to his care, it was holden that this was not a draft for the payment of money within 7 Geo. 3, c. 50.

In a case where the indictment charged the prisoner, as a person employed in sorting letters in the post-office, with secreting a letter, containing a draft purporting to be drawn in London, but which appeared upon the evidence to have been drawn at Maidstone, *without having any stamp* upon it, contrary to the 31 Geo. 3, c. 25, s. 4, it was holden that this was not a draft for the payment of money within the 7 Geo. 3, c. 50, s. 1. The objections submitted on behalf of the prisoner at the trial were, first, that a draft on a banker or bill of exchange not stamped pursuant to the directions of the 31 Geo. 3, c. 25, and 37 Geo. 3, c. 136, could not be received in evidence for any purpose; but if, on the authority of decided cases, it should be thought admissible, then, secondly, that such a draft or bill of exchange, if it could be so called, could not be the subject of larceny, inasmuch as it could not be of any value whatever; and, thirdly, that being so invalid, it could not be considered as a security for the payment of money within the 2 Geo. 3, c. 25, s. 3, the secreting of which, when sent in a letter, came within the meaning of the 7 Geo. 3, c. 50. The note was, however, received in evidence by the court; and the jury found the prisoner guilty. But the case was reserved for the consideration of the twelve Judges, and argued before them at considerable length. It was contended, on behalf of the prisoner, that the paper writing in question, purporting to be a draft for payment of money, was not in law a draft for payment of money, within the 7 Geo. 3, c. 50, inasmuch as it was not stamped pursuant to the stamp acts; (*q*) and that, being unstamped, it was not a chose in action, the stealing of which could be the subject of larceny within the 2 Geo. 2, c. 25, s. 3, (*r*) for without a stamp it was of no value.

(*n*) It was in the following form:—

Post Bill.

No. 6127.

Birmingham, 13th Feb. 1783.

Sir Wm. Lemon, Bt. and Co., bankers, London, pay 5 Gs. to Mr. Richd. Moore or bearer, on dem^d. value rec^d.

Robt. Coales.

Five Gs.

Entd. R Moore.

As to this being a post bill, it was observed, that the words of the act were "*Bank* post bill."

(*o*) Shepherd's case, Mich. T. 1781. 2 East, P. C. c. 16, s 22, p. 582.

(*p*) Willoughby's case, Warwick Lent Ass. 1783, East. T. 1783. 2 East, P. C. c. 16, s. 22, p. 581.

(*q*) 31 Geo. 3, c. 25, and 37 Geo. 3, c. 136.

(*r*) Repealed by 1 Wm. 4, c. 66, s.31.

That the 7 Geo. 3, c. 50, either creates a new felony, or takes away the benefit of clergy from an old offence; and that, in either case, the instrument secreted or stolen must be of some value; whereas the draft in question was of no legal value, being a draft drawn contrary to the directions of the Legislature, who by the stamp act had declared that a draft so drawn should not "be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available, in law or equity." (*s*) And several cases of forgery were cited, in which it had been holden, that a forged order for the payment of money, or delivery of goods, must be such as, if genuine, would be compulsory, and might be legally enforced. (*t*) It was also argued, that even if the paper writing in question were admissible in evidence on this indictment, though not stamped according to the directions of the statute, yet that it did not prove the allegation in the indictment that the said draft "then and there was *in force*, and the property of, &c., and the sum of money made payable and secured thereby unsatisfied;" that this allegation was material and not proved, but on the contrary absolutely negatived by the evidence; inasmuch as, for want of a stamp, the writing in question appeared to be an instrument which could not be *enforced*, which could not import any property in the drawer, which could not secure any sum of money, and on which of course nothing could be due and unsatisfied. For the crown it was contended, that though a draft not stamped cannot be given in evidence in any action brought thereon to recover its value, yet that it is not void and of no effect to all intents and purposes; and cases were cited in which it was decided that a forged draft drawn on unstamped paper may be given in evidence, not only on an indictment for forgery, but in an action for the recovery of the penalty. (*u*) That though in case the indictment had been framed for larceny, on the 2 Geo. 2, c. 25, it might have been questionable whether the prisoner could have been legally convicted, as that statute does not mention "*a draft for the payment of money*" *eo nomine*, and as the instruments therein enumerated are such as, by retaining a value, may be legally in force for the money due and unsatisfied upon them; yet in this case, as the indictment was framed entirely upon the 7 Geo. 3, c. 50, it charged an offence quite different and distinct from that of stealing a chose in action under the 2 Geo. 2, c. 25; the object of the Legislature in passing the later statute 7 Geo. 3, c. 50, being to secure the conveyance of every instrument, whether immediately valuable or not, that might be sent by the post, and to protect the revenue arising from the postage of letters; and the two statutes being therefore made with different objects in view, and not *in pari materiâ*. And with respect to the objection, that the allegation in the indictment that the draft "was *in force*" was not proved

(*s*) 31 Geo. 3, c. 25.

(*t*) Mitchell's case, Fost. 119. Lockett's case, 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940. Williams's case, 1 Leach, 114. 2 East, P. C. c. 19, s. 37, p. 937. Ellor's case, 1 Leach, 323. 2 East, P. C. c. 19, s. 37, p. 938. Clinch's case, 1 Leach, 540. 2 East, P. C. ibid., and Moffatt's case, 1 Leach, 431. 2 East, P. C. c. 19, s. 45, p. 954.

(*u*) Hawkeswood's case, 1 Leach, 257. 2 East, P. C. c. 19, s. 45, p. 955. Reculist's case, 2 Leach, 703. 2 East, P. C. c. 19, s. 45, p. 956. And it was observed that Moffatt's case, *ante*, note (*t*), proceeded upon the words of 15 Geo. 3, c. 51, and 17 Geo. 3, c. 30, which enact, that all notes drawn contrary to the directions of those acts *shall be void*. For the cases on this subject see *post*, chap. on *Forgery*.

it was answered that it was an unnecessary allegation, and need not be proved. In the course of the argument Lord Eldon, C. J., observed, that the Legislature had not made it felony to secrete any letter, but to secrete any letter containing any of the particular securities specified in the statute. (*v*) The Judges were all of opinion that the conviction was wrong; that the draft not being stamped was of no value, nor in any way available, and therefore was not a bill or draft within the act. (*w*)

In a case were the letter embezzled was described as having contained several notes, it was held to be sufficient to prove that it contained any one of them; and also that if the instrument is upon the face of it, a note, the maker's signature need not be proved. In the same case it was also held, that upon an indictment stating the prisoner to have been employed in two branches of the post office proof of his having been employed in either is sufficient. (*x*)

Ranson's case. Secreting a letter containing the *paid notes* of a country bank, holden to be within the 7 Geo. 3, c, 50.

A case has been mentioned in a former part of this work, (*y*) where upon an indictment on the first section of the 7 Geo. 3, c. 50, it was holden, that a servant of the post office, employed as a facer of letters, who secreted a letter containing the *paid-notes* of a country bank, which were in the course of being conveyed from the London bankers, who paid them, to the country bankers, for the purpose of being re-issued, had committed an offence within the statute; as the notes, though not re-issued, were considered as retaining the character and falling within the description of promissory notes. (*z*)

A person indicted in two counts as a charger and sorter, and in two other counts, as "a person employed in the post office," and acquitted on the counts in which he was indicted as a charger and sorter, cannot be convicted on the other two counts.

Upon an indictment on the 7 Geo. 3, c. 50, the charge was laid against the prisoner, in the first and third counts, as a person "employed in sorting and charging letters in the post office;" and in the second and fourth counts as a person "employed in the business relating to the General Post office;" and upon the evidence it appeared, that the prisoner was only a sorter and not a charger of letters, whereupon the jury were directed to convict him on the second and fourth counts only. But an objection was afterwards taken that, as the prisoner had been acquitted on the counts which charged him as a sorter and charger, and he did not appear to be a person employed by the post office in any other business but that of sorting, which is one of the employments particularly specified in the statute, he could not be convicted on the second and fourth counts. And this objection being submitted to the consideration of the Judges, they thought the objection valid: but they inclined to think that the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. (*a*)

Dawson's case. Points

Where an indictment upon the 7 Geo. 3, c. 50, s. 1, charged the prisoner, as a person employed in the business of the post office as a

(*v*) And in 2 Leach, 909, note (*a*), it is observed, that there does not appear to be any clause in either of the more recent statutes 42 Geo. 3, c. 81, or 52 Geo. 3, c. 143, by which a servant of the post office, who is entrusted with a letter, may be punished for secreting, embezzling, or stealing such letter, unless it contains some, or one, or part of the securities mentioned in the statutes.

(*w*) Pooley's case, 2 Leach, 887. 3 Bos. & Pull. 311. Russ & Ry. 13. See Rex v. Yates, R. & M. C. C. R. 170, *ante*, p. 79.

(*x*) Rex v. Ellins, Mich. T. 1810, Russ. & Ry. 188.

(*y*) *Ante*, p. 79.

(*z*) Ranson's case, 2 Leach, 1090, Russ. & Ry. 232. And see Clarke's case, *ante*, p. 74.

(*a*) Shaw's case, O. B. 1771, *cor.* the Recorder, and Mich. T. 12 Geo. 3. 2 Black. Rep. 789. 2 East, P. C. c. 16, s 21, p. 580. 1 Leach, 79.

post-boy, &c. with secreting, &c. certain bills of exchange, contained in a letter sent by the post, which came to his possession in his said employment, it was holden not to be a variance, to describe such letter in the indictment as one "to be delivered to *Messrs.* B., N., and H.;" as the word *Messrs.* was frequently added to their address in the direction of letters, and other papers received on business, though the parties themselves, in drawing or indorsing bills, making out invoices &c. wrote B., N., and H., without ever adding *Messrs.* as part of their description. And it was considered that the acceptance of bills, directed to them in that manner, would be a using of that firm. It was also holden to be sufficient to allege, in part description of the bills so secreted and stolen, that they were subscribed by A. and B., without saying that they were drawn or made by them. (*b*)

as to the description of the letter, and of the bills secreted.

Where an indictment on the 52 Geo. 3, c. 143, alleged that a letter was "to be delivered to a certain person at Turvey," and the letter was directed to Mr. P. at Turvey-house, which was in the parish of Turvey about a quarter of a mile from the village of that name, it was held sufficient; for if it was to be delivered at Turvey-house that was a delivery at Turvey, as Turvey-house was in the parish of Turvey. (*c*)

Evidence.

Though the post office marks in town or country, proved to be such, are evidence that the letters, on which they appear, were in the office to which those marks belong at the dates which they specified; yet a mark of double postage having been paid on a letter is not of itself evidence that the letter contained an enclosure. Upon a case reserved, the Judges held a conviction wrong, on the ground that there was not sufficient evidence of a double letter having been put into the post office; the clerk who put it into the office, paid the postage, and wrote "post paid 2*s.*," not having been called. (*d*)

Embezzling the postage of letters.

The offence of embezzling monies received for the postage of letters was made punishable by the 5 Geo. 3, c. 25, s. 19, and the 7 Geo. 3, c. 50, s. 3. But these statutes are repealed by the 1 Vict. c. 32, and the 1 Vict. c. 36, contains no provisions for the embezzlement of monies received for postage. (*e*)

Sloper's case. Secreting a letter with intent to embezzle the postage.

In a case where the prisoner was indicted for secreting a letter, containing a bank-note for ten pounds, the jury found specially that the prisoner was an officer employed in the business of the post office, in stamping and facing letters; that he secreted the letter in question, while in the execution of his office, without opening it, and without knowing that the ten pound bank-note was contained in it; and that he secreted it with intent to defraud the king of the postage thereof, which had been paid. The determination of the Judges, upon this case, was never communicated. (*f*) But it is suggested that the case

(*b*) Dawson's case, *cor.* Chambre, J., Lancaster Spr. Ass. 1801, and before the Judges, Trin. T. 1801. 2 East, P. C. c. 16, s. 39, p. 605.

(*c*) Rex *v.* Pearson, 4 C. & P. 572, Littledale and Bosanquet, Js.

(*d*) Rex *v.* Plumer, Hil. T. 1814, Russ. & Ry. 264. It seems to have been considered also in this case, that though a letter found upon the prisoner might properly be read, it was not evidence of the facts stated in it, and that such facts must, therefore, be proved by other evidence.

(*e*) The practice recently has been to indict in such cases under the 2 Wm. 4, c. 4, *ante*, p. 203.

(*f*) Sloper's case, *cor.* Blackstone, J., O. B. 1772. 2 East, P. C. c. 16, s. 23, p. 583. 1 Leach, 81, in which last authority it is said that the prisoner remained in Newgate till July, 1777; and that in the following session, Sept. 1777, there was no account of him.

seems to fall within one of the offences provided for by the 5 Geo. 3, c. 25, s. 19; though some difficulty might have arisen in bringing it within the corresponding clause, 7 Geo. 3, c. 50, s. 3, because it appeared that the letter had not been destroyed, but was found in the prisoner's custody. (*f*)

Pearce's case. The prisoner obtained the mail bags fraudulently by the delivery of a person in the post office to him, while on the outside; and it was holden to be a stealing out of the post office.

In a case upon the 7 Geo. 3, c. 50, s. 2, it appeared that the prisoner, intending to steal the mail bags, went one night, about the usual time, to the post-office at High Wycombe; and, pretending to be the mail guard, obtained, from the person who was there, the bags of letters, which were let down to him from out of the window of the post office by a string, from whence he took them, and immediately made off. Upon these facts the prisoner was convicted on a count in the indictment for stealing the letters out of the post office; and the case being submitted to the consideration of the twelve Judges, they were all of opinion that the conviction was right; and that the artifice of the prisoner, in obtaining the delivery of the letters, in the bag, out of the house, was the same as if he had actually taken them out himself. (*g*) In this case the property did not pass; as the postmaster had no property in the mail bags to part with. (*h*)

Servants of the post office may be convicted of stealing out of the post office.

It was supposed to have been decided that the second section of the 7 Geo. 3, c. 50, did not extend to servants of the post office. (*i*) But the report of such decision has been mentioned as incorrect. And it is clear that a person might be convicted under the third section of the 52 Geo. 3, c. 143, for stealing a letter, though such person had an employment in the post office, especially if such letter did not come to him in the course of his employment. The prisoner was employed by the post office to deliver letters, and not to sort them; but he did sort them, when regularly he ought not to have done so, and, whilst sorting, stole a letter. The indictment charged him as a sorter with secreting, and as a common person (under sec. 3, of the 52 Geo. 3,) with stealing: but as it appeared that he ought not to have been allowed to sort, he was acquitted of secreting, and it was then urged that he could not be convicted under the third section, because he was a person employed in the post office, and the case of *Rex* v. *Pooley* was cited. A case being reserved, the Judges stated that the report of *Rex* v. *Pooley* was as to the point in question mistaken; that *Rex* v. *Simpson, cor.* Lord Ellenborough, Thomson, B., and Lawrence, J., O. B. 1810, was in point the other way; that a man who stole was not less a person stealing because he had some employment in the office; and that upon a contrary construction if a person in the office stole, but not in the course of his employment, he would be unpunishable. (*j*)

Howatt's case. Holden that

Previously to the last case it had been holden that a letter-carrier taking letters out of the post-office, intending to deliver them to the

(*f*) 2 East, P. C. c. 16, s. 23, p. 583; and see Howatt's case, *infra*.

(*g*) Pearce's case, Hil. T. 1793. 2 East, P. C. c. 16, s. 39, p. 603.

(*h*) This was noticed as differing the case from that of Atkinson, 2 East, P. C. c. 16, s. 104, p. 673. *Ante*, p. 34.

(*i*) Rex *v.* Pooley, Russ. & Ry. 31. 2 Leach, 904. 1 East, P. C. *Addenda*, xvii. 3 Bos. & Pul. 315. Skutt's case, O. B. July Sess. 1774, as stated in Pooley's case, 2 Leach, 904. A different objection is mentioned as the ground of the acquittal in Skutt's case in another report of it (1 Leach, 106. 2 East, P. C. c. 16, s. 22, p. 582,) namely, that the letters contained *money*, and not any security relating to the payment of money mentioned in the statute.

(*j*) Rex *v.* Brown, East. T. 1817, MS. Bayley, J., and Russ. & Ry. 32, note (*a*). And see Rex *v.* Salisbury, 5 C. & P. 155, where Patteson, J., held that a letter carrier might be convicted of stealing a letter out of a post office upon an indictment under the 52 Geo. 3, c. 143.

owners, but to *embezzle the postage*, was not indictable for stealing such letters, under the second section of the 7 Geo. 3, c. 50. The prisoner was a letter-carrier at the post-office, at Manchester; he contrived to obtain possession of the letters in question before they were counted out, and delivered to him, by any of the clerks, in the usual way; and he was detected with them in his pocket, in the letter-carrier's room, which was near to the clerk's office. But it appeared from circumstances, and the jury so found, when they convicted him of the offence of stealing the letters, "that he intended to have delivered the letters, and only to have embezzled the postage." Upon the case being afterwards submitted to the consideration of the twelve Judges, two of them, at first, suggested that as the act of the prisoner deprived the crown of its lien, though there were no intention to defraud the true owner, it was as much larceny as stealing from a pawn-broker; and that the clause in question was positive, without adverting to the view with which the act was done. On the other hand it was observed that the two first clauses of the statute, sec. 1 and 2, respected the safe carriage of letters, and seemed to be confined, as appeared further by the preamble, to a taking to the prejudice of the owner: and that the third clause, sec. 3, was for the protection of the revenue; which went to shew that the Legislature did not mean to protect the revenue by the antecedent clauses. And it was also observed that if the letters had been so taken by those to whom they were directed, it would not have been within the clause under consideration: though, if it were a question of larceny at common law, it would be equally larceny in the owner. And this being an indictment on the statute, and not for taking the goods of such an one, as charged in an indictment for stealing the goods of a bailee, all the Judges ultimately agreed that the conviction was wrong, on the finding of the jury, which negatived a stealing within the act. (*k*)

a letter-carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, was not indictable under the 7 Geo. 3, c. 50, s. 2.

Secreting a letter containing a bill of exchange was not within the 52 Geo. 3, c. 143, s. 2, if the object was to deliver the letter with its contents, but to cheat the revenue of the postage. The first count stated the prisoner to be employed in stamping letters, and that he secreted a letter containing bills of exchange. The second count charged the prisoner with stealing the bills. The prisoner was a stamper in the London post-office, and having been seen slip a letter into his coat pocket, was desired to empty his pocket, which he did, and thereout produced eight letters, one of which was the letter stated in the indictment; it was a letter written from America, and put in the post-office at Liverpool marked "Liverpool ship letter:" from whence it arrived that morning, directed "Mr. Samuel Williams, 13, Finsbury Square." It was and had been taxed as a double letter, and the sum of three shillings and twopence marked upon it as the amount of postage, and had been afterwards stamped by the prisoner, whose duty it was, after stamping it, to deliver it to the sorter. The other seven letters were single letters, and it was sworn that they could be of no use to the prisoner, but to enable him to receive the postage. When the prisoner produced the letters, he was asked if he had any explanation to give, and he said he had taken them to *cog*, which is a cant phrase for taking them as missorted letters to get

Secreting a letter in order to obtain the postage was not a secreting within the 52 Geo. 3, c. 143, if the object was to deliver the letter, and embezzle the postage.

(*k*) Howatt's case, Lancaster Sum. Ass. 1795, and Mich. T. 1795. 2 East, P. C. c. 16, s. 39, p. 604.

the postage. The jury found the prisoner guilty, but added that they thought the secreting the letter was only for the purpose of appropriating the postage; and, upon a case reserved, the Judges were of opinion that as the statute extended to such letters only as contained valuable documents, the security of the documents was the object contemplated by the Legislature, and as the prisoner had no intention to put these documents in hazard, or to prevent the person for whom they were intended from receiving them, the case, though within the letter, was not within the spirit of the act, and the conviction was therefore wrong. (*n*)

"Receiving house." Post office, and stealing from and out of a post office.

The 52 Geo. 3, c. 143, s. 3, made it felony to steal "from or out of any post office or house or place for the receipt or delivery of letters;" and under that act it was held that a receiving house was not a "post office," but "a place for the receipt of letters," and that the whole shop and not merely the letter-box was to be considered "a place for the receipt of letters"; and that in order to constitute a stealing from or out of such place the letter must be carried out of the shop, and therefore, if a person took a letter and stole its contents in the shop, that was not an offence within that section of the act. The indictment in some counts charged the prisoner with stealing a letter from and out of a certain post office, and it appeared that the prisoner was servant of Mr. Abram, a law stationer, at a shop in Middle Temple lane, which was a receiving house of the general post office. The letter in question was taken to Mr. Abram's shop, but whether it was put into the letter-box, or given to a person in Mr. Abram's shop was not clearly proved. One of the notes contained in the letter was afterwards found in a boot, in a room of a house opposite to Mr. Abram's shop, and the prisoner acknowledged having put this note into the boot: it was held that this shop was not a post office within the meaning of the act; but that it was "a place for the receipt of letters"; that the whole room was the place for receiving letters and not the mere box, and that if a person went into the shop and laid a letter on the counter, that was sufficient: but that in order to convict the prisoner of stealing the letter out of the post office the jury must be satisfied that he took the letter out of the shop, and it was not sufficient if he opened it in the shop and took its contents out in the shop. (*o*)

Pigeon-holes for private letters in a post office.

It has been held that letters put into pigeon-holes in a post office for private individuals are still within the post office. On an indictment on the 52 Geo. 3, c. 143, for stealing letters from the post office at Liverpool, it appeared that at that post office there is a set of pigeon-holes, into which letters for certain merchants, who pay to the post-master a guinea a year, were placed immediately on their arrival; and by this means those merchants were enabled to get those letters sooner than they otherwise would do; it was objected, that as soon as the letters were deposited in the pigeon-holes they ceased to be in the post office, and consequently, that the indictment for stealing from the post office could not be sustained; but the objection was overruled. (*p*)

(*n*) Rex *v.* Sharpe, R. & M. C. C. R. 125. Sec. 26 of the 1 Vict. c. 36, seems framed to meet this and the preceding case, as it makes the offence to secrete, "for any purpose whatever," a post letter, without reference to its contents. C. S, G.

(*o*) Rex *v.* Pearson, 4 C. & P. 572. Littledale and Bosanquet, Js.

(*p*) Brett's case, 1 Lew. 228, Vaughan, B.

The 52 Geo. 3, c. 143, s. 2, contained two clauses one relating to letters &c. with which persons employed under the post office had been "entrusted in consequence of such employment," the other relating to letters, &c. which in any other manner came into the possession of such persons "whilst so employed." The prisoner, who was indicted under this act for stealing a letter from the post office at Dursley, was employed by the post-mistress at Dursley to carry letters from Dursley to Berkeley, and the evidence tended to show that he had stolen a letter, sent from Cardiff and directed to Dudley, but which had been missent to Dursley. Patteson, J., "I think this letter cannot be said to have come to his hands in consequence of his employment, because he, as a letter carrier from Dursley to Berkeley, would not have a letter addressed from Cardiff to Dudley come to his hands in the course of his duty. However the second section of the act goes on 'whilst so employed.' The question then is, whether those words relate to time only, or whether they make it essential that the letter should come to his hands in the course of his duty. I am inclined to think that they relate merely to time, because the words 'in consequence of such employment' are used in another part of the section." (*q*)

Under the 52 Geo. 3, c. 143, s. 3, which provided for the stealing mail bags, &c. from "any carriage or from the possession of any person employed to convey letters," in a case where a mail rider had fixed the mail portmanteau on the saddle of his horse, containing four bags of letters, and had slung the bridle of his horse on a staple at the stable-door of the post office about thirty yards from the door of the house, and then went into the house to put on his great coat, and staid about two minutes, and in the interval the robbery took place; it was held to be a stealing from the possession of the mail rider. (*r*)

A draft or check on unstamped paper may be received in evidence, for collateral purposes,—as to prove the stealing, &c.

In a case upon the 7 Geo. 3, c. 50, s. 2, where it appeared that the check or draft which the prisoner had taken out of the letter was drawn on unstamped paper, it was objected on behalf of the prisoner that it could not be received in evidence, even as a medium to show that he had stolen the letter; but the court overruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of recovering the money contained in it. And they relied upon the cases in which it had been decided that such an instrument might be given in evidence on an indictment for forging it, or in an action to recover the penalty. (*s*)

(*q*) Rex *v.* Salisbury, 5 C. & P. 155, and MSS. C. S. G. The new act omits the distinction contained in the 52 Geo. 3, c. 143.

(*r*) Rex *v.* Robinson, 2 Stark. N. P. C. 485, Wood. B.

(*s*) Pooley's (second) case, O. B. 1801. 2 Leach, 900, S. C. 1 East, P. C. *Addenda*, xvii. and 3 Bos, & Pul. 315. And see Morton's case, and Reculist's case, *post*, Chap. on *Forgery*.

CHAPTER THE TWENTY-SECOND.

OF LARCENY AND EMBEZZLEMENT OF NAVAL AND MILITARY STORES.

4 Geo. 4, c. 53. Persons stealing or embezzling ammunition or other naval or military stores, may be transported, &c.

THE 4 Geo. 4, c. 53, enacts, "That every person who shall be lawfully convicted of stealing or embezzling his Majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding or abetting any such offender shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years." (*a*)

1 Geo. 1, st. 2, c. 25.

Some provisions respecting the embezzlement of naval stores, when under the value of twenty shillings, were made by the 1 Geo. 1, stat. 2, c. 25, but that statute was repealed by the 2 Wm. 4, c. 40, s. 35. (*b*)

9 Geo. 3, c. 30, s. 5. As to the apprehension of persons stealing or embezzling naval stores.

The 9 Geo. 3, c. 30, s. 5, relates to the apprehension of persons stealing or embezzling naval stores. It enacts "that for the more speedy and effectual bringing to justice persons guilty of stealing or embezzling his Majesty's naval stores, the treasurer, comptroller, surveyor, clerk of the acts, or any commissioners of the navy for the time being, may, from time to time in all places whatsoever, exercise the office of a justice of the peace to all intents and purposes, in causing any person who shall be charged with stealing or embezzling of any naval stores, the property of his Majesty, to be apprehended, committed, and prosecuted for the same; and it requires all constables and other officers to execute and obey all warrants of such persons, touching any of the matters and things thereinbefore contained."

Provision is made by the Annual Mutiny Acts for the punishment of persons embezzling military and naval stores, by the proceedings of a court-martial.

The 5 Vict. c. 12, s. 8, the Annual Mutiny Act, enacts, that "every paymaster or other commissioned officer of her Majesty's forces, or any person employed in the ordnance or commissariat department, or in any manner in the care or distribution of any money, provisions,

(*a*) All the other provisions of this statute are repealed by the 7 & 8 Geo. 4, c. 27. No provision is made by the 4 Geo. 4, for the punishment of accessories after the fact, they are therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8 & 9, and 1 Vict. c. 90, s. 5. See *ante*, p. 135, note (*b*).

(*b*) The act is wholly repealed, except so much thereof as continues two acts made in the eleventh William the Third, and the fifth of Anne.

forage, or stores, who shall embezzle or fraudulently misapply, or be concerned in or connive at the embezzlement, fraudulent misapplication, or damage, of any money, provisions, forage, arms, clothing, ammunition, or other military stores belonging to her Majesty's forces or for her use, may be tried for the same by a general court-martial, which may adjudge any such offender to be transported, as a felon for life or for any certain term of years, or to suffer such punishment of fine, imprisonment, dismissal from her Majesty's service, and incapacity of serving her Majesty in any office civil or military, as such court shall think fit, according to the nature and degree of the offence, and every such offender shall, in addition to any other punishment, make good at his own expense the loss and damage sustained, which shall have been ascertained by such court-martial; and the loss and damage so ascertained as aforesaid shall be a debt to her Majesty, and may be recovered in any of her Majesty's courts at Westminster or in Dublin, or the court of exchequer in Scotland or in any court in her Majesty's colonies, where a person sentenced by such court martial shall be resident after the said judgment shall be confirmed and made known." (*e*)

The offences of knowingly receiving, or concealing naval or military stores which have been stolen, or of unlawfully having possession of naval or military stores, will be mentioned in a subsequent chapter.

(*e*) And see a similar provision in the Marine Mutiny Act, 5 Vict. c. 12, s. 16.

CHAPTER THE TWENTY-THIRD.

OF LARCENY OF CLOTH AND OTHER ARTICLES IN A PROCESS OF MANUFACTURE.

PARTICULAR provisions have been enacted by several statutes for punishing the embezzlement of articles in a course of manufacture, which as they relate to petty offenders, (principally workmen employed in particular manufactories) and subject them to the summary jurisdiction of justices of the peace, do not come within the scope of this treatise. (*a*)

7 & 8 Geo. 4, c. 29. Stealing certain goods in process of manufacture, punishable by transportation, &c.

The 7 & 8 Geo. 4, c. 29, s. 16, enacts, "that if any person shall steal to the value of ten shillings any goods or article of silk, woollen, linen or cotton, or of any one or more of these materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender being convicted thereof shall be liable to any of the punishments which the court may award as hereinbefore last mentioned."

The 1 Vict. c. 90, s. 2, recites this section and enacts, that so much of the said act as relates to the punishment of persons convicted of any of the offences hereinbefore specified as in that act contained shall from and after the commencement of this act (1st October, 1837) be repealed; and that "every person convicted after the commencement of this act of any of such offences respectively shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years." And by sec. 3, "it shall be lawful for the court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

Principals in the second degree, and accessories.

By the 7 & 8 Geo. 4, c. 29, s. 61, principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact, (except receivers of stolen property) are liable to be imprisoned for any term not exceeding two years. (*b*)

(*a*) The greater part of them will be found collected and well arranged in 5 Burn's Just. tit. *Servants*.

(*b*) *Ante*, p. 2. As sec. 61 only relates to felonies punishable under that act, it admits of doubt whether principals in the

Cases upon the repealed act 18 Geo. 2, c. 27.

Some questions may possibly arise upon the words "laid, placed or exposed during any stage, process or progress of manufacture in any building, field, or other place." In a case in which the prisoner was indicted upon the 18 Geo. 2, c. 27, (now repealed,) for stealing yarn out of a bleaching ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner; Thomson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner. (*c*) So in another case upon that statute where the indictment was for stealing calico placed to be printed and dried in a certain building, it was held, that in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was made use of either for drying or printing calico. (*d*) But it should be observed, that this repealed statute mentioned particularly a building, &c. made use of by any calico printer, &c. for printing, whitening, bowking, bleaching, or drying.

It has been decided in a case upon the 7 & 8 Geo. 4, c. 30, s. 3, that goods remain in a "stage" "process" or "progress of manufacture," though the texture be complete, if they be not yet brought into a condition fit for sale. (*e*)

second degree and accessories are now punishable under it; if not, they would seem punishable as for a felony not specially provided for. See note (*b*), *ante*, p. 135.

(*c*) Hugill's case, *cor.* Thompson, B., at York, 4 Black. Com. 240, note (8), ed. 1800.

(*d*) Rex *v.* Dixon and others, Russ. & Ry. 53.

(*e*) Rex *v.* Woodhead, 1 M. & Rob. 549, Coleridge, J. See this case in its proper place in chap. 52.

CHAPTER THE TWENTY-FOURTH.

OF LARCENY BY TENANTS AND LODGERS.

Qu. offence at common law.

It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony: (*a*) and it was at length decided by a majority of the Judges that it was not. (*b*) In consequence of this decision, the 3 Wm. & M. c. 9, s. 5, was passed, which, after reciting that it was a frequent practice for idle and disorderly persons to hire lodgings with an intent to have an opportunity to take away, imbezil, or purloin the goods and furniture being in such lodgings, enacted and declared that if any person or persons should take away, with an intent to steal, imbezil, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they were to use, or should be let to him or them to use, in or with such lodging, such taking, imbezzilling, or purloining, should be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender should suffer as in case of felony.

Several points of nicety and difficulty arose upon the construction of this statute, and upon the statement of the contract in the indictment, (*c*) but it was repealed by the 7 & 8 Geo. 4, c. 27, and the statute passed for consolidating and amending the laws relative to larceny has substituted a more simple enactment, and provided that the indictment shall be in the common form as for larceny.

(*a*) Raven's *alias* Aston's case, Kel. 24, 81, 82. 1 Hawk. P. C. c. 43, s 2. And see as to a special property or bare use, &c., *ante*, p. 21.

(*b*) Meeres's case, Show. 50. One of the judges thought it was felony, and that a lodger had a bare use of the goods, like a guest. And two of the judges only thought it no felony, because no intent was found to steal, either in the taking the lodgings, or carrying away the goods. And all the judges thought it a point deserving very good consideration. Show. 55. Mr. East remarks upon the point, that if it clearly appear that a lodger took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, there seems no reason why it should not be felony at common law. 2 East, P. C. c. 16, s. 26, p. 585. And in 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17, p. 472, note (13), a *qu.* is made whether it would not now be holden that a lodger purloining furniture is guilty of larceny at common law, on the ground of the possession still continuing in the owner of the house. But it has lately been ruled that if a man hires a lodging with intent that a comrade of his may steal the furniture, the thief cannot be indicted at common law as for stealing the goods of the original owner, Rex *v.* Belstead, East. T. 1820, MS. Bayley, J., and Russ. & Ry. 411.

(*c*) 2 East, P. C. 586. 6 Ev. Col. Stat. Pt. V. Cl. VII. No. 17, p. 472, note (14). Brown's case, 1 Hawk. P. C. c. 43, s. 3. Palmer's case, 2 Leach, 680. 2 East, P. C. 586. Pope's case, 1 Leach, 336. 2 East, 587. Bill's case, 1 Hawk. P. C. c. 43, s. 7. Rex *v.* Goddard and Fraser, 2 Leach, 545. Pike's case, 1 Hawk. P. C. c. 43, s. 4. Mann's case, 1 Hawk. P. C. c. 43, s. 6. Butler's case, 1 Hawk. P. C. c. 43, s. 8. Rex *v.* Healey, R. & M. C. C. R. 1. Rex *v.* Bew, Russ. & Ry. 480.

The 7 & 8 Geo. 4, c. 29, s. 45, for the punishment of depredations committed by tenants and lodgers, enacts, "that if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; (*d*) and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and, in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

7 & 8 Geo. 4, c. 29, s. 45. Tenants and lodgers stealing any property from houses or apartments let to them.

(*d*) *Ante*, p. 1.

CHAPTER THE TWENTY-FIFTH.

OF EMBEZZLEMENTS AND FRAUDS BY BANKRUPTS.

6 Geo. 4, c. 16. Bankrupt not surrendering and submitting to be examined;

The 6 Geo. 4, c. 16, s. 112, enacts, "that if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt, shall not, before three of the clock, upon the forty-second day after notice thereof in writing, to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the *London Gazette* of the issuing of the commission, and of the meetings of the commissioners, surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them, from time to time, upon oath, or, being a Quaker, upon solemn affirmation; or if any such bankrupt, (*a*) upon such examination, shall not discover all his real or personal estate, and how and to whom, upon what consideration, and when he disposed of, assigned or transferred any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bonâ fide* before sold or disposed in the way of his trade, or laid out in the ordinary expense of his family); or if any such bankrupt shall not, upon such examination, deliver up to the commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned only, or imprisoned and kept to hard labour in any common gaol, penitentiary-house, or house of correction, for any term not exceeding seven years." (*b*)

or not making discovery of his estate and effects;

or not delivering up his goods, books, &c.;

or removing or embezzling to the value of 10*l.* felony.

Punishment.

Lord Chancellor may enlarge time for surrender.

The 113th section enacts, "that the Lord Chancellor shall have power, as often as he shall think fit, from time to time to enlarge the time for the bankrupt surrendering himself for such time as the Lord

(*a*) Lord Henley Bank. L. 383, observes, "there is an inaccuracy in this clause, which should be remedied on a future revision of the law; it has omitted the words 'in case of any default or wilful omission.'"

(*b*) "The words 'such bankrupt,' mean a person not merely declared a bankrupt by the commissioners, but a person liable to be so 'declared.'" Per Parke, J., Rex *v.* Jones, 4 B. & Ad. 345. "The words 'such bankrupt' import not merely a person against whom a valid commission has issued, but one who has become bankrupt.'" per Patteson, J., ibid.

Chancellor shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself."

The 115th section enacts, "that if any bankrupt apprehended by any warrant of the commissioners shall, within the time hereby allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered."

Proviso for surrender by bankrupt apprehended.

Upon the repealed statute 5 Geo. 2, c. 30, which contained provisions of a similar nature, though (as to some of them) imperfectly framed, it was observed, that no instance ever occurred of a capital punishment, or (as was believed) of a capital conviction, for the mere omission to surrender. (*c*) And the learned Judges presiding in the Court of Chancery, in many instances, superseded commissions, in order to prevent a prosecution for not surrendering in time, where there did not appear to have been any intention in the bankrupt of defrauding his creditors by not appearing within the time appointed, and where his absence proceeded rather from an ignorance of the consequence, or accident. (*d*) Such an order did not, however, prevent a prosecution, but operated only as an intimation of the Chancellor's opinion that the bankrupt did not keep out of the way fraudulently, and that it was a case in which the Chancellor did not see reason to think that if prosecuted he would have been convicted; (*e*) and it appears clear that there must have been a wilful omission to surrender to constitute a felony. (*f*)

Repealed statute, 5 Geo. 2, c. 30.

Very few points appear in the books upon the construction of this repealed statute, and some of them are inapplicable to the present law. (*g*)

Points upon the repealed statute.

In an early case, upon the repealed statute, an objection was taken to an indictment that there ought to have been an averment in the indictment, that the commissioners did sit, and that those commissioners should have been named; whereas they were not named in the notice, which only set forth that he was required to surrender to *the commissioners at Guildhall;* and it might as well be understood of the commissioners of sewers, or of the lieutenancy, as of the commissioners of bankrupts, for they all sit at the same *Guildhall.* The court were of opinion that this, together with other objections, was good. (*h*)

(*c*) 4 Ev. Col. Stat. *Bankrupts*, p. 88.

(*d*) *Ex parte* Wood, 1 Atk. 222. *Ex parte* Shiles, 1 Madd. 249.

(*e*) By the Vice-Chancellor in *ex parte* Shiles, 1 Madd. 249.

(*f*) Id. ibid.

(*g*) The 1 Geo. 4, c. 115, s. 1, after reciting so much of the 5 Geo. 2, c. 30, as made it a capital felony for a bankrupt to conceal, embezzle, &c., to the value of 20*l.*, or any books of account, &c., with an intent to defraud his creditors, enacted, that so much of the said act as inflicted capital punishment of death on the offence thereinbefore recited should be repealed, and that any person duly convicted of the offence thereinbefore recited, which was punishable with death, under the recited act, should be liable to be transported beyond the seas for life, or for such term not less than seven years, as the court should adjudge, or should be liable to imprisonment, or imprisonment and hard labour, for any term not exceeding seven years. Then succeeded the 6 Geo. 4, c, 16.

(*h*) Rex *v.* Frith, O. B. 1738. 1 Leach, 10. Upon this opinion of the court being pronounced, the prosecutor moved that the indictment might be quashed. But the court said it was by no means proper to encourage the quashing of indictments after prisoners have pleaded. The motion was accordingly refused; and the prisoner being put upon his defence, an acquittal was entered, 1 Leach, 11. But the court may, in its discretion, quash an indictment at any time before the jury are charged with the trial of the prisoner.

Nicety in framing indictments on that statute.

It was observed that the principal nicety in framing an indictment on that statute consisted in the recital of the proceedings before and under the commission. (*i*)

And the necessary evidence required attention; as it was necessary to prove regularly the trading, the petitioning creditor's debt, the act of bankruptcy, the issuing the commission, and the subsequent proceedings. "While the commission subsists, its validity may be assumed for certain civil purposes; but when a criminal case occurs, unless the party was a bankrupt, all falls to the ground." (*j*) In a case where a defendant was indicted for refusing to give the commissioners an account of his effects, he was acquitted on the ground that he was an infant at the time the debts were contracted, and could not, therefore, be a bankrupt for debts which he was not obliged to pay. (*k*) And it has since been held that a commission against an infant is void. (*l*) And the Court of Chancery refused to lend its aid to a prosecution on that statute by ordering the clerk under the commission to attend the trial, and produce the proceedings. (*m*)

The following points were understood to have been decided in a case upon the repealed statute in which the defendant was charged by the indictment with concealing his effects to the amount of 20*l.* with intent to defraud his creditors: first, that an averment in an indictment for felony, that a commission issued under the great seal of *Great Britain*, was sufficiently proved by evidence that it issued under the great seal of Great Britain and Ireland; secondly, that a bankrupt could not set up a prior secret act of bankruptcy to invalidate his commission; thirdly, that a creditor might prove the act of bankruptcy before the commissioners; and, fourthly, that a commission of bankruptcy was not liable to any of the stamp duties imposed by the 44 Geo. 3, c. 98. (*n*) But it has since been doubted whether on such an indictment the petitioning creditor is a competent witness. (*o*)

It was also ruled that on an indictment against a bankrupt where the petitioning creditors' debt was alleged to be due to A., B., and C., surviving executors of the last will and testament of D., after proof that A., B., and C., were the executors, and were directed by the will to carry on the business, it was necessary to prove that they all assented to act in discharge of the trust: and that a general admission by the prisoner of a debt, due to the executors of D., would not supply the defect. (*p*)

(*i*) 2 Chit. Crim. L. 511, notes.

(*j*) By Lord Ellenborough, C. J., in Rex *v.* Punshon, 3 Campb. 97.

(*k*) Rex *v.* Cole, 1 Ld. Raym. 443.

(*l*) Belton *v.* Hodges, 9 Bing. 365.

(*m*) 1 Hawk. P. C. c. 49. *Fraudulent Bankruptcy*, s. 7.

(*n*) Rex *v.* Bullock, 2 Leach, 996. 1 Taunt. 71. But upon the third point, *viz.*, the proof of the act of bankruptcy by a creditor, a *qu.* is made by the reporter in 2 Leach, 996; and in 1 Taunt. 71, the marginal note upon this point is, "*Semble*, that commissioners of bankrupt may receive evidence of the act of bankruptcy from a creditor, who seeks to prove under the commission: or at least if they do, after evidence *aliunde* of the act of bankruptcy, proof that the commissioners declared the bankrupt to be such on the creditors' evidence will not disprove the allegation that he was duly declared a bankrupt." But it has been ruled in a late case that upon an issue to try whether an act of bankruptcy has been committed a creditor is an incompetent witness, though he has not proved under the commission, Crooke *v.* Edwards, 1 Stark. R. 302. And see Adams *v.* Malkin, 3 Campb. 543. And see 2 Stark. Evid. 193, and the cases there collected.

(*o*) Rex *v.* Walters, 5 C. & P. 138. Park, J. A. J., after consulting Patteson, J., offered to admit the witness, subject to further consideration, but he was not examined.

(*p*) Rex *v.* Barnes, 1 Stark. R. 243. In this case it was also ruled that, although the probate of a will had been produced, the will itself could not be read in evidence

A bankrupt in prison is not bound to apply for a *habeas corpus*, &c.

Where a bankrupt was indicted for not surrendering himself under sec. 112 of 6 Geo. 4, c. 16, to the commissioners pursuant to notice, and it appeared that he was in custody under a detainer collusively lodged; and it was contended that he was bound to give notice of his situation to the commissioners, in order to enable them to issue their warrant to bring him before them for examination, and that he was bound to apply for a *habeas corpus* to enable him to appear before the commissioners, or at all events that he was bound to apply to the Lord Chancellor for an enlargement of the time, in which to surrender: Littledale, J., said, "This being a case of felony, the act must be construed favourably for the prisoner; and as it does not provide money to pay the expenses of a *habeas corpus* in the first instance, I think the bankrupt is not compellable to make the application contended for. And as the commissioners have the power to issue their warrant, and by diligent search may discover where he is, the bankrupt is not bound to give them notice. I am further of opinion that the not doing the things contended for, will not make a bankrupt guilty of felony, though the detainer under which he is in custody be collusive." (*q*)

A bankrupt is not indictable for concealment until he has concluded his last examination. A bankrupt was indicted for not delivering up certain account books, and it appeared that the final examination had never been completed, but that it had been adjourned *sine die*; it was held that he must be acquitted, for until the final examination was concluded, he had a *locus penitentiæ*, and might deliver up all his books correctly. (*r*)

Indictment bad for not specifying sufficiently particular parts of the property.

It appears to have been holden, that where an indictment against a bankrupt for concealing property did not, in stating the property, sufficiently specify particular parts of it, though it might have sufficiently specified others, and those specified might have been of the necessary value, such indictment was bad, on the ground that the statement as to the parts not specified tended to embarrass the prisoner. And the decision appears to have proceeded upon the principle that where value is essential to constitute an offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having only ascribed that value to all those articles collectively. (*s*)

The indictment must allege a trading, petitioning creditor's debt, and act of bankruptcy, as well as the issuing of the commission.

An indictment on the 6 Geo. 4, c. 16, s. 112, must allege that there had been a trading by the party, a petitioning creditor's debt, and that he became bankrupt, and it is not sufficient to allege that a commission of bankrupt was duly awarded, by virtue of which the commissioners found that the party became a bankrupt. An indictment stated that a commission of bankrupt was duly awarded and issued against E. O. Jones, directed to the commissioners therein named, thereby giving them authority to proceed, according to the statute, with the body of the said E. O. Jones, as also all his lands, which he had in his own right, before he became bankrupt, &c., by virtue of which said commission the commissioners found that the said E. O. Jones did become a bankrupt within the true intent.

upon the mere production of it by the officer of the ecclesiastical court, without some indorsement upon it for the purpose of authentication.

(*q*) Mitchell's case, 1 Lew. 20, 4 C. & P. 251.

(*r*) Rex *v.* Walters, 5 C. & P. 138, Park, J. A. J.

(*s*) Rex *v.* Forsyth, Russ. & Ry. 274.

and meaning of the said statute before the suing forth of the said commission, and did adjudge him to be a bankrupt accordingly. It then charged the defendants with conspiracy to conceal and embezzle a great part of the personal estate of Jones. The defendants having been found guilty, the judgment was arrested on the ground that the indictment did not state enough to shew that the defendants conspired to do an illegal act; it ought to have alleged not merely the issuing of a commission of bankrupt, but that there had been a trading by Jones, and a petitioning creditor's debt, and that he became bankrupt. Without such allegation the indictment would clearly have been insufficient under the 5 Geo. 2, c. 30, and sec. 112 of the 6 Geo. 4, c. 16, implied that the commission therein mentioned should have duly issued, and sec. 12 shewed that a valid commission could issue only against a trader who had committed an act of bankruptcy, and upon the petition of a creditor. (*s*)

Indictment must conclude "against the form of statute."

An indictment against a bankrupt for concealing part of his personal estate must conclude "against the form of the statute," or it is bad in arrest of judgment. The indictment, after stating that the prisoner was a trader, &c., alleged that he did not disclose and discover all his estate and effects to the commissioners, but fraudulently and feloniously concealed and embezzled part of his personal estate, specifying it; to this indictment it was objected, in arrest of judgment, that the offence was not stated to be done "against the form of the statute;" and, upon a case reserved, the Judges were unanimously of opinion that the omission of *contra formam*, &c., was not cured by the 7 Geo. 4, c. 64, ss. 20 and 21, and was fatal to this indictment. (*t*)

Averment of service of notice.

Where an indictment alleged that notice of the fiat was delivered to the bankrupt according to the direction of the statute, it was objected that as the words of the statute are "notice thereof in writing to be left at the usual place of abode of such person, or personal notice in case such person be then in prison," the indictment ought to have alleged that the bankrupt was in prison; for if he was not, the service ought to have been at the dwelling-house; but Williams, J., was inclined to think that personal service would do in any case. (*u*) But where an indictment on the 5 Geo. 2, c. 30, in a similar case alleged a personal service, without stating whether the bankrupt was at the time in confinement or not; Best, J., was inclined to think that the indictment ought to have averred that the bankrupt was in prison. (*v*) And where such an indictment stated a notice requiring the bankrupt personally to appear before the commissioners, according to the directions of the several statutes made and then in force concerning bankrupts, and particularly the statute passed in the 5 Geo. 2, entitled "An act to prevent the committing of frauds by bankrupts," and on the production of the notice it appeared that the title to the 49 Geo. 3, *viz.*, "An act to alter and

(*s*) Rex *v.* Jones. 4 B. & Ad. 345.

(*t*) Reg. *v.* Radcliffe, 2 Moo. C. C. R. 68. S. C. 2 Lew. 57, where the indictment is set out at length. It was further objected that the indictment only alleged that the fiat was "issued," not that it was "duly issued," but Williams, J., held that the word "duly" was better omitted, as he was bound to presume that it was duly issued, as it was issued by competent authority. This point also was reserved, but not decided by the judges.

(*u*) Reg. *v.* Radcliffe, *supra*. The point was reserved, but no opinion given upon it.

(*v*) Rex *v.* Burraston, Gow. N. P. R. 210.

amend the laws relating to bankrupts," had been substituted for that of the 5 Geo. 2; it was held a fatal variance. (*w*)

Refusal to submit to examination.

Upon an indictment on the same repealed statute of 5 Geo. 2, charging the bankrupt with not submitting to be examined, it was decided, that if a bankrupt surrendered to his commission, and at the time of such surrender refused to answer particular questions concerning his property, but took the oath, and assigned, as his reason for not answering, that he intended to dispute the commission, the refusal to answer such question was not a capital offence within the statute. (*x*)

Evidence.

Upon an indictment on the same statute, qualified by 1 Geo. 4, c. 115, s. 1, against a bankrupt for concealing his effects, where the evidence was that the prisoner, on his last examination, stated that a book given in by him contained an account of all his effects, it was holden to be incumbent on the prosecutor to produce the book, or to account for its non-production. The book was a necessary part of the prosecutor's case, in order that it might have been seen whether that book mentioned the property. (*y*)

In the same case it was held at the trial that it was not necessary that the goods should be concealed by the prisoner himself, or that he should have had the possession of them after the bankruptcy; but that it was sufficient if another person had them as the agent of and subject to the control of the prisoner, and had taken them by the direction, and with the privity and knowledge of the prisoner, to the place where they were deposited. (*z*)

In the same case it was also held at the trial that the indictment might be preferred in Middlesex, if the prosecutor could prove an actual concealment there; although the last examination of the bankrupt took place in London. (*a*)

Where an indictment for conspiracy stated the bankruptcy of one of the defendants in a prefatory allegation, Lord Tenterden, C. J., held that the assignment could not be put in without calling the attesting witness. (*b*)

Parol evidence of what the bankrupt says at his examination.

Parol evidence of anything a bankrupt says at the time of his last examination, cannot be received, although it appear that no part of what he said was taken down in writing. The paper purporting to be the final examination, did not contain any questions or answers; it merely stated that the commissioners, not being satisfied with the answers of the bankrupt adjourned the examination *sine die;* and it was proposed to give parol evidence of what the bankrupt said before the commissioners, which it was contended might be done, as it was shewn that what the bankrupt said was not taken down; and besides by sec. 36, the commissioners are empowered to examine by parol: Park, J. A. J., "I can receive no evidence of the examination but the writing. The examination is required to be in writing by the Act of Parliament; and that part which relates to the examining by parol, applies only to the questions which may be either put by parol or by written interrogatories." (*c*) So where an indictment alleged that after the examination of the bankrupt and after he had subscribed

(*w*) Ibid., Best, J., after consulting Richardson J.

(*x*) Rex *v.* Page, Russ. & Ry. 392.

(*y*) Rex *v.* Evani, (1825,) R. & M. C. C. R. 70.

(*z*) Ibid. per Littledale, J.

(*a*) Ibid. per Littledale, J.

(*b*) Rex *v.* Pope, 5 C. & P. 208.

(*c*) Rex *v.* Walters, 5 C. & P. 138.

the same, a question was put to the bankrupt, and it was objected to any evidence being given of questions and answers, which were not reduced to writing; it was replied that the material answers alone were taken down; and it sometimes happened that answers which at the time seemed immaterial, afterwards became material. The answers proposed to be given in evidence were given after the examination had concluded in the first instance, but they also were reduced to writing. Williams, J., "I cannot receive parol evidence of any answers to questions that were put to the bankrupt before the commissioners subscribed their names to the examination. I must presume, that all the answers prior thereto that were material, were taken down, and included in the examination before their signatures were affixed to it. But answers to questions put subsequently to such examination may be given in evidence." (*d*)

The balance sheet of a bankrupt.

It has been held that the balance sheet of a bankrupt signed and sworn by him was not evidence against him on an indictment for concealing his effects, to prove the petitioning creditor's debt. (*e*) The ground of this decision was that the balance sheet could not be given in evidence, unless there were a valid commission, and therefore the balance sheet being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt as a part of the commission. (*f*)

But it has since been held that the examination of a person taken on oath before commissioners of bankruptcy, is admissible against him on a charge of forgery, he having been cautioned and allowed to elect what questions he would answer. (*g*)

It was agreed that a bankrupt's wife could not be examined on the part of the prosecution, on an indictment against the bankrupt for offences against the 5 Geo. 2, c. 30. (*h*)

It seems that the production of the *Gazette* will be sufficient without proof of its being bought of the *Gazette* printer, or where it comes from: and possibly, where the prisoner has appeared to his commission, and has been examined, averment of notice in the *Gazette* may not be necessary. (*i*)

(*d*) Reg. *v.* Radcliffe, 2 Lew. 57.

(*e*) Rex *v.* Britton, 1 M. & Rob. 297. Patteson, J., after consulting Alderson, B.

(*f*) Per Patteson, J., in Reg. *v.* Wheater, *infra*.

(*g*) Reg. *v.* Wheater, 2 Moo. C. C. R. 45. S. C. 2 Lew. 157. See this case more fully in the chapter on *Evidence*.

(*h*) 1 Hawk. P. C. c. 49, *of Fraudulent Bankruptcy*, sec. 4. *Ex parte* James, 1 P. Wms. 610, where the Lord Chancellor said, that a wife could not by the common law be a witness for or against her husband; and that though a former statute 21 Jac. 1, authorized the commissioners to examine the wife touching any concealments of the goods, effects, or estate of the bankrupt, yet it did not extend to examining the bankrupt's wife touching his bankruptcy, or whether he had committed any act of bankruptcy, and how or when he became a bankrupt.

(*i*) Rex *v.* Forsyth, Russ. & Ry. 274. But it will be more prudent to be provided with the full proof.

CHAPTER THE TWENTY-SIXTH.

OF EMBEZZLEMENTS AND FRAUDS BY INSOLVENT DEBTORS.

THE 7 Geo. 4, c. 57, s. 70, enacts, "that in case any prisoner shall, with intent to defraud his or her creditors or creditor, wilfully and fraudulently omit in his or her schedule, so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessaries, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall and may be lawful for the court before whom such offender shall have been so tried and convicted, to sentence such offender to be imprisoned, and kept to hard labour for any period of time not exceeding three years; and that in every indictment or information against any person for such offence, it shall be sufficient to set forth the substance of the offence charged on the defendant, without setting forth the petition, or conveyance, or assignment to the provisional assignee, appointment of assignee or assignees, or any conveyance or assignment whatever, or balance sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, rule, order or proceeding of or in the said court, except so much of the schedule of such prisoner as may be necessary for the purpose."

Wilfully omitting any thing in schedule.

misdemeanor.

what matters only the indictment need set out.

In point of law a prosecutor may prefer separate indictments for the fraudulent omission of each article. To an indictment under the preceding section for fraudulently omitting ten chairs, ten tables, two carts, &c., the prisoner pleaded *auterfois acquit;* and the former indictment was the same as the present, except that the two carts mentioned in the present indictment, were not specified in the former one; it was, however, submitted that the two charges were substantially the same; the charge in each indictment was that the prisoner had fraudulently sworn to a schedule, which did not contain a true enumeration of his goods. Patteson, J., "I cannot say that the plea of *auterfois acquit* is, in strictness, a good defence to the whole of this indictment. The prisoner may have fraudulently omitted out of his schedule the goods mentioned in this indictment, which were not mentioned in the last; and, in point of law, I think a prosecutor may prefer separate indictments for each such omission. But though the present indictment be in point of law maintainable, I cannot help saying that, excepting under very peculiar circumstances, I think such a course ought not to be pursued; and if the

Separate indictments may be preferred for each separate fraudulent omission.

case goes on, I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were omitted out of the schedule under circumstances essentially different from the others." (*a*)

Wilful omission from the schedule.

The 1 & 2 Vict. c. 110, the act for abolishing arrest on mesne process in civil actions, by sec. 99 enacts, "that in case any prisoner whose estate shall, by an order under this act, have been vested in the said provisional assignee, shall with intent to defraud the creditors or creditor of such prisoner, wilfully and fraudulently omit in his schedule so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessaries, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall be lawful for the court before whom such offender shall have been so tried and convicted to sentence such offender to be imprisoned and kept to hard labour for any period of time not exceeding three years; and that in every indictment or information against any person for any offence under this act, it shall be sufficient to set forth the substance of the offence charged on the defendant without setting forth the petition, or order vesting such prisoner's estate in the provisional assignee, appointment of assignee or assignees, or balance sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, rule, order, or proceeding of or in the said court, except so much of the schedule of such prisoner as may be necessary for the purpose."

(*a*) Reg. *v.* Champneys, 2 M. & Rob. 26. See Rex *v.* Moody, 5 C. & P. 23, *post*, *Perjury*.

CHAPTER THE TWENTY-SEVENTH.

OF RECEIVING STOLEN GOODS.

RECEIVERS of stolen goods were at common law punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing them; (a) but by the provisions of several statutes, now repealed, such receivers were made accessories after the fact to the felony of the thief, in cases where the thief had been convicted, or was amenable to justice; and were made liable to be prosecuted for a misdemeanor in cases where the thief had not been convicted, and whether he was amenable to justice or not. And the 7 & 8 Geo. 4, c. 29, passed for consolidating and amending the laws relative to larceny, contains several enactments upon the subject of receiving stolen goods.

The offence at common law was only misdemeanor.

Section 54 enacts, "that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment: provided always, that no person howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence." (b)

7 & 8 Geo. 4, c. 29, s. 54. Receivers of stolen property: where the original offence is felony, the receivers may be tried either as accessories after the fact, or for a substantive felony.

By sec. 55, "if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for

Sec. 55. Where the original offence is a misdemeanor, receivers may be prosecuted for a misdemeanor.

(a) Post. 373.
(b) As to hard labour and solitary confinement. See sec. 4, *ante*, p. 128.

any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment."

Sec. 56. Receivers may be tried where the principal is triable, or where the property is found in their possession.

The 56th sec. enacts, "that if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried and punished in any county or place in which he shall have, or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property."

Sec. 76. Trial of persons receiving in one part of the United Kingdom, property stolen, &c., in any other part.

Sec. 76, after providing that nothing contained in the act shall extend to Scotland or Ireland except as follows, and then enacting as to trials in cases of larceny where the thief, having stolen, &c., property in one part of the kingdom, shall afterwards have the same property in his possession in any other part, further enacts, that "if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part."

Sec. 60. Receivers of property where the original offence is punishable on summary conviction.

Sec. 60 provides for the punishment of receivers where the stealing, &c., is punishable on summary conviction, and enacts, "that where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first or second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable."

The author thought that the provisions of this statute would prevent a difficulty, which frequently occurred, in consequence of the proof not corresponding with the charge in the indictment, either where the party, being charged as the thief, turned out to have been the receiver, or, being charged as receiver, appeared upon the evidence to have actually stolen the property. And it was conceived that where, from the nature of the case, it appeared to be advisable, a count charging the party accused as receiver might be joined in the same indictment with a count charging him as the thief, and that he might be convicted upon such of the counts as was supported by the evidence. But, although there is no objection in point of law to including a count for stealing and a count for receiving in the same indictment, and the Judges differed in opinion as to whether the prosecutor should be put to his election on which

of the two counts he would proceed, yet they all agreed that directions should be given to the respective clerks of assize not to put both charges in the same indictment. (*b*)

In some cases, upon the repealed statutes, the distinction between a receiver and an accomplice was the subject of attentive consideration.

Distinction between a receiver and principal.

Dyer and Disting's case. Goods removed from one part to another of a boat by A., and afterwards taken from the boat by A. & B.

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. It appeared that the barilla was on board a foreign ship at Plymouth, consigned to Hawker; that Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing it on shore; and that Disting, together with several others, were employed as labourers in removing it to Hawker's warehouses, after it was landed. And the jury found that, while the barilla was in Dyer's boat, some of his servants, without his privity, consent, or participation, severed some of it from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found that Dyer afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, *in removing it from the boat, for the purpose of carrying it off.* It was objected, for the prisoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But the learned Judge, before whom the trial was had, was of opinion that, though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete by the severance and removal of the barilla to another part of the boat, as being an asportation in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit; and that Dyer, having assisted in the act of carrying it off, was therefore guilty as principal. (*c*)

Case of Atwell and O'Donnell. Goods removed in the morning from part of a warehouse to another by A., and taken away by A. and B. at night.

Another case arose out of the same transaction. It appeared that the rest of the barilla was lodged in M. Hawker's warehouse; that while it was there several persons, employed as labourers or servants by Hawker, entered into a conspiracy to steal some of it; that accordingly, some of them, who had access to the warehouse, removed a parcel of it nearer to the door than it was before, in the course of the morning; and that about nine at night these persons, together with the prisoners Atwell and O'Donnell, who had in the mean time agreed to purchase it of the others, came to the warehouse yard and assisted the others, who took it out of the

(*b*) Rex *v.* Galloway, R. & M. C. C. R. 234. This point was again considered in Rex *v.* Madden, R. & M. C. C. R. 277, and a great majority of the judges held that the rule laid down in Rex *v.* Galloway, should be adhered to. In Rex *v.* Flower, 2 C. & P. 413, the indictment contained counts for stealing and receiving two pigs, and Vaughan, B., compelled the prosecutor so elect upon which he would proceed. "The reason why counts ought not to be joined in an indictment against a prisoner for stealing, and also for receiving is, because they are in fact totally distinct offences. and a prisoner cannot be found guilty of both;" per Parke, B. Reg. *v.* Blackson, 8 C. & P. 43.

(*c*) Rex *v.* Dyer & Disting, Exeter Sum. Ass. 1801, *cor.* Graham, B., who conferred with the other judge, (Le Blanc, J.) and afterwards said that he was fully satisfied that his opinion was well founded. 2 East, P. C. c. 16, s. 154, p. 767, 768.

warehouse, in carrying it away from thence. They were all indicted as principals in the felony; and the same objection was made as before, that Atwell and O'Donnell were only receivers or accessories after the fact, the felony being complete before their participation in the transaction. But it was ruled that, so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it, and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises: and that all the defendants, having concurred in, or being present at the act of removing them from the warehouse wherein they were lawfully deposited, were principals. (*d*)

King's case. If goods are removed from the possession of the prosecutor by A. in the absence of B., and B. afterwards joins in carrying them away, B. is not a principal.

But where the goods had been so entirely taken away from the premises or actual possession of the owner, that their further removal could not be deemed a continuing part of the original taking, the case was holden to come under a different consideration; and the party concerned only in such further removal was decided not to be guilty of stealing the goods. Upon an indictment for larceny, in stealing several firkins of butter and some cheeses, the facts proved were, that two men, in the absence of the prisoner, broke open the warehouse of the prosecutor, stole the butter and cheese in question, carried them into the adjoining street, and deposited them at a distance of about thirty yards from the door of the warehouse: after which they went for the prisoner, brought him to the place, and informed him of what they had done; and he assisted in carrying the property to a cart, which was kept in waiting at some distance to be ready to convey it away. Upon this evidence an objection was taken on behalf of the prisoner, that he could not be found guilty of stealing in this case, as the felonious taking of the property was complete before he had any part in the transaction. It seemed, however, in the first instance, to the learned Judge by whom the prisoner was tried, that he might properly be found guilty; on the ground that as every continuation of a larceny is so far a new larceny, and a new taking, as to sustain an indictment for larceny in any county into which the property is carried, and as the possession in law of the property in this case remained in the prosecutor, notwithstanding the removal of it from his warehouse to the place where it was deposited in the street, so that he might have brought trespass against any stranger taking it from the place in the street without any felonious intent; it might be considered that the prisoner, who was present aiding and abetting in a continuation of the larceny, was a principal in the larceny so continued: and the prisoner was accordingly convicted. But, the case being reserved for the consideration of the twelve Judges, they were of opinion that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as a principal; and that the conviction of him as a principal was therefore wrong. (*e*)

(*d*) Rex *v.* Atwell, O'Donnell, and others, *cor.* Graham, B., at the same time as the preceding case of Dyer and Disting, and decided after the like consideration. *Ante*, note (*c*), 2 East, P. C. ibid. All the prisoners found guilty on both indictments as principals in the two several transactions received sentence of transportation for seven years.

(*e*) Rex *v.* King, *cor.* Bayley, J., York

So going towards the place where a felony was to be committed in order to assist in carrying off the property, and assisting accordingly, was held not to make the party a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. The prisoner, and J. S., went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the Judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. (*f*) But where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the Judges came to a different conclusion, and held that such accomplice was a principal, and that the conviction of him as a receiver was wrong. (*g*)

If a servant commit a larceny at the time he gives his master's goods to an accomplice both are principals. If a servant commit a larceny, and afterwards deliver the goods to his accomplice, the latter is a receiver.

Where a servant is entrusted with goods by his master, the possession of the servant is the possession of the master, but such possession is determined by the felonious act of the servant, and in cases where the servant delivers his master's goods to another person, who is his accomplice, it frequently becomes material to ascertain at what time the servant committed the felonious act, because if he committed it at the time when he delivered the goods to his confederate, both are guilty of larceny as principals; but if he committed it in the absence of his confederate, and afterwards delivered the goods to him, the servant is the principal and his confederate a receiver. Butteris and Grove were indicted as principals for stealing some fat. Butteris, being in the service of the prosecutor, was sent by him to deliver some fat to A. B., but he did not deliver all the fat to A. B., having previously given part of it to Grove; it was objected that Grove ought to have been charged as a receiver; but it was held that it was a question for the jury whether Grove was present at the time of the separation, as the fat was in the master's possession till the separation; and the case was left to the jury to say whether Grove was present at the time when the separation was made, or received the fat afterwards. (*h*) So where Gruncell was indicted for stealing a quantity of hay, and Hopkinson for receiving the hay, knowing it to have been stolen, and it appeared that Gruncell, who was a carter, and allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, took from his master's stables two trusses of hay above the quantity which was allowed for the horses; and that Hopkinson, who was the ostler at a public house where the waggon stopped on the journey, came to the tail of the waggon and received the two trusses of hay from Gruncell, and carried them to the stable: it was objected that if Hopkinson had committed any offence at all it was that of stealing, as the hay being in the master's waggon was in the master's possession, and the act of the prisoner in removing it from the waggon constituted a larceny and not a receiving; but it was held that the indictment was properly framed, on the ground that as the hay was not hay ap-

Lent Ass. 1817. And before the judges in East. T. 1817, Russ. & Ry. 332. And see Rex *v.* M'Makin and Smith, Russ. & Ry. 333, note (*b*).

(*f*) Rex *v.* Kelly, Mich. T. 1820, MS. Bayley, J., and Russ. & Ry. 421. And see *ante*, Vol. 1, Book 1, p. 28.

(*g*) Rex *v.* Owen, East. T. 1825, R. & M. C. C. R. 96. *Ante*, Vol. 1, p. 28.

(*h*) Rex *v.* Butteris. 6 C. & P. 147, Gurney, B.

propriated by the master for the horses, the moment it got into the waggon, *animo furandi*, the larceny was complete. If, however, it had been hay allowed for the horses which had been stolen, it would have been otherwise. (*i*)

A party may be indicted for receiving goods stolen by *persons unknown*.

It was settled upon the repealed statutes, that a party might be indicted for receiving goods stolen by persons unknown: and where an indictment was objected to because it did not ascertain the principal thief, and did not therefore state to whom in particular the prisoner was accessory, the Judges were unanimously of opinion that it was good; the great view of the statutes being to reach the receivers, where the principal thieves could not easily be discovered. (*j*). But where the principal was known, it was considered to be proper to state the facts according to the truth. (*k*) And a case is reported in which it was ruled, that an indictment against an accessory before the fact to a larceny, which stated a stealing by "a certain person to the jurors unknown," and that the prisoner incited, &c., "the said person unknown" to commit the said felony, could not be supported where the principal felon was a witness before the grand jury. The counsel for the prosecution, in opening the case, stated that the grand jury had found the bill upon the evidence of the principal, who acknowledged that he had stolen the goods in question, and proposed to call the principal as a witness to establish the guilt of the prisoner. But Le Blanc, J., interposed, and directed an acquittal. He said, he considered the indictment wrong, in stating that the wheat had been stolen *by a person unknown*; and asked, how the person who was the principal felon, could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill? (*l*) Where, however, two bills of indictment had been found by the same grand jury, one of which charged the prisoner with receiving goods stolen by a person unknown, and the other charged him with receiving the same goods stolen by one H. Moreton, and the prisoner was tried on the first mentioned indictment, the counsel for the prosecutor having declined to proceed upon the other against H. Moreton, and objection was taken that the allegation of the person who committed the principal felony being unknown to the grand jury was negatived by the other record, the Judges (upon the point being reserved for their consideration) held the conviction right. They were of opinion that the finding by the grand jury of the bill imputing the principal felony to H. Moreton, was no objection to the second indictment, although that indictment stated the principal felony to have been committed by a person to the jurors unknown. (*m*)

But where the principal is known, it should be so stated, but see *post*, p. 243, 244.

(*i*) Reg. v. Gruncell, 9 C. & P. 365. Mirehouse, C. S., after consulting Patteson, J., who went very carefully through the cases on the subject, and was clearly of opinion the indictment was properly framed.

(*j*) Thomas's case, O. B. 1766. 2 East, P. C. c. 16, s. 164, p. 781.

(*k*) 2 East, P. C. c. 16, s. 164, p. 781. And see *ante*, p. 97, that though in an indictment for larceny the goods may be laid to be the property of persons unknown, yet such an allegation will be improper if the owner be really known.

(*l*) Rex v. Walker, 3 Campb. 264. And S. P. by Dallas, J., Anon. Worcester Lent Ass. 1815.

(*m*) Rex v. Bush, Mich. T. 1818, Russ. & Ry. 372. This case seems to overrule a case mentioned in 2 Stark. Ev. 617, where the prisoner was indicted for a misdemeanor in receiving stolen goods, and it appeared that the principal had been convicted at the same assizes, and Thomson, B., directed an acquittal. The statement of the case in Rex v. Caspar, *post*, p. 244, seems to shew that Littledale, J., adhered to the opinion expressed in Rex v. Cordy, *ante*, p. 98, note (*p*). C. S. G.

It is sufficient to state the conviction, without stating the *attainder* of the principal.

In an indictment againt a receiver, as an accessory after the fact to the felony, where the principal had been convicted, it was decided to be sufficient to state the *conviction*, without stating the *attainder* of the principal. In a case where it was moved in arrest of judgment that the indictment was bad because it did not state that the principal was *attainted*, the point was reserved for the consideration of the Judges, who all held that the indictment was good, upon reference to a great number of precedents, and on a consideration of the statute 1 Anne, st. 2, c. 9, s. 1, 2. (*n*) In a subsequent case, where the prisoner was charged with knowingly receiving stolen goods, the indictment stated that the goods had been stolen by Isaac Powell, who had been *duly convicted* of the felony at the great session for Brecon. An examined copy of the record of Powell's conviction was produced, which stated that the prisoner was asked if he was (not *is*) guilty; and it did not state that issue was joined, or how the jurors were returned, and the only award against the prisoner was, that he should be in mercy, &c. It was objected that this entry was not sufficiently formal and correct to support the averment that Powell had been *duly convicted*. But the learned Judge ruled, that the judgment was not necessary, and might be rejected; that the conviction was sufficient; that in the common case, where the receiver is tried with the thief, there is no judgment on the thief, before the verdict against the receiver; and that although this record was full of errors, yet an erroneous attainder of the principal was sufficient against the accessory until it was reversed. (*o*) And the Judges held, that the objections to the copy of the record produced were not material. (*p*)

7 Geo. 4, c. 64, s. 11, accessories to suffer the same punishment though principals not attainted.

The statute 7 Geo. 4, c. 64, s. 11, in order that all accessories may be convicted and punished in cases where the principal felon is *not attainted*, enacts, "that if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted."

The indictment need not state time, place, &c.

The indictment against the receiver of stolen goods, charging him as an accessory, need not allege time and place to the fact of stealing the goods; a statement of them to the offence of the receiver will be sufficient. (*r*) And in a case where an indictment charged the prisoner by the name of Francis Morris, with receiving stolen goods, "he the said *Thomas* Morris knowing, &c.," it was holden that the words "the said Thomas Morris" might be rejected as surplusage. (*s*)

The indictment

As the statute makes the offence to consist in receiving the goods

(*n*) Hyman's case, 2 Leach, 925. 2 East, P. C. c. 16, s. 164, p. 782.

(*o*) Rex *v.* Baldwin, *cor.* Thompson, B., Monmouth Sum. Ass. 1812. 3 Camph. 265, MS. Bayley, J.

(*p*) Mich. T. 1812, MS Bayley, J., Russ. & Ry. 241.

(*r*) Stott's case, 2 East, P. C. c. 16, s. 144, p. 753, and s. 163, p. 780.

(*s*) Morris's case, 1 Leach, 109. And see also Redman's case, 1 Leach, 477. where words which obstructed the sense of an indictment on the statutes 3 W. & M. c. 9, s. 4, and 5 Ann. c. 31, s. 5, were rejected as insensible and useless.

need not name the principal.

knowing them to have been stolen, the indictment need not name the principal, or allege that he was unknown. The second count of an indictment charged the prisoner with having received goods stolen by "a certain evil disposed person," and it was objected that it ought either to have stated the name of the principal, or else to have stated that he was unknown. Tindal, C. J., "It will do. The offence created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. The objection is founded on the too particular form of the indictment. The statute makes the receiving the goods, knowing them to have been stolen, the offence." (*t*)

An indictment against several receivers alleging the stealing by an evil-disposed person is good, and it is no objection after the verdict that such separate receivers have been tried together.

An indictment for a substantive felony against several prisoners, for separate receipts of stolen property, which alleges that a certain evil disposed person stole the property, is good, and it is no objection after verdict that the prosecutor was not compelled to elect against which of the prisoners he would proceed. The first count alleged that a certain evil disposed person stole one hundred and two pounds weight of gold dust, &c.; the second count charged Lewin Caspar with feloniously inciting the said evil disposed person to commit the said felony; the third count, Ellis Caspar the like offence; the fourth count, E. Moses feloniously receiving the said one hundred and two pound's weight of gold dust; the fifth count, I. Isaacs feloniously receiving all the goods stolen; the sixth count, A. Abrahams feloniously receiving as in the fifth count; the seventh count, Ellis Caspar feloniously receiving as in the fifth count. (*u*) Upon the case being opened, it was contended that the prosecutor ought to elect which of the prisoners he would proceed against, but Littledale, J., in the view he then took of the indictment, that it was a case of principal and accessories, thought the prosecutor was not bound to elect; if he had thought otherwise, he would have directed him to elect. The case then proceeded, and H. Moss was examined as the evil disposed person mentioned in the indictment who stole the gold dust. He was not a person unknown either to the grand jury or the prosecutor, for his name was on the back of the indictment, and there was another indictment found by the grand jury, in which H. Moss was charged as the person who stole the gold dust. Though H. Moss was examined, it was a question for the jury upon the whole evidence, whether he or Lewin Caspar stole it. At the close of the case for the prosecution, it was again contended that an election should be made, but Littledale, J., still thought the prosecutor was not bound to elect; other objections were then taken, which (the prisoners having been found guilty) were saved for the consideration of the Judges: before whom it was contended, first, that this was an indictment against principal and accessories, and not for a substantive felony; and, therefore, it ought to have shown that the principal had been convicted or out-

(*t*) Rex *v.* Jervis, 6 C. & P. 156.

(*u*) It struck Littledale. J., on looking over the abstract, that it was incorrect in calling the statement of the offences committed by the several prisoners so many counts; and he thought that what were called the first seven counts were only one count against a principal and several accessories, assuming that receivers may be considered as accessories in the strict legal sense of the word. And see my note, vol. 1, p. 688. C. S. G.

lawed; secondly, that the prosecutor ought to have been compelled to elect against whom he would proceed; and thirdly, that the indictment was bad as to the accessories before the fact, inasmuch as the principal was not named; and, after elaborate argument, the learned Judges determined that the statement that an evil disposed person stole, was too uncertain to support the charge against Lewin Caspar as accessory before the fact, but that the other prisoners were sufficiently charged with a substantive felony in receiving, and properly convicted. (*v*)

Separate receivers of stolen goods may be tried at the same time with the principal felon.

Where a count charging Hartall and Neal with a burglary and stealing sundry articles, and Mole with receiving part of the articles stolen, and Horseman with receiving other part of the articles, was joined with a count charging Mole and Horseman with the substantive felony of jointly receiving all the articles, and with counts charging Mole and Horseman separately with a separate substantive felony, in each separately receiving a part of the articles stolen; and it appeared that Mole and Horseman had received part of the stolen property on different occasions, and quite unconnectedly with one another; it was objected, that as distinct felonies had been committed by Mole and Horseman, each ought to have been tried separately; but it was held that all the prisoners might be convicted upon this indictment. (*w*) So where two prisoners were indicted for stealing a sheep, and two others, separately in distinct counts, for receiving separate parts of the mutton so stolen, and all the prisoners were found guilty; it was moved in arrest of judgment on behalf of the receivers, on the ground that they were charged with separate felonies, for which they ought to have been indicted separately. Parke, B., "The objection forms no ground for a motion in arrest of judgment. If there had been anything in the point, you ought to have asked me to put the prosecutor to his election, if justice had required the separation, while the trial was going on; but you can take no advantage of the objection after verdict." (*x*)

Counts charging the receiving from the principal and charging a substantive felony may be joined.

Where a principal and a receiver are included in the same indictment, the receiver may be charged in one count with receiving the goods from the principal, and in another count with a substantive felony for receiving them from an evil disposed person. The indictment charged four prisoners with a burglary and stealing a number of articles, and the fifth prisoner with receiving a part of the stolen goods from the other prisoners, and another count charged the fifth prisoner with a substantive felony in receiving the same part of the goods from a certain evil disposed person. It was objected that there was a misjoinder of counts; that the statute allowed the party to be indicted in one way or the other, but not

(*v*) Reg. *v.* Caspar, 2 Moo. C. C. R. 101. S. C. 9 C. & P. 289.

(*w*) Rex *v.* Hartall, 7 C. & P. 475, Littledale, J.

(*x*) Reg. *v.* Hayes, 2 M. & Rob. 155. It is clearly settled that the principal and accessory may be included in the same indictment and tried together. 1 Hale, 623. Fost. 365. And the felony of the principal is just as distinct from the felony of the accessory, as the felony of one receiver from the felony of another receiver, and there is stronger ground for the principal and receiver being tried separately, than for separate receivers being tried separately, inasmuch as evidence may be admissible against the principal, which is not admissible against the receiver, Rex *v.* Turner, R. & M. C. C. R. 347, and the receiver may be prejudiced by the receipt of such evidence. C. S. G.

in both; and that by joining the two counts in one indictment, the prisoner was deprived of the benefit of pleading *auterfois acquit*, which was given him by the 7 & 8 Geo. 4, c. 29, s. 54, but it was held that there was no misjoinder. And Parke, B., afterwards said, "There was an objection taken on the ground of a misjoinder of counts, where a count for receiving was added as for a substantive felony. I had some doubt on the point; but I have conferred with my Brother Bolland, and looked at authorities, and I now find that it is a matter quite in the discretion of the Judge. It is not open to a demurrer; neither is it a ground for quashing the indictment. Therefore, whenever it is clear that there is only one offence, and the joinder of the counts cannot prejudice the prisoner, we think that the objection ought not to prevail. We have accordingly directed the officer to draw these indictments in the manner which we understand has prevailed on the circuit, and at the Old Bailey." (*y*)

A count for a substantive felony in receiving may be joined with a count for killing with intent to steal.

An indictment charging the principal with killing a sheep with intent to steal one of the hind legs of the sheep, and the accessory with receiving nine pounds of the mutton so stolen as aforesaid, cannot be supported against the accessory, but if such an indictment also contain a count for a substantive felony in receiving the mutton from a certain evil disposed person, the accessory may be convicted upon it. The first count charged that Wheeler killed a sheep "with intent to steal one of the hind legs of the said sheep." The second count charged Cowley with receiving nine pounds weight of mutton part of the goods and chattels "so stolen as aforesaid." The third count charged Cowley with receiving the nine pounds' weight of mutton from a certain evil disposed person; and it was held that the second count could not be supported, as it stated the mutton to have been "so stolen as aforesaid;" and there was no stealing mentioned, but only an intention to steal; but it was held that Cowley might be convicted on the third count. (*z*)

Joinder of counts.

A count charging a person with being accessory before the fact may be joined with a count charging him with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, as the party may be found guilty upon both. (*a*) And a case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harbouring, and comforting the felons, and the prisoner was convicted. (*b*)

Indictment for receiving

An indictment upon the 7 & 8 Geo. 4, c. 29, s. 55, for receiving goods which have been obtained by false pretences, must allege the

(*y*) Rex *v.* Austin, 7 C. & P. 796.

(*z*) Rex *v.* Wheeler, 7 C. & P. 170. Coleridge, J., who at first doubted, first, whether if the principal were known his name should not be stated, and if not known whether it should not be charged that he was not known; secondly, that the count was for receiving stolen goods, and was joined not with a count for stealing but with a count for killing with intent to steal, which seemed to be an offence of a different nature. His lordship, however, left the case to the jury, and the prisoners were found guilty, and afterwards sentenced.

(*a*) Reg. *v.* Blackson, 8 C. & P. 43, Parke, B., and Patteson, J.

(*b*) Anonymous, mentioned by Parke, B., ibid. In many cases it is advisable to insert such counts, as the evidence may fail to prove the receipt of the stolen property, and yet may be sufficient to obtain a conviction for comforting and assisting the felon. See Rex *v.* Lee, 6 C. & P. 536, *ante*, vol. 1, p. 37, and see Reg. *v.* Caspar, *ante*, p. 245, where one count charged Ellis Caspar as an accessory before, with inciting the principal, and another as accessory after, in receiving the stolen property.

goods to have been obtained by false pretences, and that the receiver knew that they were so obtained. The indictment stated that the prisoner unlawfully did receive of a certain evil disposed person one shoulder of mutton, of the weight of seven pounds, of the value, &c. of the goods and chattels of T. W., which said goods and chattels had been then lately before to wit, on &c. at &c., unlawfully obtained taken and carried away, she the prisoner at the time of her so receiving the said goods and chattels well knowing the said goods and chattels to have been unlawfully obtained taken and carried away: after a verdict of guilty it was moved in arrest of judgment that the offence was not brought within the 7 & 8 Geo. 4, c. 29, s. 55, unless it appeared on the indictment that the goods had been obtained by false pretences, and that the receiver knew them to be so unlawfully obtained; and, upon a case reserved, the Judges were unanimously of opinion that the indictment was bad, on the ground stated in the motion in arrest of judgment. (*c*)

goods obtained by false pretences.

The bare receiving of stolen goods, knowing them to be stolen did not make an accessory at common law. But if a party received goods from the thief to keep for him, knowing them to have been stolen, or if he received goods to facilitate the escape of the thief, or if he knowingly received them upon an agreement to furnish the thief with supplies out of them, and accordingly supplied him, this made the party an accessory at common law, for it was relieving and comforting. (*d*) If the prisoner receive the property knowing it to be stolen for the purpose of assisting the thief, or for the purpose of concealment, it is a receiving within the statute, although he neither gains any profit or advantage by the receipt. Upon an indictment for receiving stolen goods, Taunton, J., told the jury, that "if the prisoner received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it: it is a receiving within the meaning of the statute." (*e*) So in a similar case Gurney, B., told the jury that "if the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same." (*f*)

Receiving stolen goods at common law.

Under the statute.

Upon an indictment for receiving stolen goods there should be some evidence to shew that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving. Upon an indictment for receiving stolen property the evidence was that the property having been discovered after the loss concealed in an old engine-house, several persons kept watch, and one of the prisoners came alone in the night, and took the property out of the engine-house, on which he was immediately seized, and dropped the bag, in which the property was, among some standing corn, and shortly afterwards the other prisoners came up, and carried the bag away. After telling the jury that they must be satisfied that all the prisoners knew that there was stolen property in the engine-house, and that they took it away with a common design, Patteson, J., proceeded, "but if you do believe that, then another difficulty arises, for, if you believe that

Upon an indictment for receiving there should be some evidence that the goods were stolen by some other person.

(*c*) Reg *v.* Wilson, 2 Moo. C. C. R. 52.

(*d*) 1 Hale, 620.

(*e*) Rex *v.* Richardson, 6 C. & P. 335, *cor.* Gaselee, J., Vaughan, B., and Taunton, J.

(*f*) Rex *v.* Davis, 6 C. & P. 177.

they all went away together, then the question will arise, whether all were not the stealers? There is no evidence that any other person stole the property; if there had been evidence that some one person had been seen near the house from which the property was taken, or there had been strong suspicions that some one person stole it, then those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen. But, if you are of opinion, that some other person stole it, and that the prisoners knew of that fact, and planned together in order to get the property away, they may be convicted of receiving. I confess it appears to me on this evidence rather dangerous to convict them for receiving. It is evidence on which persons are constantly convicted of stealing. The question is, whether you are satisfied that they were the stealers or the receivers?" (*f*)

But a statement by the prisoner of having received is sufficient.

But a statement by the prisoner that he received the stolen property from another person is sufficient. On an indictment for receiving a stolen shirt it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt, and a statement made by her that she had received it form another person; it was objected that there was no evidence of receiving; Littledale, J., "In a case on the early part of this circuit the only evidence was recent possession, and the counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the possession of some one else before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else. That is evidence of receiving." (*g*)

Other circumstances.

And where a mother, her son, and a third party, were indicted for sheep stealing, and the only evidence against the mother was, that the house, in which the carcase of the sheep was found, was her house, but there were no female footsteps seen near the spot from which the sheep was taken, but only male footsteps, which were traced to the son and the other prisoner; and there was distinct evidence affecting the son and the other prisoner, and the son lived in the same house with his mother: Parke, J., told the jury that there was no evidence to put the mother on her defence for stealing, whatever evidence there might be of receiving. (*h*)

If the indictment allege that the goods were received from a particular person, it must be proved that they were received from such person.

If an indictment allege that the goods were received from the thief, it must be proved that they were received from the thief, and if it appear that the thief gave them to a person, from whom the prisoner received them, it is a fatal variance. The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that the person who stole them was a certain ill-disposed person to the jurors unknown; it was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner and Parke, J., held that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether the person from whom he was proved to have received it was an

(*f*) Rex *v.* Densley, 6 C. & P. 399.
(*g*) Rex *v.* Sarah Cordy, Gloucester Lent Ass. 1832, MSS. C. S. G.
(*h*) Arundel's case, 1 Lew. 115.

innocent agent or not of the thief. (*i*) So where an indictment charged Woolford with stealing a gelding, and Lewis with receiving it, knowing it to have been "so feloniously stolen as aforesaid," and Woolford was acquitted; Patteson, J., held that Lewis could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding, knowing it to have been stolen by some person unknown. (*j*)

But where some prisoners are indicted as principals and some as receivers, and the indictment contains, as it may, (*k*) separate counts against each receiver for a substantive felony, although all the principals are acquitted, the receivers may be convicted and sentenced. An indictment charged three prisoners with stealing a carpet bag and a number of articles therein contained, and two other prisoners with receiving separately certain of the goods so stolen as aforesaid, and there were two other counts, each of them charging one of the two last-mentioned prisoners with a substantive felony in separately receiving portions of the same goods, and the jury acquitted the three principals, but found the receivers guilty; it was moved, in arrest of judgment, that the principals having been acquitted, no judgment could be given against the receivers: that a larceny committed by another person could not be given in evidence upon this indictment, and although a count for a substantive felony might be inserted, such count was only introduced to prevent an acquittal, if it turned out that the property was received from some other person, but still the principal must be proved to have committed the felony; but the objection was overruled, and judgment given against the receivers. (*l*)

But if there is a count for a substantive felony the receiver may be convicted, though the principal be acquitted.

If two prisoners are charged jointly with receiving stolen goods, a joint act of receiving must be proved; and proof that one received in the absence of the other, and afterwards delivered to him will not suffice. Successive receivers are all separate receivers, and all punishable as such. Two prisoners, John and Mary Messingham, were convicted on a joint indictment for receiving fifty pounds weight of pork. The pork had been stolen by some person unknown, and both prisoners knew it to have been stolen; it was found in the cottage of Mary M., in which John M., her son, lived with her. The voluntary statements of the prisoners shewed that John received the pork in the absence of Mary, and took it into the cottage when she was not at home, and that Mary afterwards salted it. It was objected that Mary could not be legally convicted jointly with John upon this indictment, because the offence of John was complete before Mary took any part in the transaction; and, upon a case reserved, the Judges were unanimous that, on a joint charge, it was necessary to prove a joint receipt; and as the mother was absent when the son received, it was a separate receipt by him. (*m*)

Upon a charge of jointly receiving a joint receipt must be proved.

But it has since been holden that where a person knowing goods to have been stolen, directs his servant to receive them into his premises, and the servant in pursuance of that direction, afterwards receives them in the master's absence, the servant knowing that they had been stolen, they may be jointly indicted for receiving them. Upon an indictment against two principals for stealing goods, and

Servant receiving by the direction of his master.

(*i*) Elsworthy's case, 1 Lew. 117.

(*j*) Rex *v.* Woolford, 1 M. & Rob. 384.

(*k*) See Rex *v.* Austin, *ante*, p. 246.

(*l*) Reg. *v.* Pulham, 9 C. & P. 80, Gurney, B.

(*m*) Rex *v.* Messingham, R. & M. C. C. R. 257.

against Miller and Holborne for receiving the goods knowing them to have been stolen, it appeared that the principals brought the goods to Holborne's warehouse, and left them with Miller, who, after some hesitation, accepted them; Holborne was at this time absent; but it was clear on the facts that shortly after he came home, he was aware of the goods having been left, and there was strong ground for suspecting that he knew that they had been stolen; it was also clear that his servant Miller, soon after the goods were left with him, was aware they had been unlawfully procured, as he was found disguising the barrels in which they were contained; it was submitted for Holborne, that as the goods were in the first instance received by Miller in Holborne's absence, the indictment, alleging a joint act of receiving could not be supported, even though the jury thought that Holborne, when he came in, assented to the unlawful act of his servant, and the preceding case was cited; for the prosecution it was contended that there was some evidence to go to the jury, that Holborne, even before he went out, must have been aware that the goods were about to be left at the warehouse, and must have given orders for their reception, and if Miller took them in, in pursuance of previous orders from Holborne, the prisoners might be convicted of a joint receiving. Maule, J., thought there was sufficient evidence of this nature and told the jury that if they were satisfied that Holborne had directed the goods to be taken into the warehouse, knowing them to have been stolen, and that Miller in pursuance of that direction, had actually received them into the warehouse, he also knowing them to have been stolen, they might properly convict both of the prisoners. (*n*)

Where husband and wife are jointly indicted for receiving stolen goods, and there is no evidence to shew that the wife was present, or of her conduct when they were received, she ought not to be convicted if the husband is. (*o*)

The thing received may be stated under a different denomination from that stolen.

It is sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination; so that where the indictment charged the principal with stealing a live sheep, and the accessory with receiving "twenty pounds of mutton, part of the goods," &c. the conviction was holden to be proper. (*p*)

Proceeds of stolen notes.

But were an indictment charged one prisoner with stealing six promissory notes of 100*l.* each, and the other prisoner with receiving the said promissory notes, knowing them to have been stolen, and the only evidence against the receiver was that at one time he showed a number of 20*l.* notes, which he said were part of the prosecutor's money, and at another time he threw down a sovereign, saying "I had a hundred sovereigns of the captain's money, and this is one of them:" it was held that if the prisoner never received either of the 100*l.* notes into his possession, he must be acquitted upon that indictment. He was not here charged with receiving the proceeds; this indictment imputed that he received "the said promissory notes;" now the only notes mentioned in the indictment were the notes of 100*l.* each. (*q*) Where some prisoners were charged with feloniously

(*n*) Reg. *v.* Parr, 2 M & Rob. 346.

(*o*) Rex *v.* Archer, R. & M. C. C. R. 143, *ante*, vol. 1, p. 19. See note (*g*), ibid.

(*p*) Rex *v.* Cowell and Green, 1796. 2 East, P. C. c. 16, s. 48, p. 617.

(*q*) Rex *v.* Walkley, 4 C. & P. 132. Taddy Serjt. It is conceived that no indictment could be framed on the 7 & 8 Geo. 4, c. 29, s. 54, for receiving the

"receiving, harbouring, comforting, assisting, and maintaining" other prisoners, and the prisoners who were charged with harbouring, &c. had been found in possession of various sums of money derived from the disposal of the property stolen, but it did not appear, although they were in frequent communication with the principals, that they had received any of the stolen property itself, or done any act to assist the principals personally, Law, R., after consulting Littledale and Patteson, J's., said, that "in their opinion the proof amounts to evidence of an imperfect receiving, and not to the offence charged in the indictment." (*r*)

The averment of the guilty knowledge, which is the gist of the offence, should be correctly made; as where an indictment against a receiver who was tried with the principal, contained a defective statement, that the receiver knew the goods to have stolen (omitting the word "been,") the Judges thought the indictment bad, this being the gist of the offence; but they afterwards took time to consider. (*s*)

Evidence of guilty knowledge.

The necessary evidence of the offender knowing the goods which he has received to have been originally stolen may be collected from the circumstances of the particular case; and it is said, that the buying goods at an under value is presumptive evidence that the buyer knew they were stolen. (*t*)

Evidence of other receipts of stolen property is admissible to prove guilty knowledge.

Upon an indictment for receiving stolen goods, evidence may be given of different receipts of goods stolen from the same person in order to show guilty knowledge in the receiving, at least of such receipts as were prior to the one charged in the indictment; but where on an indictment for receiving several articles, it appears that they were received at different times, the prosecutor must elect on which receipt he will proceed. Upon an indictment against a principal and receiver, the evidence against the receiver was that many of the goods were found in her possession; others pledged by herself, and others by her direction, with different pawnbrokers at different times for a period of between four and five months, and other parcels were proved to have come into her possession at several and distinct times, and she admitted that all these things had been given to her by the principal; and it was submitted that the prosecutor should elect what articles he meant to rely upon, and Gaselee, J., decided that as there was evidence that some of the things came at different times, these were several distinct acts of receiving, and that the prosecutor must elect what act of receiving he relied upon to support the felonious receiving. The prosecutor then elected to go upon the receiving of two particular pieces of silk. It was then objected that evidence ought not to be allowed of the receiver having pledged or disposed of, or having in her possession the other articles of stolen property, in order to raise an inference of guilty knowledge; but as all the property had been stolen from the same persons and had all

proceeds of stolen property. That section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold, silver, &c., if it were melted after the stealing, an indictment for receiving it might be supported, because it would still be *the same* chattel, though altered by the melting; but where a 100*l.* note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money, for which a stolen horse was sold, as for receiving the proceeds of a stolen note. C. S. G.

(*r*) Reg. *v.* Chapple, 9 C. & P. 355.

(*s*) Rex *v.* Kernon, Hil. T. 1788, MS. Bayley, J: but see Redman's case, 1 Leach 477, *contra.*

(*t*) 1 Hale, 619. 2 East, P. C. c. 16, s. 153, p. 765.

been brought to her by the principal, Gaselee, J., thought it was admissible, and proper to be left to the jury, as an ingredient to make out the guilty knowledge; and he told the jury that they might take into their consideration the circumstances of her having the various articles of stolen property in her possession, and pledging or otherwise disposing of them at various times, as an ingredient in coming to a determination whether, when she received the two pieces of silk, she knew them or either of them to have been stolen. The jury found the prisoners guilty; and, upon a case reserved, the Judges were unanimously of opinion that evidence of other acts of receiving was properly admitted against the receiver, and the conviction was therefore right. (*u*) So where upon an indictment for receiving stolen goods, it was proposed to prove other receipts of stolen articles, besides those laid in the indictment; Gurney, B., held that any receipts, that were before those laid in the indictment were evidence, and that strictly speaking the receiving another article the subject of another indictment was admissible. (*v*) In the same case it was held that evidence might be given not only of the finding of the goods mentioned in the indictment in the house of the prisoner, but also of the finding of many other goods marked with the mark of the prosecutor, with a view to the *scienter*. (*w*) So upon an indictment for receiving stolen tin it was held that evidence might be given that when the constable went to search the prisoner's warehouse for stolen iron, he saw the prisoner endeavouring to conceal some brass in some sand, and that after he was taken away in custody, his wife carried some tin under her cloak from a warehouse on the premises. (*x*) In the same case it was held that what the prisoner said to the constable not only relating to the tin which was stolen, and for which the constable was not searching, but also relating to the iron for which he was searching was admissible in evidence. (*y*)

Advertisement in a paper.

Where upon an indictment for receiving stolen reissuable notes, the prisoner's counsel in cross-examination attempted to show that no means had been taken to inform the public of the number and particulars of the notes, and the counsel for the prosecution then proposed to read an advertisement from the *British Traveller*, it was objected to, unless it could be shewn that it had come to the knowledge of the prisoner; but Gaselee, J., held that as by the cross-examination it was attempted to be shown that no means had been taken to apprise the public that any notes had been stolen, or guard them against taking them, it was admissible: and, upon a case reserved, the Judges were clearly of opinion, that under the particular circumstances of the case, it was properly received. (*z*)

Evidence of the conviction of the principal.

In those cases where it is necessary to prove that the principal has been duly *convicted*, we have seen that it appears to have been ruled to be sufficient to give in evidence the examined copy of a

(*u*) Rex *v.* Dunn, R. & M. C. C. R. 146. The marginal note seems to limit the evidence of all other receipts to such as were "prior to that on which the prosecutor elects to proceed;" but no such point seems to have been raised in the case; but see the next case. C. S. G

(*v*) Rex *v.* Davis, 6 C. & P. 177, MSS. C. S. G. Gurney, B., thought if the receipt charged in the other indictment were given in evidence on this, that, as a matter of candour, the other indictment ought to be waived.

(*w*) Ibid.

(*x*) Reg. *v* Mansfield, 1 C. & M. 140, Coleridge, J.

(*y*) Ibid.

(*z*) Rex *v.* Vyse, R. & M. C. C. R. 218. See this case, *ante*, p. 76.

record, shewing that he was found guilty of the felony before a court of competent jurisdiction, though the proceedings be informal, and the judgment erroneous. (*a*)

Principal felon a witness.

In prosecutions for the *misdemeanor* in receiving stolen goods, on the repealed statute 22 Geo. 3, c. 58, it was settled that the principal felon, though not convicted or pardoned, was a competent witness against the receiver. (*b*)

The receiver may controvert the guilt of the principal.

In cases where the principal and receiver are joined in the same indictment, and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; and in cases where the principal has been previously convicted, though the record of the conviction will be sufficient presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet according to great authority, it is competent to the receiver to controvert the guilt of the principal, and to shew that the offence of which he was convicted, did not amount to felony in him, or not to that species of felony with which he was charged. (*c*)

Where several prisoners are jointly indicted for receiving stolen goods, and one of them convicted and the others acquitted, and one of the prisoners who was acquitted is afterwards separately indicted for receiving the same goods, a plea of *auterfois acquit* on the former indictment is good, if it be demurred to on the part of the prosecution. (*d*)

Restitution of stolen property. The owner of stolen property prosecuting thief or receiver to conviction, shall have restitution of his property.

As to the restitution of the stolen property upon the conviction of the receiver, the 7 & 8 Geo. 4, c. 29, s. 57, in order to encourage the prosecution of offenders, enacts, "that if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security." (*e*)

Exception.

(*a*) *Ante*, p. 243. Rex *v.* Baldwin, 3 Campb. 265.

(*b*) Haslam's case, O. B. 1786, and before the twelve Judges, 1 Leach, 418. 2 East, P. C. c. 16, s. 166, p. 782. Patram's case, *cor.* Grose, J., Bridgwater Sum. Ass. 1787, 1 Leach, 419, note (*a*). 2 East, P. C. ibid.

(*c*) Fost. 365. Smith's case, O. B. 1783, 1 Leach, 288. Rex *v.* Dunn, 4 C. & P. 377, where Bosanquet, J., thought that the record of the principal's conviction on his own confession was *primâ facie* evidence against the accessory; but see Rex *v.* Turner, *ante*, vol. 1, p. 42.

(*d*) Rex *v.* Dann, R. & M. C. C. R. 424. See this case, *ante*, vol. 1, p. 834.

(*e*) *Ante*, p. 131.

CHAPTER THE TWENTY-EIGHTH.

OF TAKING A REWARD FOR HELPING TO THE DISCOVERY OF STOLEN PROPERTY.

Offence of taking a reward to help to stolen goods.

AN offence nearly connected with that of receiving stolen goods, is that of taking a reward to help any person to goods which have been stolen.

7 & 8 Geo. 4, c. 29, s. 58. Taking a reward for helping to the recovery of stolen property, without bringing the offender to trial, a misdemeanor.

The 7 & 8 Geo. 4, c. 29, s. 58, enacts, "that every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment." (a)

As to the averment that the offender "had not apprehended, nor caused to be apprehended, the principal, &c." As to the conviction of the principal felon.

In a case upon a statute relating to the same subject, 4 Geo. 1, c. 11, now repealed by the 7 & 8 Geo. 4, c. 27, it was considered proper to aver, that the defendant had not apprehended or caused to be apprehended the principal, &c., such reservation being in the enacting clause, and part of the description of the offence. (b) In a case where the principal felon was dead, and had not been convicted of the offence, it was objected that the person receiving the reward to help to the stolen goods could not be convicted. The point was reserved as one of great importance, and of the first impression, for the consideration of the Judges: but their opinion was never publicly communicated, though it was presumed, from the prisoner being discharged after remaining some time in gaol, that the objection prevailed. (c) With respect, however, to another objection,

(a) As to principals in the second degree and accessories, see sec. 61, as to hard labour and solitary confinement, see sec. 4, and the 1 Vict. c. 90, s. 5, *ante*, p. 128.

(b) 2 East, P. C. c. 16, s. 155, p. 771.

(c) Drinkwater's case, 1740, 1 Leach, 15. 2 East, P. C. c. 16, s. 155, p. 770 And see Wild's case on the statute 5 Anne, c. 31, s. 6. 2 East, P. C. c. 16, s. 142, p. 746.

that the principal felon had not been convicted of the offence, it was well observed that this could not have been the ground of the prisoner's discharge, inasmuch as the statute, by the very terms of it, precluded the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender; for it stated that the offender should be guilty of felony, &c., "unless he did apprehend, *or cause to be apprehended*, the felon who stole the goods, and cause such felon to be brought to his trial for the same, *and give evidence against him*." And it was therefore suggested, that the true ground of the doubt was, that by the death of the principal, the *stipulated condition had become impossible to be performed* without any default of the defendant. (*d*)

The principal felon may be a witness against the party indicted for taking the reward.

There is also a case upon the repealed statute, where the principal felon not only was not convicted, but was admitted as a witness against the party indicted for taking the reward; namely, the case of the notorious Jonathan Wild, whose extensive traffic in the taking of such rewards is said to have been the occasion of the passing of this clause in the repealed statute. (*e*) The prisoner was first indicted on the 10 & 11 Wm. 3, c. 23, (now repealed) for privately stealing a box of lace in a shop, and acquitted, upon its appearing from the testimony of one Kelly, who had actually stolen the box, and who was admitted as a witness for the crown, that the prisoner was not in the shop at the time, but only waited at the corner of the street to receive the goods; but immediately upon this acquittal he was again arraigned, tried, and convicted, on the statute in question, 4 Geo. 1, c. 11, s. 4, for receiving ten guineas from the owner of the shop as a reward for helping her to the box of lace so stolen by Kelly; and Kelly was again examined as a witness on the part of the crown on this indictment. (*f*)

In a late case it was held to be an offence within this act of 4 Geo. 1, c. 11, s. 4., (now repealed) to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them. (*g*)

As a further means of putting a stop to this pernicious traffic in stolen goods, it is enacted by the 7 & 8 Geo. 4, c. 29, s. 59, "that if any person shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return

(*d*) 2 East, P. C. c. 16, s. 155, p. 770.

(*e*) 4 Blac. Com. 132.

(*f*) Wild's (Jonathan) case, 1725, 1 Leach, 17, note (*a*). 2 East, P. C. c. 16, s. 155, p. 770. 4 Blac. Com. 132. The prisoner was executed upon this conviction. See also as to the point of the principal felon being a witness, *ante*, Haslam's case, p. 253.

(*g*) Rex *v.* Ledbitter, R. & M. C. C. R. 76.

to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or if any person shall print or publish any such advertisement, in any of the above cases, every such person shall forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same by action of debt, to be recovered with full costs of suit."

CHAPTER THE TWENTY-NINTH.

OF UNLAWFULLY RECEIVING OR HAVING POSSESSION OF PUBLIC STORES.

The several statutes relating to the offences mentioned in the title to this chapter will be set forth, in the first instance, in the order in which they were passed; and the few decided cases which have occurred upon their construction will be subsequently noticed.

The statute 9 & 10 W. 3, c. 41, s. 1, (*a*) recites, "that notwithstanding divers good laws made and enacted for the preventing of the stealing and embezzlement of his Majesty's stores of war, and naval stores, those frauds, thefts, and embezzlements were frequently practised, and the convicting of such offenders was rendered difficult and impracticable, by reason that it rarely happened that direct proof could be made of such offenders' immediate taking, embezzling, or carrying away such stores from the places for keeping and preserving the same, but only that such goods were marked with the king's mark, and found in the custody and possession of the said person accused for stealing or embezzling the same:" and it then enacts, "that it shall not be lawful to or for any person or persons whatsoever, other than persons authorized by contracting with his Majesty's principal officers or commissioners of the navy, ordnance, or victualling office for his Majesty's use, to make any stores of war, or naval stores whatsoever, with the marks usually used to and marked upon his Majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from three inches downwards, with a twine in lieu of a white thread, laid to the contrary way as aforesaid, or any canvass, wrought or unwrought, with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise, upon pain that every such person or persons, who shall make such goods so marked as aforesaid, not being a contractor with his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers for his Majesty's use, or employed by such contractor for that purpose as aforesaid, shall for every such offence forfeit such goods, and the sum of two hundred pounds, together with costs of suit;" one moiety thereof to his Majesty, and the other moiety to the informer, to be recovered by action of debt, &c. in any court of record at Westminster.

9 & 10 Wm. 3, c. 41, s. 1. Recital of the frequent embezzlement of stores, and the difficulty of convicting offenders.

Enactment that it shall not be lawful for persons (except those authorised) to make any stores with the marks used upon the King's stores, upon pain of forfeiting the goods, and 200*l.*, &c.

And the second section enacts, "that such person or persons, in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid,

Sec. 2. Persons in whose possession stores so

(*a*) Made a public act by 1 Geo. 1, st. 2, c. 25, s. 14.

marked shall be found, and persons concealing such stores, shall forfeit the goods and 200*l.*, &c., and be imprisoned till payment.

and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods, and the sum of two hundred pounds, together with the costs of prosecution, one moiety to his Majesty, and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment, until payment and performance of the said forfeiture, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods, as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession."

Sec. 4. Provision that the commissioners of the navy, &c., may sell stores; and buyers secured from the penalty by a certificate.

But the statute provides, that the principal officers or commissioners of the navy, &c., may sell and dispose of any of the stores so marked, as they might have done before; and that persons buying such stores of the principal officers, &c., or by their order, may keep the same without incurring any penalty, upon producing a certificate or certificates under the hand and seal of three or more of the said principal officers, &c., that they bought such goods from them, or from persons who did buy the said stores from the said principal officers, &c., at any time before such stores were found in their custody. (*b*)

Sec. 8. The act not to hinder officers, &c., from lending stores to vessels in distress with a certificate, &c.

And also, that the act shall not hinder any of the principal officers, &c., or any chief commander of any of his Majesty's ships at sea, to lend any stores to any merchant ship or vessel in distress, or otherwise, as might lawfully be done before the act: in case the goods so lent be restored with all possible conveniency, and provided the persons borrowing have such certificate as before mentioned, which the said principal officers, &c., or commander-in-chief are required to give to the party borrowing. (*c*)

9 Geo. 1, c. 8, s. 3. Persons having or concealing *marked* timber, &c., to suffer as in case of having or concealing other stores.

The statute 9 Geo. 1, c. 8, s. 3, recites the provisions of the 9 & 10 Wm. 3, c. 41, s. 2, and that it was necessary to give power to mitigate the penalties therein mentioned, and to explain and amend the act: and then enacts, "that if any person or persons shall be lawfully convicted of having in his, her, or their custody, any timber, thick stuff, or plank, marked with the broad arrow, by stamp, brand, or otherwise, or of concealing any timber, thick stuff or plank so marked, every such person so offending shall suffer, forfeit and pay, as for having, keeping, or concealing any other warlike, naval, or ordnance stores contrary to the said act."

Sec. 4 gives a power to mitigate penalties.

The fourth section provides, that it shall be lawful "for any Judge, justice or justices, before whom any offender or offenders shall be convicted of any of the crimes or offences before recited, enacted or mentioned in this act, to mitigate the penalty for the same, as he or they shall see cause, and to commit the offender or

(*b*) Sec. 4. As to the form of the certificate the section further enacts, "in which certificate or certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners." And it empowers the commissioners or any three of them, from time to time, to give to persons who shall desire the same, and shall have bought any of the said stores, within thirty days after the sale and delivery of the stores.

(*c*) Sec 8. The 1 Geo. 1, st. 2, c. 25, here introduced in the last edition is repealed by the 2 Wm. 4, c. 40, s. 35, except so much as continues the 11 Wm. 3, c. 7, and 5 Anne, c. 34. C. S. G.

offenders, so convicted, to the common gaol of the county or place where the offence shall be committed, there to remain without bail or mainprize, until payment be made of the penalty and forfeiture imposed by this or the said former act, or mitigated as aforesaid, or to punish such offender or offenders corporally, by causing him, her (*d*) or them to be publicly whipped, or committed to some public work-house, there to be kept to hard labour for the space of six months or a less time, as to such Judge, justice, or justices, in his or their discretion, shall seem meet: anything in the said recited act, or in any other act to the contrary notwithstanding."

Sec. 5, as to disputes concerning penalties.

The succeeding section enacts, that where any dispute shall arise between the persons on whose informations on oath persons offending in the premises, or against the said former act, shall be prosecuted or convicted, touching the right to the forfeitures or penalties, the Judge or justice before whom the offender shall be convicted shall examine and finally determine the matter.

17 Geo. 2, c. 40, recites the 9 & 10 Wm. 3, c. 41, and 9 Geo. 1, c. 8, and doubts which had arisen upon those statutes;

The statute 17 Geo. 2, c. 40, s. 10, recites the statute 9 & 10 Wm. 3, c. 41, and the 9 Geo. 1, c. 8, ss. 3, 4, 5, and that doubts had arisen touching the method of trial and punishment of offenders against those acts, whether they might be indicted and tried for the offences, and whether any Judge, justice of assize, or justices of the peace at sessions, might hear, try, and determine, the same, and on conviction set such fine, or mitigate the same and the forfeitures, &c., or whether such offenders, in order for recovering the said forfeitures, &c., could only be proceeded against by action of debt, bill, &c., in a court of record at Westminster; and then declares and enacts, "that it shall and may be lawful to and for any Judge, justice or justices at the assizes, or justices of the peace at the general quarter sessions to be holden for any county, city, borough, or town corporate, to hear, try, and determine by indictment or otherwise, all or any the crimes or offences mentioned in the said recited acts; and that the said Judge, justice or justices of assize, or justices of the peace as aforesaid, before whom such offender or offenders shall be indicted or tried, and convicted of all or any the crimes or offences in the said recited acts mentioned, may impose any fine, not exceeding the sum of two hundred pounds, on such offender or offenders (one moiety to be paid to his Majesty, and the other moiety to the informer;) and may mitigate the said penalty and forfeitures inflicted by the said recited acts or either of them, and to commit the offender or offenders so convicted and fined, to the common gaol of the county or place where the offence shall be committed, there to remain without bail or mainprize, until payment be made of the penalty and forfeitures imposed by this or the said former acts, or mitigated as aforesaid: or in lieu thereof, to punish such offender or offenders in the premises corporally, by causing him, her, (*d*) or them to be publicly whipped, and committed to some house of correction or public work-house, there to be kept to hard labour for the space of three months or less time, as to such Judge, justice or justices of assize or justices of the peace, shall in his or their discretion, seem meet."

And enacts, that Judges at the assizes and justices at sessions may try by indictment any offences mentioned in those statutes, and may fine, &c., or in lieu thereof punish corporally.

39 & 40 Geo. 3, c. 89, s. 1,

The 39 & 40 Geo. 3, c. 89, a principal statute upon this subject, and intituled, "An act for the better preventing the em-

(*d*) The whipping of females is abolished by the 1 Geo. 4, c. 57 s. 2.

recites a statute 22 Car. 2, c. 5, and also the 9 & 10 Wm. 3, c. 41. 9 Geo. 1, c. 8. and 17 Geo. 2, c. 40. and the necessity of further prevention of the embezzling of stores: and enacts that persons knowingly selling, receiving, &c., *marked* stores (being new, or only one-third worn;) and persons concealing such stores, shall be deemed receivers of stolen goods, and be transported for fourteen years, unless they produce a certificate.

bezzlement of his Majesty's naval, ordnance, and victualling stores," recites a statute 22 Car. 2, c. 5, (*e*) and also the statutes 9 & 10 Wm. 3, c. 41, s. 2. 9 Geo. 1, c. 8, ss. 3, 4, and 17 Geo. 2, c. 40, s. 10, and further recites, that it was become necessary to make some further and more effectual provision for preventing the wicked practices of the stealers, embezzlers, and receivers of his Majesty's warlike and naval, ordnance, and victualling stores: and then enacts, "that every person or persons (such person or persons not being a contractor or contractors, or employed as in the said recited act, 9 & 10 Wm. 3, c. 41, is mentioned) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, any stores of war, or naval, ordnance, or victualling stores, or any goods whatsoever, marked as in the said recited acts are expressed, or any canvass marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called buntin, wrought with one or more streaks of raised tape (the said stores of war, or naval, ordnance, or victualling stores or goods above mentioned, or any of them, being in a raw or unconverted state, or being new or not more than one third worn), and such person or persons who shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, (*f*) unless such person or persons shall, upon his, her, or their trial, produce a certificate under the hands of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities or weights of such stores or goods as he, she, or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her, or their hands or possession."

Sec. 2. And persons having possession of certain articles *marked*, &c., but not *new*, &c., and persons convicted of any offence contrary to the 9 & 10 Wm. 3, c. 41, shall, besides forfeiting such stores, and 200*l.*, be corporally punished.

The second section enacts, "that such person or persons (not being a contractor or contractors, or employed as aforesaid) in whose custody, possession, or keeping, any of the said stores called canvass, marked with a blue streak in a serpentine form, or bewper, otherwise called buntin, wrought as above mentioned, shall be found, (such canvass or bewper, otherwise called buntin, not being charged to be new, or not more than one-third worn) and all and every person and persons who shall be convicted of any offence contrary to so much of the said recited act of the 9 & 10 Wm. 3, as relates to the making or the having in possession or concealing any of his Majesty's warlike, or naval or ordnance stores, marked as therein specified, shall, besides forfeiting such stores, and the sum of two hundred pounds, together with costs of suit as therein mentioned, be corporally punished by pillory, (*g*) whipping, (*h*) and

(*e*) Now repealed by 7 & 8 Geo. 4, c. 27.

(*f*) Mr. Lonsdale, St. Cr. Law, p. 221, makes a *quære* whether the punishment of these offences is affected by the 7 & 8 Geo. 4, c. 29, s. 54, *ante*, p. 237.

(*g*) But the pillory is now abolished by the 56 Geo. 3, c. 138, and 1 Vict. c. 23.

(*h*) See note (*d*), *ante*, p. 259.

imprisonment, or by any or either of the said ways and means, in such manner, and for such space of time as to the Judge or justices, before whom such offender or offenders shall be convicted, shall seem meet, anything in the said last-mentioned act, or in the before recited acts of 9 Geo. 1, and 17 Geo. 2, to the contrary thereof, in anywise notwithstanding: provided always, that it shall and may be lawful to and for such Judge or justices to mitigate the said penalty of two hundred pounds, as he or they shall see cause."

Sec. 3. As to the exemption of contractors.

It is then provided by the third section, that nothing in this act, or in the said recited act of the 9 & 10 Wm. 3, contained, shall extend to exempt from the operation of this act, or the said recited act, respectively, "any person or persons being a contractor or contractors or employed as in the said last mentioned act is mentioned, except only so far as concerns stores or goods marked as aforesaid, which shall be *bonâ fide* provided, made up, or manufactured by such person or persons, or by their order, and which shall not have been before delivered into his Majesty's store, unless, having been so delivered, they shall have been sold or returned to such person or persons by the commissioners of his Majesty's navy, ordnance, or victualling respectively."

Sec. 4. Persons defacing the marks, denoting the King's property in stores, made guilty of felony, punishable by transportation for fourteen years.

The fourth section enacts, "that if any person or persons shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks in the said act of the 9 & 10 Wm. 3, or in this act mentioned, or any other mark whatsoever, denoting the property of his Majesty, his heirs or successors, in or to any warlike or naval, ordnance, or victualling stores, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing his Majesty's property in such stores, such person or persons shall be deemed guilty of felony, and shall, on being convicted thereof, be transported to parts beyond the seas for the term of fourteen years, in like manner as other felons are directed to be transported by the laws and statutes of this realm."

Sec. 5. Offenders not having been transported, and offending a second time, are to be transported for fourteen years.

The fifth section enacts, "that if any person or persons who shall hereafter be convicted of any offence contrary to this act, for which he shall not have been transported beyond the seas, or contrary to the said recited act of 9 & 10 Wm. 3, shall be guilty of a second offence, either contrary to that act or to this present act, which would not otherwise, as the first offence, subject him her or them to transportation, and shall be thereof legally convicted, such person or persons shall, by judgment of the court wherein he she or they shall be so convicted, be transported to parts beyond the seas for the term of fourteen years, in like manner as other offenders may be transported by the laws and statutes of this realm now in force."

Sec. 6. Persons returning from transportation before their time, excluded from clergy.

The sixth section enacts, "that if any person or persons transported in pursuance of this act shall return into any part of Great Britain or Ireland before the end or expiration of the term for which he or she shall have been so transported, every such person or persons so returning shall suffer as felons, and shall have execution awarded against him her or them, as persons attainted of felony, without benefit of clergy."

Sec. 7 provides

By the seventh section, provision is made for the mitigation of

for the mitigation of punishment by the court before which any offender is convicted.

punishment, by the court before which any offender is convicted. It enacts, "that it shall and may be lawful to and for the court before whom any offender or offenders shall be indicted and convicted of all or any of the crimes or offences hereinbefore-mentioned to be punishable with transportation, to mitigate or commute such punishment, by causing the offender or offenders to be set on the pillory, (*j*) publicly whipt, (*jj*) fined, or imprisoned, or by all or any one or more of the said ways and means, as such court in its discretion shall think fit; one moiety of which fine (if any imposed) shall be to his Majesty, and the other moiety thereof to the informer, and also to order such offender or offenders to be imprisoned until such fine be paid."

Sec. 8, 9, 10, Rewards.

The three succeeding sections of the act relate to rewards to be given to persons discovering or apprehending offenders, and the mode in which they shall be distributed and paid. (*k*)

Sec. 11 empowers any commissioner of the navy, &c., to issue a warrant to search for concealed stores, and to bring the same and the offender before them, and to commit, &c., and if the party in whose possession the stores were found, do not satisfactorily account for them, such stores are to be forfeited, and the party to be deemed guilty of a misdemeanor.

The eleventh section enacts, that any commissioner of the navy, ordnance, or victualling, for the time being, (who is authorized for these purposes to act as a justice of peace for the county, &c.) (*l*) or any justice of peace may, upon the oath of a credible person, that there is reason to suspect that any stores, &c. are concealed, by warrant under hand and seal, cause the place to be searched in the day time, by a peace officer, and in case any stores, &c. marked as mentioned either in this act, or the 9 & 10 Wm. 3, c. 41, shall be found, cause the same, and the offenders to be brought before them, and commit, bind over, or otherwise deal with such offenders according to law: and it then enacts, "that in case upon any such search, or upon any seizure whatsoever of stores or goods, marked as aforesaid, any naval, ordnance, or victualling stores, not so marked as aforesaid, shall be found, which may reasonably be suspected to belong to his Majesty, the party or parties in whose possession or keeping the same shall be found, shall be required to give to the commissioner or justice of the peace respectively before whom the said stores or goods shall and may be brought, an account to the satisfaction of such commissioner or justice, that the same were not embezzled or stolen from any of his Majesty's ships or vessels, yards, storehouses, or other places, or that if the same were embezzled or stolen, the same had come to the possession of the said party or parties honestly, and without any knowledge or suspicion that the same had been embezzled or stolen; on failure whereof by a reasonable time, to be set by such commissioner or justice of the peace, the said stores or goods shall thereupon become forfeited, and such party or parties shall be deemed and adjudged guilty of a misdemeanor."

Sec. 12, 13, Barges, boats, &c., and persons conveying stores in them may be detained, &c., and if the

The twelfth section authorizes persons deputed by the principal officers, or commissioners of the navy, &c. to search and detain any barge, boat, or other craft, reasonably suspected to contain any stores, &c. embezzled, or unlawfully procured; and apprehend the persons reasonably suspected of having, or conveying them in such barge, &c. and convey them, together with the stores, &c. before a

(*j*) See note (*g*), *ante*, p. 260.

(*jj*) See note (*d*), *ante*, p. 259.

(*k*) And see the 2 Wm. 4, c. 40, s. 34, by which these rewards are now regulated.

(*l*) And see also as to the authority of the treasurer, &c., or any commissioner of the navy for the time being, to act as a justice of the peace, 9 Geo. 3, c. 30, s. 5.

commissioner or justice of peace, who are to commit, bind over, or otherwise deal with such persons according to law, in respect of the *marked* stores, &c.; and in respect of the stores, &c. *not marked*, but nevertheless reasonably suspected to be the property of his Majesty, the persons on whom they are found are to be required to give an account, to the satisfaction of the commissioner or justice, that they were not embezzled, or if embezzled had come to their possession honestly, and without knowledge or suspicion, that they had been embezzled; on failure whereof by a reasonable time to be set, as thereinbefore mentioned, such stores, &c. are to become forfeited, and the person apprehended to be adjudged guilty of a misdemeanor, and the barge, boat, &c. are to be forfeited. The following section of the act gives power to persons so deputed, and also to any peace officer, to apprehend persons having any stores, &c. though not in any barge, boat, or other craft, and authorizes similar proceedings in such cases.

stores be *marked* are to be committed, &c.; and if *not marked* the persons are to give a satisfactory account, or the stores are to be forfeited, and the persons guilty of misdemeanor.

Apprehension of persons having stores, &c., though not in a barge, &c.

The act then provides for the disposal of stores, &c. and any barge boat, &c. which have become forfeited.

The sixteenth section enacts, that every person adjudged guilty of any of the aforesaid misdemeanors, before any commissioner, or justice of peace, shall, for every such misdemeanor, forfeit for the first offence the sum of forty shillings; for the second offence the sum of five pounds; and for the third and every subsequent offence, the sum of ten pounds, over and above the other forfeitures thereinbefore mentioned. And it further provides for the levying and disposal of the forfeitures.

Sec. 16. Punishment of misdemeanors.

By the seventeenth section, every adjudication in any of the said misdemeanors is to be certified by the commissioner or justice making it to the next general or quarter sessions of the peace, to be filed and entered amongst the records of the session: and such conviction is not to be set aside or quashed for want of form, nor be removed by *certiorari*, advocation, or suspension into any other court; but shall be deemed to be final to all intents and purposes whatsoever.

Sec. 17. Conviction to be certified to the quartor sessions.

Powers are then given to the commissioners of the navy, ordnance, and victualling, and to justices of peace out of sessions, to hear and determine offences in a summary way, in cases where the stores found are of a value not exceeding twenty shillings, and punish the offender by fine, &c. And an appeal is given to the quarter sessions from such convictions.

Sec. 18, 19, 20, 21, 22, 23. Summary jurisdiction.

The twenty-fourth section enacts, "that nothing hereinbefore contained, which gives to any commissioner or justice of the peace, power and authority to hear and determine offences in a summary way, shall extend or be deemed, construed, or taken to extend, to prevent the party or parties accused of selling or delivering, or of having in his, her, or their custody, possession, or keeping, or of receiving or concealing any of the stores, marked as above mentioned, under the value of twenty shillings, from being prosecuted as receivers of stolen goods under this act, or for unlawfully having the same in his, her, or their custody, or concealing the same under the said recited acts of the 9 & 10 Wm. 3, 9 Geo. 1, or 17 Geo. 2. in any court of record, oyer and terminer, or otherwise, as they might have been if no such power or authority had been given; or to take away from any person or court whatsoever any power, right, jurisdiction, pre-eminence, or authority, which he or they or any of them

Sec. 24. Nothing in the act as to summary jurisdiction is to prevent the parties accused from being prosecuted as receivers of stolen goods.

ought lawfully to have had and enjoyed for the hearing and determining of such offences, in case no such power or authority to hear and determine the same in a summary way had been given; so as that the same person shall not be punished twice for the same offence."

Sec. 25, 26. Commissioner of the navy, &c., may sell marked stores, and the buyer be protected by a certificate.

It is then enacted, that the commissioners of the navy, ordnance, or victualling, may sell and dispose of marked stores, as before the making of the act; and that persons buying them of the commissioners may keep them without incurring any penalty, upon producing a certificate under the hand and seal of three or more of the commissioners, that they bought the stores from them, or a certificate from such persons as shall appear to have bought the stores from the commissioners, that such stores were stores or part of stores bought of the commissioners. In these certificates the quantities of the stores are to be expressed, and the time when and where bought of the commissioners: and the commissioners, or any three of them, and also the persons afterwards selling the stores are directed, from time to time, to give such certificates to the buyers desiring the same, within thirty days after the sale and delivery. And provision is made for the punishment, by forfeiture of 200*l.*, &c. of persons giving or publishing any false certificate.

Penalty for false certificate.

Several enactments are then made for the protection of persons making seizures, and otherwise acting in execution of the statute.

Sec. 29, *et seq.* Scotland.

By the twenty-ninth section, the statute is to extend to Scotland; and several subsequent sections direct the course of proceedings in that country.

52 Geo. 3, c. 12, extends the former statutes to Ireland.

The statute 52 Geo. 3, c. 12, recites the statute 22 Car. 2, c. 5, (*m*) and also the statutes 9 & 10 Wm. 3, c. 41, 9 Geo. 1, c. 8, 17 Geo. 2, c. 40, and 39 & 40 Geo. 3, c. 89; and enacts, that all those acts, so far as they severally relate to his Majesty's naval ordnance and victualling stores, therein respectively mentioned, shall extend to Ireland; but provides that no summary proceedings shall be had there before a justice of the peace, without the consent in writing of the naval store-keeper for the time being, at any port in Ireland.

54 Geo. 3, c. 60, extends the 9 & 10 Wm. 3, c. 41, and 39 & 40 Geo. 3, c. 89.

The statute 54 Geo. 3, c. 60, extends the provisions of the 9 & 10 Wm. 3, c. 41, and 39 & 40 Geo. 3, c. 89, in respect to the making, selling, delivering, receiving, having in possession, and concealing, cordage wrought either with a white thread laid the contrary way, or with a twine laid to the contrary way, mentioned in those acts, to cordage wrought with one or more *worsted* threads.

55 Geo. 3, c. 127, recites the 9 & 10 Wm. 3, c. 41, the 9 Geo. 1, c. 8, the 17 Geo. 2, c. 40, and the 39 & 40 Geo. 3, c. 89, and extends those acts to all public stores.

The statute 55 Geo. 3, c. 127, repeals a former act, 53 Geo. 3, c. 126. It also recites the statutes 9 & 10 Wm. 3, c. 41, 9 Geo. 1, c. 8, 17 Geo. 2, c. 40, and 39 & 40 Geo. 3, c. 89, and enacts, that those statutes, "so far as the same severally relate to his Majesty's naval, ordnance, and victualling stores therein respectively mentioned, and all the pains, penalties, forfeitures, regulations, restrictions, powers, provisions, clauses, matters, and things therein respectively contained, relating to his Majesty's naval, ordnance, and victualling stores therein respectively mentioned, shall extend and be construed to extend to all public stores whatsoever under the care, superintendance, or control of any officer or person in the service of his Majesty, his heirs or successors, or employed in any public department or office, either

(*m*) *Ante*, p. 260.

marked with the marks or any of them in the said recited acts or any of them specified, or with the broad arrow, and the letters B. O., or with a crown and the broad arrow, or with his Majesty's arms, or with the letters G. R., to denote the property of his Majesty his heirs or successors therein, and to all and every person and persons, not authorized by the proper officer or officers, person or persons in his Majesty's service, in that behalf so to do, using any such marks, or making any goods marked with such marks, or any of them, and to all and every person and persons in whose custody, possession, or keeping, any such public stores so marked as aforesaid shall be found, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, or who shall conceal any such public stores so marked as aforesaid, unless such person or persons shall upon his, her, or their trial, produce a certificate or certificates under the hand or hands of the proper officer or officers, person or persons in his Majesty's service authorized to grant the same, of such and the like nature as the certificate in the said recited acts of the 9 & 10 Wm. 3, and 39 & 40 Geo. 3, mentioned; and to all and every person and persons who shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase wholly or in part, any of the said marks, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing the property of his Majesty his heirs or successors therein, as fully and effectually, to all intents and purposes, as if all the same several pains, penalties, forfeitures, regulations, restrictions, powers, provisions, clauses, matters, and things, in the said several acts contained, so far as the same severally relate to his Majesty's naval, ordnance, and victualling stores, and the punishment of persons offending in manner therein mentioned were herein and hereby severally repeated and re-enacted in respect to all other public stores whatsoever."

Construction of these statutes. *Onus probandi* upon the party having stores in his possession.

Upon the construction of these statutes it should be observed that the king's mark denotes the original ownership, and that the *onus probandi* is thrown upon the party having public stores in his possession, to account satisfactorily for that possession according to the regulations prescribed. But though the bare fact of possession ordinarily concludes the party, it is open to explanation; and the presumption arising from it may be rebutted by circumstances. (*n*)

But the fact of possession is open to explanation; and the presumption arising from it may be rebutted by circumstances.

This principle was acted upon by Mr. Justice Foster, in a case where a widow woman was indicted on the 9 & 10 Wm. 3, c. 41, for having in her custody divers pieces of canvass marked with his Majesty's mark in the manner described in the act, she not being a person employed by the commissioners of the navy to make the same for his Majesty's use. The canvass was produced at the trial marked as charged in the indictment, and was proved to the satisfaction of the court and jury to be of that sort which is commonly made for the use of the navy; and to have been found in the defendant's custody. The defendant did not attempt to shew that she was within the exception of the act, as being a person employed to make canvass for the use of the navy; nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvass coming into her possession. Her defence was that when there happened to be in his Majesty's stores a considerable quantity

(*n*) 2 East, P. C. c. 16, s. 153, p. 765.

of old sails, no longer fit for that use, it had been customary for the persons, intrusted with the stores, to make a public sale of them in lots, larger or smaller, as best suited the purpose of the buyers; and that the canvass produced in evidence, which happened to have been made up long since, some for table linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant; and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the crown, who insisted that, as the act allows of but one excuse, the defendant, unless she can avail herself of that, cannot resort to any other: and they asked why, if the canvass was really bought of the commissioners, or of persons acting under them (which is the only excuse pointed out by the statute), no certificate of that matter was taken at the time of the purchase, since the fourth section of the act admits of that excuse, and the second section admits of no other? But Foster, J., was of opinion that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seemed to exclude any other excuse for those in whose custody they should be found; yet still, the circumstances attending every case, which might seem to fall within the act, ought to be taken into consideration; otherwise a law calculated for wise purposes might, by too rigid a construction of it, be made a handmaid to oppression. He observed that there was no room to say that this canvass came into the possession of the defendant by any act of her own; that it was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. That things of this kind had been frequently exposed to public sale; and though the act pointed out an expedient for the indemnity of the buyers; yet, probably, few buyers, especially where small quantities had been purchased in one sale, had used the caution suggested to them by the act. And that if the defendant's husband really bought this linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for this neglect. He, therefore, thought the evidence given by the defendant proper to be left to the jury; and directed them that if, upon the whole of the evidence they were of opinion, that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was acquitted. (*o*)

Banks's case. A defendant, against whom the possession of stores is proved, may discharge himself by other evidence than that of a navy board certificate.

In a subsequent case of an information upon the 9 & 10 Wm. 3, c. 41, and 17 Geo. 2, c. 40, s. 10, it was contended by the counsel for the prosecution that the only mode by which the defendant, against whom a possession of the stores was proved, could discharge himself, was by producing the Navy Board certificate granted at the time of the sale, as that was the only evidence of the legal possession of them. But Lord Kenyon, C. J., said that though it was clear that in prosecutions under the statutes in question it was sufficient for the crown to prove the finding of the stores, with the king's

(*o*) *Anon. cor.* Foster, J., on the Western circuit, Fost. 439.

mark, in the defendant's possession, to call upon him to account for that possession, and the manner of his coming by them, so as to throw the *onus* upon the defendant of proving that he had legally become possessed of them; yet, that it could not bear a question, but that the defendant had other means of shewing that he had lawfully become possessed of them than by the production of the certificate from the Navy Board; as, for example, he might shew that he had bought them from another person who was in the practice of buying stores at the navy sale; and who, therefore, might fairly be presumed to have had the regular certificate, but who, when he sold part to the defendant, could not, consistently with his own safety, part with the certificate he had obtained, of his having been the purchaser of the whole lot. (*p*) And his Lordship, after alluding to the case in which this doctrine had been holden by Mr. Justice Foster (whom he spoke of as one of the best crown lawyers that had ever sat in Westminster-hall), said that if the defendant could shew either a navy certificate, or prove the purchase of the stores mentioned in the information from any person who might be presumed to have been possessed of the proper certificate, from the circumstance of such person having frequently been a purchaser at such sales, he was of opinion that it was such evidence as ought to induce the jury to find the defendant not guilty. And the defendant, accordingly, gave such evidence, and was acquitted. (*q*)

Cole's case. A distinction taken (upon the particular circumstances of the case) between a receiving and having in possession.

Where an indictment charged that one T. Cole, on the 28th of January, 1801, unlawfully, willingly, and knowingly did *receive and have* in his custody, possession and keeping, certain naval stores of the king, being all marked with the broad arrow, he not being a contractor, &c., against the statute; with a second count, charging him with concealing naval stores, &c.; and the jury found the prisoner guilty on the first count, but acquitted him on the second, and said that they did not find that he *received* the stores after the 28th of July, 1800, but only that he had them in his possession after that day; the judgment was respited in order to take the opinion of the Judges upon the point. A majority of the Judges were inclined to think that the statute was to be construed in the disjunctive, and the word *or* (receive *or* have) not to be taken as *and*, but, because of the disagreement of some, and that the case was not likely to occur again, the prisoner, on the finding of the jury, was recommended to mercy. (*r*)

It appears to have been agreed that the foregoing case was not within the 9 & 10 Wm. 3, c. 41, because the goods were not charged to have been found in the prisoner's possession. (*s*)

The forfeiture under 9 & 10 Wm. 3, c. 41, s. 2, accrues by conviction on an indictment.

In a case upon the 9 & 10 Wm. 3, c. 41, s. 2, an exception was taken to the indictment, in arrest of judgment, that no indictment lay because it was a new offence, and a particular penalty inflicted of forfeiture of the goods and 200*l.*; but the exception was overruled because the forfeiture accrues by the conviction on an indictment for the offence. (*t*)

(*p*) At this time, by the statute 39 & 40 Geo. 3, c. 89, s. 25, a buyer is protected by producing a certificate from such person as shall appear to have bought the stores from the commissioners, *ante*, p. 261.

(*q*) Rex *v.* Banks, *cor.* Lord Kenyon, C. J., 1794. 1 Esp. R. 145.

(*r*) Cole's case, 1801, MS., and 2 East, P. C. c. 16, s. 153, p. 767. The date of the stat. 39 & 40 Geo. 3, c. 89, is the 28th July, 1800.

(*s*) Id. ibid.

(*t*) Reg. *v.* Harman (3 Anne,) 2 Lord Raym. 1104.

Counts upon sections 1 and 2 of the 39 & 40 Geo. 3, c. 89, may be joined in the same indictment.

Proof of negative averment of the prisoner not being a contractor, &c.

Though the having in possession new stores, or stores not more than one-third worn, is subject to transportation for fourteen years, by the 39 & 40 Geo. 3, c. 89, s. 1, and the having in possession stores not new, or more than one-third worn, is, by the second section of that statute, subjected to a different punishment, yet counts for both these offences may be included in the same indictment. (*u*) It is said to have been agreed that, although an indictment state that the prisoner, "then or at any time before not being a contractor with or authorized by the principal officers or commissioners of our said lord the king, of the navy, ordnance, &c., for the use of our said lord the king, to make any stores of war, &c.;" yet, that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must shew, if the truth be so, that he is within the exception in the statute. (*v*)

As to the informer being a witness.

It appears to have been holden in one case, that the informer was an interested witness, as being entitled to a moiety of the fine of 200*l.*, on a prosecution on the 17 Geo. 2, c. 40, s. 10, and 9 & 10 Wm. 3, c. 41, though it was urged that it was in the discretion of the Judge to inflict a corporal punishment in lieu of the fine, and the witness was rejected. (*w*) But, in a subsequent case, Lord Kenyon, C. J., said, that he had considered the objection to the competency of the informer's being a witness on the ground of interest; and that, as the statute had given the Court a power, at their discretion, either to inflict a corporal pnnishment, or to impose a fine in case of conviction, and as it was only in case a fine was imposed that the witness could expect to derive any benefit (an uncertainty depending upon the judgment of the court) he was then of opinion that the objection went to the credit, not to the competency, of the witness, and that, therefore, his evidence was admissible. (*x*)

As to the person considered as an informer.

It appears to have been holden that, where a peace-officer, in searching for other goods, discovered naval stores, and in consequence of such discovery by him an information was filed against the offender, such peace-officer was to be deemed the informer. (*y*) But where a witness stated, that though no information respecting the stores in question had been given to the Admiralty until the time of the seizure, yet that he made the seizure in consequence of information given to him, by another person, of the stores being in the defendant's possession, it was ruled that the witness was not to be considered as the informer, and that the informer was the person upon whose information the seizure had been made, not he who had made the seizure in consequence of such information. (*z*)

Corporal punishment may be inflicted under the 9 & 10 Wm. 3, c. 41, s. 2, 9 Geo. 1, c. 8, s. 4, and 17 Geo. 2, c. 40, s. 10.

With respect to the power of the court to inflict corporal punishment, under the authority of the statutes 9 & 10 Wm. 3, c. 41, s. 2, 9 Geo. 1, c. 8, s. 4, and 17 Geo. 2, c. 40, s. 10, it was contended, in a case where the defendant had been convicted on an indictment charging him in one count with concealing naval stores, and in another with having them in his custody, that no such power existed under either of those statutes, where the defendant was

(*u*) By Lord Ellenborough, C. J., in Rex *v.* Johnson, 3 M. & S. 550.

(*v*) Willis's case, 1791, 1 Hawk. P. C. c. 89, s. 17.

(*w*) Rex *v.* Blackman, *cor.* Kenyon, C. J., 1791, 1 Esp. R. 93.

(*x*) Rex *v.* Cole, *cor.* Lord Kenyon, C. J., 1794. 1 Esp. 169.

(*y*) Rex *v.* Blackman, 1 Esp. 5.

(*z*) Rex *v.* Banks, 1 Esp. R. 145.

ready and offered to pay the penalty of 200*l.*, but the Court of King's Bench said it was impossible to raise any serious doubt upon the point, for that the words of the statutes were in the disjunctive, enabling them either to impose a penalty, or to punish the offender corporally. (*a*) In another case, where the defendant was brought up for judgment for a similar offence, it was moved on the part of the prosecution, that he should be adjudged to pay the whole penalty of 200*l.* *and the costs*, and submitted that the court had the power of awarding costs under the words of the 9 & 10 Wm. 3, c. 41, s. 2. And the court adjudged the defendant to pay the penalty of 200*l.*, together with the costs, which were taxed at 12*l.* (*b*)

And costs may be awarded under 9 & 10 Wm. 3, c. 41, s. 2.

But the statute 39 & 40 Geo. 3, c. 89, took away the power of the court to sentence to *hard labour*. A defendant was brought up for judgment, after conviction, on the stat. 9 & 10 Wm. 3, c. 41, s. 2, for unlawfully having in his possession the king's naval stores, marked with the king's mark, and judgment was about to be pronounced that he should be imprisoned in the house of correction for the county of Surry, and there kept to *hard labour* for three calendar months, and be once during that time publicly whipped. This would have been warranted by the statute 17 Geo. 2, c. 40, s. 10, reciting the statutes 9 & 10 Wm. 3, c. 41, and 9 Geo. 1, c. 8; but a doubt occurring how far the power of sentencing to hard labour was taken away by the subsequent statute of the 39 & 40 Geo. 3, c. 89, s. 2, the court, upon further consideration, and comparing the different provisions of these statutes, were of opinion that the power of sentencing to hard labour was taken away by the latter statute, and therefore pronounced judgment that the defendant should be imprisoned in the house of correction for the county of Surry, for three calendar months, and be once during that time publicly whipped. (*c*)

But the 39 & 40 Geo. 3, c. 89, took away the power of the court to sentence to hard labour.

(*a*) Rex *v.* Bland, 5 T. R. 370. 2 Leach, 595. 2 East, P. C. c. 16, s. 148, p. 760. And the later statute, 39 & 40 Geo. 3, c. 89, s. 1, expressly enacts as to corporal punishment. *Ante*, p. 260.

(*b*) Chapple's case, 5 T. R. 371, note (*a*).

(*c*) Rex *v.* Bridges, K. B., 1806, 8 East. 53.

CHAPTER THE THIRTIETH.

OF UNLAWFULLY RECEIVING TACKLE OR GOODS CUT FROM OR LEFT BY SHIPS; AND OF RECEIVING GOODS STOLEN ON THE RIVER THAMES.

1 & 2 Geo. 4, c. 75, s. 1. Pilots, &c., taking up anchors, cables, &c., or goods, &c., cut from or left by ships, are to make a report to the deputy vice-admiral, and to deliver the articles, &c.

THE 1 & 2 Geo. 4, c. 75, s. 1, enacts, "that all pilots, boatmen, hovellers, or other persons who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise which may have been parted with, cut from or left by any ship or vessel within any harbours, rivers, or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for or taken possession of by any such boatman, pilot, hoveller, or other person," shall send a report in writing of the articles so found, and stating the marks, if any, thereon, and also an accurate and particular description of the bearings, distances, and situations, and the time when and where the same were so found, to a deputy vice-admiral or his agent, at or near to the port or place where such boatmen, &c. shall first arrive with such articles, within forty-eight hours after their arrival at such port, &c. or before they shall leave the port, if they shall quit it before that time shall expire; and shall also, within the same period, deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint for safe custody, until the same shall be claimed by the owner thereof, or his agent, and the salvage, together with such other charges and expenses as are thereinafter directed to be paid in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor, and that "every such pilot, boatman, hoveller, or other person, who shall wilfully and fraudulently keep possession of, or retain or conceal, or secrete any anchors or cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise, or deface, take out, or obliterate the marks and numbers thereon, or alter the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identification of such articles so found, weighed, swept for, or taken possession of as aforesaid, and shall not report and deliver the same at some proper warehouse or other place in manner aforesaid, and within the time herein-before limited, shall forfeit all claim to salvage, and shall, on conviction, be adjudged and deemed guilty of receiving goods knowing them to have been stolen, and

And pilots, &c., fraudulently retaining, &c., any such articles, or defacing marks, and not reporting and delivering, &c., to be guilty of receiving goods knowing them to have been stolen.

shall suffer the like punishment as if the same had been stolen on shore." (*b*)

The twelfth section enacts, "that if any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandise, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions hereinbefore contained with regard to such articles shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to have been stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court before which he she or they shall be tried."

Sec. 12. Persons knowingly, &c., purchasing or receiving any anchors, cables &c., or goods taken up, &c., if the directions have not been complied with, are to be deemed guilty of receiving goods, knowing, &c.

The statute then requires, that in case any master, &c. of any ship bound to parts beyond the seas, shall find and take on board any anchor, &c. or any goods, &c. or shall receive such articles on board from any other person who may have found the same, knowing the same to have been so found, the master, or other person having the command of the ship, shall make a true entry in the log-book of the description of the articles, stating the marks, and the bearings, time, &c. when taken on board, and shall transmit a report on the first opportunity to the Trinity House, and on the return of the ship shall deliver up the articles into the possession of a deputy vice-admiral, or his agent, within twenty-four hours, with a similar report; and for default imposes a pecuniary penalty not exceeding 100*l.* (*c*)

Sec. 13 requires masters, &c., of ships going out to sea, finding or receiving anchors, cables, &c., to take certain steps for communicating, &c.

The fifteenth section, reciting that "pilots, hovellers, boatmen, and other persons in small vessels, have for many years conveyed anchors and cables which may have been weighed, swept for, or taken possession of by them as aforesaid, or which they may have purchased of other persons, knowing them to have been weighed, swept for, or taken possession of, without being reported as aforesaid, to foreign countries, and there sold and disposed of, to the manifest injury and loss of the owners thereof," enacts, "that every pilot, hoveller, boatman, or the master of any such vessel, who shall convey any such anchor or cable to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be deemed and adjudged guilty of felony, and shall be transported for any term not exceeding seven years.,"

Sec. 15 makes the conveying anchors and cables obtained by weighing, sweeping for, &c., to any foreign port, &c., and there selling, &c., felony.

This act requires dealers in marine stores to have their names, with the words, "dealer in marine stores," painted upon the front of the places where their goods are deposited; (*d*) and contains many other regulations for preventing depredations on ship-owners, &c. and for the adjustment of salvage, some of which are enforced by pecuniary penalties, recoverable by proceedings of a summary nature.

Depredations upon ship-owners, &c.

By section 22, all felonies, misdemeanors, and other offences under the act shall be laid to be committed, and shall be tried in

Sec. 22. Trial of offences

(*b*) The act contains no provisions as to the punishment of principals in the second degree and accessories, they are therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8 & 9, and 1 Vict. c. 90, s. 5. See my note, *ante*, p.135 C S. G.

(*c*) Sec. 13.

(*d*) Sec. 16.

where articles found; or where offenders reside, if articles found in foreign parts.

any city or county, (being a county,) where any article, &c. in relation to which the offence shall have been committed, shall have been found in the possession of the person committing the offence; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside. (*e*)

The 2 Geo. 3, c. 28, contained various provisions relative to persons unlawfully receiving or having in possession ropes, materials, &c., of any vessel on the river Thames, and provided that if any person should buy or receive any part of the cargo, &c., of a vessel in the said river, knowing the same to have been stolen, he should be transported for fourteen years. This statute, is however, wholly repealed by the 2 & 3 Vict. c. 47 s. 24.

The 39 & 40 Geo. 3, c. 87, made further provisions for the more effectual prevention of depredations on this river and its vicinity, and recited that the said offences not being declared by the 2 Geo. 3, c. 28, to be felony, the trial might be traversed, and provided that the parties indicted under the 2 Geo. 3, should not traverse.

It appears to have been holden in K. B. that a receiving of such stolen goods is a felony.

From this section of the statute, it appears to have been the opinion of the Legislature, that the offence of receiving, under the former act, 2 Geo. 3, c. 28, s. 12, was only a misdemeanor. But a different construction was put upon the former statute, by the Court of King's Bench, in a case where a motion was made to bail a defendant, committed for receiving part of a cargo, belonging to a vessel in the Thames, knowing it to have been stolen. The motion was opposed on the ground that the offence was a felony. And it was argued that by the 3 & 4 W. & M. c. 9, s. 4, (now repealed) receivers of stolen goods might be prosecuted as felons; and by 1 Anne, st. 2, c. 9, s. 2, (also now repealed) might be punished as for a misdemeanor, where the principal felon was not convicted; that the statute under which the prisoner stood committed, must be considered as *in pari materiâ;* and that although the twelfth section of it did not, in express words, declare that such offenders should be *felons,* yet it was evident they were intended by the Legislature to be so considered; for by the fourteenth section it was enacted, that any person stealing, or unlawfully receiving stolen goods, knowing the same to be stolen, should, on discovering two other offenders, be entitled to a pardon for all *such felonies;* and the court was of opinion that it was a felony. (*f*) And upon this point it is observed, that the statute seems only to have made the receiving of the goods under such circumstances evidence of their having been received by the party, knowing them to have been stolen. (*g*) But the words of the statute appear to be very general in their expression, if in fact they were intended only to apply to the evidence of a receiving.

(*e*) By sec. 23, the act is not to extend within the limits of the Cinque Ports, specified in the 48 Geo. 3, c. 130; nor to the 48 Geo. 3, c. 104, which is an act for the regulation of pilots. Sec. 24 contains a proviso for the jurisdiction, &c., of the High Court of Admiralty, &c.; sec. 25, a proviso for the right of the crown, and of the lords of manors; sec. 34, for the right of the Trinity-houses of Kingston-upon-Hull, Newcastle-upon-Tyne, and Scarborough; and, sec. 35, for the rights of the city of London. By sec. 36, the act is not to extend to Scotland or Ireland. As to offences within the jurisdiction of the Cinque Ports, see now 1 & 2 Geo. 4, c. 76.

(*f*) Rex *v.* Wyer, 1 Leach, 480, decided in 28 Geo. 3. 2 T. R. 77. 2 East, P. C. c. 16, s. 145, p. 753.

(*g*) 2 East, P. C. c. 16, s. 145, p. 753.

By the 2 & 3 Vict. c. 47, s. 26, "every person who within the metropolitan police district shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to any vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor." **Receiving stores on the Thames.**

By sec. 27, "every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof, shall be deemed guilty of a misdemeanor." **Cutting ropes.**

By sec. 28, "it shall be lawful for any constable to take into custody every person who, for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandise, belonging to or having been part of the cargo of any ship, boat, or vessel lying in the river Thames or the docks or creeks adjacent thereto, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, boat, or vessel, wharf, quay, or landing place, any such article, or who shall be accessory to any such offence, and also to seize and detain any boat in which such person shall be found or out of which any article shall be so let fall thrown, or conveyed away; and every such person shall be deemed guilty of a misdemeanor."

CHAPTER THE THIRTY-FIRST.

OF CHEATS, FRAUDS, FALSE TOKENS, AND FALSE PRETENCES.

WHERE the possession of goods is obtained, in the first instance, without fraud upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continues undetermined, will in general be only a breach of trust or civil injury, and not the subject of a criminal prosecution. (*a*) But where the party obtaining the goods has recourse to fraudulent means in the first instance, and thereby succeeds to the extent of inducing the owner not only to deliver the possession of the goods to him but absolutely to *part with the property* in them, though such a taking will not, as we have seen, be considered as felonious and amounting to larceny; (*b*) yet if effected by means of a false pretence, it will come within the enactment of the 7 & 8 Geo. 4, c. 29, s. 53, and be punishable as a misdemeanor. And that statute, reciting the frequent failure of justice from the subtle distinction between larceny and fraud, provides, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof, be entitled to be acquitted of such misdemeanor. There are also other statutes which relate to particular cheats and frauds therein specified. And besides the offences of this kind punishable by statute, the common law also provides for the punishment of many of such cheats and frauds as may affect the public welfare. It was decided that, in order to constitute a cheat properly so called, there must be a prejudice received, both at common law and under the statutes (now repealed) of 33 Hen. 8, c. 1, and 30 Geo. 2, c. 24. (*c*)

There must be a prejudice to the party cheated.

In treating of these offences we may consider; I. Of cheats and frauds punishable at common law. II. Of cheats and frauds by means of false pretences, within the 7 & 8 Geo. 4, c. 29, s. 53; and III. Of some of the cheats and frauds punishable by other statutes.

(*a*) 3 Inst. 107. 2 East, P. C. c. 16, s. 113, p. 693. Ibid. c. 18, s. 1, p. 816. *Ante*, p. 56.

(*b*) *Ante*, p. 24, *et seq.* And see the opinion of Eyre, B., on the debate in Pear's case, 2 East, P. C. c. 16, s. 112, p. 689, note (*a*).

(*c*) Ward's case, 13 Geo. 1. 2 Lord Raym. 1461. 2 Str. 747. 2 East, P. C. c. 19, s. 7, p. 860, 861.

SECTION I.

Of Cheats and Frauds Punishable at Common Law.

Those cheats which are levelled against the public justice of the kingdom are indictable at common law. (*d*) Judicial acts done without authority, in the name of another, are cheats of this description; but as they are generally attended by a *false personating* of some one, they will come under consideration in a subsequent chapter. (*e*) It may briefly be mentioned in this place, that with respect to a precedent of an indictment against a married woman, for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ, it is observed, that perhaps this was considered as a fraud upon a public officer, in the course of justice. (*f*) And another case should be noticed, where, upon an application to the Court of King's Bench to discharge a defendant who had been holden to bail under a Judge's order, made upon an affidavit of debt sworn before a magistrate at Paris, the court desired that the counsel would speak upon the point, how far the making, or knowingly using such an affidavit, if false, was punishable. (*g*) And after argument, Lord Ellenborough, C. J., said, that he had not the least doubt, that any person making use of a false instrument, in order to pervert the course of justice, was guilty of an offence punishable by indictment. (*h*) In a former case it had been holden, that a person who, being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was guilty of a cheat and misdemeanor at common law, in thus affecting an interruption to public justice; although, the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. (*i*)

Cheats against public justice.

Those frauds which affect the crown and the public at large are also clearly the subject of indictment, though they may arise in the course of some particular transaction or contract with private individuals.

Frauds affecting the crown and public.

Amongst offences of this description, is the selling of *unwholesome provisions.* (*k*) And it is said, more largely, that the giving of any

Selling unwholesome provisions.

(*d*) 2 East, P. C. c. 18, s. 4, p. 821.

(*e*) *Post*, Chap. *Of Falsely Personating*, &c.

(*f*) 2 East, P. C. c. 18, s. 4, p. 821, citing Rex *v.* Blackburn, M. 36 Car. 2. Trem. P. C. 101, Cro. Circ. Comp. 78.

(*g*) The authorities referred to for the purpose of shewing that it was punishable were 2 Hawk. P. C. c. 22, s. 1, 38, and 39, (which cites Waterer *v.* Freeman, Hob. 205, 266). Worley *v.* Harrison, Dy. 249 *a*, pl. 84. Rex *v.* Mawbey, 6 T. R. 619, 635. Rex *v.* Crossley, 7 T. R. 315, and 2 East, P. C. 821, which cites the authorities mentioned, *ante*, note (*f*).

(*h*) Omealy *v.* Newell, 8 East, 364, and his lordship said that the case of the King *v.* Mawbey, (*ante*, note (*g*),) went the whole length of the proposition.

(*i*) Fawcett's case, York Spr. Ass. 1793, and East. T. 1793. 2 East, P. C. c. 19, s. 7, p. 862, and s. 45, p. 952. See the case cited more at large, *post*, Chap. *Of Forgery*, s. 2, upon the point of the offence being indictable as a forgery.

(*k*) 4 Black. Com. 162.

person unwholesome victuals, not fit for man to eat, *lucri causâ*, or from malice and deceit, is undoubtedly, in itself, an indictable offence. (*l*)

Treeve's case. Supplying prisoners of war with unwholesome food, not fit to be eaten by man, holden to be an indictable offence.

A case is reported, where the indictment against the defendant was, that he knowingly, wilfully, deceitfully, and maliciously, did provide, furnish, and deliver to and for eight hundred French prisoners of war, whose names were unknown, and being under the protection of the king, confined in a certain hospital, called Eastwood hospital, divers large quantities, to wit, five hundred pounds weight of bread, to be eaten as food, by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of, and containing dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten by man; and the said defendant then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of, and to contain dirt, filth, and other pernicious and unwholesome materials, and ingredients, not fit to be eaten as aforesaid; whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths; to the great damage of the French prisoners, to the great discredit of our said lord the king, to the evil example, &c., and against the peace, &c. (*m*) And the defendant having been convicted, it was objected, in arrest of judgment, that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty; and the judgment was respited to take the opinion of the Judges upon the point; when they all held the conviction right. (*n*) In this case, the defendant was a contractor with government for the supplying of provisions to some of the French prisoners, then in this country: but the indictment did not state this fact; and it is observed, that it was not material to state it, otherwise than as matter of aggravation, if such a case wanted any; as there could be no doubt of the offence being in itself the subject of indictment upon the principles already mentioned. (*o*)

Dixon's case. Holden to be an indictable offence for a baker to sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless.

In a more recent case the indictment charged the defendant, a baker, with supplying to the Royal Military Asylum at Chelsea, as and for good wholesome household loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them. It appeared in evidence that many of the loaves delivered by the defendant at the Military Asylum on a particular day were strongly impregnated with *alum*, and that there were found in them several pieces of alum in its crystalline form as large as horse-beans: the tendency of alum to injure the health was also proved; and a statute 37 Geo. 3, c. 98, s. 21, referred to, by which the use of alum in the making of bread is prohibited under a penalty. On the part of the defendant it was proved that though he permitted alum to be used to assist the operation of the yeast, and to make the loaves look

(*l*) 2 East, P. C. c. 18, s. 4, p. 822.

(*m*) There were eight other counts in the indictment charging the offence to have been done at different times, and in different prisons.

(*n*) Treeve's case, 1796. 2 East, P. C. c. 18, s. 4, p. 821.

(*o*) 2 East, P. C. c. 18, s. 4, p. 822.

white, yet, that very great care was employed in the use of it; that it was first dissolved, and then used in such small quantities, and so equally distributed, as not to be capable of occasioning injury; and that if, on any particular occasion, the loaves delivered at this Asylum had alum put into them in a different manner, it was quite contrary to the directions and intentions, and wholly without the knowledge or privity of the defendant. And it was contended that these facts completely negatived the averment in the indictment that the defendant, at the time these loaves were delivered, well knew that they were not wholesome, and that they were unfit for the food of man: and it was urged that the defendant could not be criminally responsible for the acts of his servants. But by Lord Ellenborough, C. J., "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself, does not produce mischief to others. He is engaged in an illegal act, and he must abide the consequences. The statute 37 Geo. 3, c. 98, shews the judgment of the Legislature with regard to alum, and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities it is innoxious. The same may be said of calomel, and even of arsenic. But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time that no harm could follow? If the defendant was cognizant of the manner in which his business was carried on, and knew that alum was at all used in the making of the loaves sent to the Military Asylum, which are proved to have contained it to a very dangerous degree, he is guilty of this indictment." And the defendant was accordingly convicted. (*p*) The point was afterwards brought under the consideration of the Court of King's Bench, who concurred in the direction of Lord Ellenborough given at the trial; and Lord Ellenborough said, "He who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible." (*q*)

Mala praxis of a physician.

A case is reported where the court of King's Bench held that the *mala praxis* of a physician is a great misdemeanor and offence at common law (whether it be for curiosity and experiment, or by neglect,) because it breaks the trust which the party has placed in the physician, and tends directly to his destruction. (*r*)

(*p*) Rex *v.* Dixon, *cor.* Lord Ellenborough, C. J., Guildhall, 1814, 4 Campb. 12. See precedents for similar offences, 2 Chit. Crim. L. 556, *et seq.* 2 Stark. Crim. Plead. 682.

(*q*) Rex *v.* Dixon, 3 M. & S. 11. And some exceptions to the indictment, taken in arrest of judgment, were overruled; and the court held that the indictment was sufficiently certain without shewing what the noxious materials were, or stating that the defendant intended to injure the children's health. Upon the last point Lord Ellenborough, C. J., said that it was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act; and that in this case it was alleged that the defendant delivered the loaves for the use and supply of the children, which could only mean for the children to eat; for otherwise they would not be for their use and supply. And see Rex *v.* Bower, *post*, 279, note (*m*).

(*r*) Dr. Groenvelt's case, 1697, 1 Ld. Raym. 213.

Rendering false accounts and other frauds by persons in official situations.

In some cases the rendering false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable. Thus, where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government; and it was objected that it was only a private matter of account, and not indictable; the court held otherwise, as it related to to the public revenue. (*s*) And instances appear in the books of indictments against overseers of the poor for refusing to account, (*t*) and for rendering false accounts. (*u*) And a precedent is given of an indictment against a surveyor of the highways for converting to his own use gravel which had been dug at the expense of the inhabitants of the parish, and also for employing for his own private gain and emolument the labourers and teams of the parishioners, which he ought to have employed in repairing the highways. (*x*) A case is also mentioned of an application to the Court of King's Bench for an information against the minister and churchwardens of a parish, who had spent the larger part of a sum of money, collected by a brief for certain sufferers by fire, at tavern entertainments, and then returned, upon the back of the brief, that the smaller sum only was collected; and the court, though they refused the information, yet referred the prosecutors to the ordinary remedy by indictment. (*y*) A fraud committed by a parish officer, in procuring the marriage of a pauper, so as to throw the burden of maintaining such pauper on another parish, may also, as we have seen, be an indictable offence. (*z*) And several precedents are given of indictments for misdemeanors in procuring sick and impotent persons, standing in need of immediate relief, to be conveyed into parishes where they had no settlements, and in which they shortly afterwards died, thereby causing great expense to the inhabitants of such parishes. (*a*)

False news.

It is said to have been resolved by all the Judges that writers of *false news* are indictable and punishable: and that probably at this day the fabrication of news, likely to produce any public detriment, would be considered as criminal. (*b*)

Fraud in an apprentice listing as a soldier, and obtaining the king's bounty.

Where an indictment charged that the defendant, being an apprentice, and fraudulently intending to obtain money from the paymaster of a regiment, and to defraud the king, &c., procured himself to be enlisted as a soldier, without the consent of his master, by means whereof he fraudulently obtained from the paymaster divers sums of money, well knowing himself to be, without the consent of his master, disqualified from serving as a soldier, to the great deceit, fraud, &c., of the king, &c., it appears to have been admitted that this was an offence at common law. But the conviction was holden bad, on the ground that the necessary proof of the

(*s*) Rex *v.* Bembridge and Powell, cited 6 East. 136. *Ante*, vol. 1, p. 141. 22 St. Tri. (by Howell) p. 1.

(*t*) Rex *v.* Commings and another, 5 Mod. 179. 1 Bott. pl. 370.

(*u*) Rex *v.* Martin, 2 Campb. 269. 3 Chit. Crim. L. 701. 2 Nol. (2d ed.) 230, note (4). *Ante*, vol. 1, p 141.

(*x*) 3 Chit. Crim. L. 666, *et seq.*

(*y*) Rex *v.* The Minister, &c., of St. Botolph, 1 Black. Rep. 443.

(*z*) *Ante*, vol. 1, p. 137. Rex *v.* Tarrant, 4 Burr. 2106.

(*a*) 3 Chit. Crim. L. 698. *et seq.* And see *ante*, vol. 1, p. 137.

(*b*) Starkie on Lib. 546, citing 4 Read. S. L. Dig. L. L. 23. Et vide Hale's Sum. 132, et per Scroggs, C. J., Rex *v.* Harris, at Guildhall, 1680. 7 St. Tri. (by Howell) 929, 930.

indenture of apprenticeship had not been given at the trial, there being two subscribing witnesses to the indenture, and neither of them having been produced. (*c*) The offence is now made punishable by a provision of the Mutiny Acts.

Falsely pretending a power to discharge soldiers.

A case is mentioned where a person, falsely pretending that he had power to discharge soldiers, took money from a soldier to discharge him; and being indicted for this offence, the court held the indictment to be good. (*d*)

Fraud by maiming in order to have a pretence to beg, &c.

A curious species of fraud may be here mentioned. It is laid down in the books that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted, and, on conviction, fined and imprisoned. (*e*)

Cheats by means of false weights or measures.

Besides the offences which have been here mentioned, there are other instances of cheats clearly affecting the public, and therefore indictable; namely, such cheats as are effected by means of *false weights or measures*, which are considered as instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. And this reasoning is considered as applying to all cases where any species of false token is used which has the semblance of public authenticity: (*f*) as to a case where cloth was sold with the alneager's seal counterfeited thereon; (*g*) and to another case where a general seal or mark of the trade on cloth of a certain description and quality was deceitfully counterfeited. (*h*) And the instances mentioned in the books of cheating by means of false dice, &c. (*i*) are referred to the same principle. (*j*)

If, therefore, a person selling corn should measure it in a bushel short of the statute measure, or should measure it in a fair bushel, but put something into the bushel to help to fill it up, it seems that he might be indicted for the cheat. (*k*) And a precedent was given of an indictment against a baker, who had contracted with a guardian of the poor, in the city of Norwich, to supply bread for the use of the poor, for delivering bread deficient in weight. (*l*) And though the knowingly exposing to sale and selling wrought gold, under the sterling alloy, as and for gold of the true standard weight, was holden not to be an indictable offence, but a private imposition only, in a common person, where no false weight or measure was used; (*m*)

Not so if he sold a quantity wh he declared to be a bushel measure of corn, but wh was less? It wd be only private, not a public fraud, not the fraud using false measures: see p. 203 supra

(*c*) Jones's case, 1777. 1 Leach, 174. 2 East, P. C. c. 18, s. 4, p. 822.

(*d*) Serlestead's case, 1 Latch. 202.

(*e*) 1 Hawk. P. C. c. 55. *Of Maiming, &c.*, s. 4. 1 Hale, 412, Co. Lit. 127 *a*.

(*f*) 2 East, P. C. c 18, s. 3, p. 820.

(*g*) Edwards's case, Trem, P. C. 103.

(*h*) Worrell's case, Id. 106. As to the deceitful making of linen cloth, see 3 Burn's Just., *Linen Cloth*, and 1 Eliz. c. 12, s. 1. And as to the deceitful working of woollen cloth, see 5 Burn's Just., *Woollen Manufacture*.

(*i*) Leeser's case, Cro. Jac. 497. Maddock's case, 2 Roll. R. 107. 2 Roll. Ab. 78. The practice is now further punishable by penalties under the statutes 16 Car. 2, c. 7, and 9 Anne, c. 14.

(*j*) 2 East, P. C. c. 18, s. 3, p. 820.

(*k*) *Per Cur.* in Pinckney's case, 2 East, P. C. c. 18, s 3, p. 820. As to the penalties for selling or buying corn otherwise than by the proper measure, see 1 Burn's Just., *Corn*.

(*l*) 2 Chit. Crim. L. 559; but it has since been held bad, ibid. As to the assize of bread, &c., see 1 Burn's Just., *Bread*.

(*m*) Rex *v.* Bower, Cowp. 323. In this case the sale of the gold was by a servant of the defendant; but the court agreed that the master was responsible for the act of his servant done in the course of his employment, and within the scope of his authority. And see as to this point Rex *v.* Dixon, *ante*, p. 277. That it would be indictable in a goldsmith so to sell gold (under the statute) see 2 East, P. C. c. 18, s. 3, p. 820, and Cowp. 324.

yet, if in such case the stamps or marks, required by statute on plate of a certain alloy, had been falsely used, it should seem that an indictment might have been sustained. (*n*) In the case in question the gold was not marked: and Aston, J., in giving his opinion, said that it was not selling by false measure, but only selling under the standard; and he cited a case in which it had been holden that selling coals under measure was not an indictable offence, but that selling them by false measure was. (*o*) And the result of the cases upon this subject appears to be that if a man sell by *false weights*, though only to one person, it is an indictable offence; but if without false weights he sell to many persons a *less quantity* than he pretends to do, it is not indictable. (*p*)

But cheats or frauds effected in the course of private transactions between individuals, fall under a different consideration.

But though in the cases which have been thus mentioned an indictment may, and in most of them clearly is, maintainable as for a cheat or fraud at common law, on the ground that they consist of offences which affect, or may affect the public, being public in their nature, and calculated for the purposes of general fraud and deceit; yet, other cases, consisting of cheats or frauds, effected in the course of private transactions between individuals, fall under a different consideration. This distinction, however, does not appear to have been at all times properly noticed: and, in a book of great authority, cheats, punishable at common law, are defined as "deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty." (*q*) But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities, from whence it seems to have originated, not involving considerations, either of public justice, public trade, or public policy, have been said to be founded either in conspiracy or forgery, which are, in themselves substantive offences, and the latter of which was usually, when successful, prosecuted as a cheat, before the various statutes, by which forgeries were, in so many instances, made capital offences. (*r*)

Unless they amount to conspiracy or forgery, which are substantive offences.

Cases of cheats amounting to conspiracy.

Thus the case mentioned where the suppression of a will was holden to be indictable as a cheat, (*s*) is said to have been probably a case of conspiracy or combination. (*t*) And the same explanation is given (*u*) of the case where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was

(*n*) 8 East, P. C. c. 18, s. 3, p. 820, note (*b*). And see 1 East, P. C. c. 4, s. 34, p. 194, where it is said that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

(*o*) The case cited was Rex *v.* Lewis. And the learned judge also cited Rex *v.* Wheatly, 2 Burr. 1125, *post*, 285. See also Rex *v.* Driffield, Say. 146.

(*p*) Per Buller, J., in the case of Young and others, 3 T. R. 104. And see Rex *v.* Nicholson, cited in Rex *v.* Wheatly, 2 Burr. 1130, and Rex *v.* Dunnage, 2 Burr. 1130, Rex *v.* Driffield, Say. 146.

(*q*) 1 Hawk. P. C. c. 71, s. 1.

(*r*) 2 East, P. C. c 18, s. 2, *et seq.* p. 817, *et seq.* The distinction between forgery and the general class of cheats was well settled in Ward's case, Hil. T. 13 G. 1. 2 Lord Raym. 1461. 2 Str. 747. 2 East, P. C. c. 19, s. 7, p. 860, 861. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced: but that to constitute a cheat, properly so called, there must be a prejudice received both at common law, and under the statutes 33 Hen. 8, c. 1, and 30 Geo. 2, c. 24, now repealed.

(*s*) 1 Hawk. P. C. c. 71, s. 1, citing Rex *v.* Brereton and others, Noy. 103.

(*t*) 2 East, P. C. c. 18, s. 5, p. 823.

(*u*) Id. ibid.

written: (*v*) and also of the case of a person who was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win. (*x*)

Mackarty and Fordenbourgh's case. Cheat effected by a conspiracy; where one person pretended to be a merchant, and the other a broker; and, as such, bartered bad wine for hats.

In another case of a cheat at common law, which has undergone considerable discussion, the indictment charged the two defendants, Mackarty and Fordenbourgh, that they falsely and deceitfully intending to defraud one Chowne of divers goods, together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenbourgh, for a certain quantity of hats, of him the said Chowne; and upon such bartering, &c. the said Fordenbourgh pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines: and the said Mackarty, on such bartering, &c. pretended to be a broker of London, when, in fact, he was not: and that Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange, to Fordenbourgh, and did deliver to Mackarty, as the broker between Chowne and Fordenbourgh, for the use of Fordenbourgh, a certain quantity of hats, of such a value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenbourgh, on such bartering, &c. affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenbourgh, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenbourgh; to the great deceit and damage of the said Chowne, and against the peace, &c. (*y*) Upon this case considerable doubts were entertained; but it seems that, ultimately, judgment was given for the crown, and that the true ground of such judgment was, that it was a case of *conspiracy*. (*z*) And, even if it were not a case of conspiracy; yet, as the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome, or fit to drink, the vending of such an article for drinking was clearly indictable; (*a*) and within the principle already mentioned, of cheats or frauds, by which the public may be affected. (*b*)

Govers's case. Cheat effected by means of a forged instrument.

In one of the principal cases where the cheat was effected by means of a *forged instrument*, the indictment charged that the defendant, intending to cheat J. S., did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and, in order to induce J. S. to believe the same, and to

(*v*) Rex *v.* Skirret and others, 1 Sid. 312, cited in 1 Hawk. P. C. c. 71, s. 1, and Rex *v.* Parris and others, 1 Sid. 431.

(*x*) Rex *v.* Orbell, 6 Mod. 42, cited in the note to 1 Hawk. P. C. c. 71, s. 1.

(*y*) Reg. *v.* Mackarty and Fordenbourgh, 2 Lord Raym. 1179. 3 Lord Raym. 325. 2 Burr. 1129.

(*z*) 2 Lord Raym. 1184. 2 Burr. 1129. 2 East, P. C. c. 18, s. 1, p. 824. Upon a recent discussion of this case, (in Rex *v.* Southerton, 6 East, 133,) it was objected to such construction that the word conspired, was not in the indictment; but in 2 East, P. C. *ubi supra*, it is said that, though the indictment did not charge that the defendants conspired, *eo nomine*, yet it charged that they, together, &c., did the acts imputed to them; which might be considered to be tantamount.

(*a*) By Lord Ellenborough, C. J., in Rex *v.* Southerton, 6 East, Rep. 133.

(*b*) *Ante*, p. 275, *et seq.* The sale of corrupted wine, contagious or unwholesome flesh, &c., is prohibited by an ancient statute, 51 Hen. 3, st. 6, and the ordinance for bakers, c. 7, under severe penalties. And, by the stat. 12 Car. 2, c. 25, s. 11, any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant, and 40*l.* if done by the vintner, or actual trader. See 4 Black. Com. 162.

give him credit, the defendant deceitfully produced to J. S. *several paper writings, which he falsely affirmed to be letters from Spain,* containing commissions for jewels, watches, and other goods, to the amount of 4,000*l.*; by means whereof the defendant got into his hands two watches, the property of J. S.: whereas, in truth, the defendant was not a merchant; and *the paper writings,* containing such commissions, *were false and counterfeit.* And it does not appear that the indictment concluded against the form of the statute, though the false tokens made use of came directly within the 33 Hen. 8, c. 1, (now repealed). (*c*) But it is observed, that if this were sustained as an indictment at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that the 33 Hen. 8, c. 1, was merely declaratory of the common law, is, that the cheat was effected by means of a *forgery,* (in which all are principals at common law;) and that the publication of such forged instruments, for the purpose of deceit was in itself a substantive offence, indictable at common law. (*d*) And, in a case where the defendant was indicted for falsely and deceitfully obtaining 450*l.* from one W. Harle, by a false token, *viz.* a promissory note, in the name of R. Hales, payable to J. E., &c. with a counterfeit indorsement thereon, the jury were directed that they must find the defendant guilty if it appeared to be a forged instrument; the instrument being a false token. (*e*) But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful; as in a case where the defendant was convicted of forgery at common law of an acquittance, the court said, that there was no reason why the offence should not be punished as a forgery, as well as if the thing fabricated had been a deed, but that it could not be prosecuted as a cheat at common law without an *actual prejudice,* which was an *obtaining* on the statute 33 Hen. 8. (*f*)

Other cases of forgeries prosecuted as cheats at common law.

It does not appear, therefore, that these cases, when duly examined, are contrary to that which has been given as a more accurate definition of cheats and frauds, punishable at common law, namely, "The fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) *which affects or may affect the public.*" (*g*) And there are many cases by which it is supported, tending to shew that a cheat or fraud, effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, cannot be the subject of an indictment at common law.

The more accurate definition of cheats, &c., at common law describes them as affecting the public.

In several of these cases of impositions upon individuals in private transactions, which have been holden not to be indictable, the cheat was effected by a mere false affirmation, or bare lie. Thus an indictment was quashed, upon motion, which charged the defendant with selling at market a sack of corn, which he

Cheats by means of a bare lie, or false affirmation, in a private trans-

(*c*) Rex *v.* Govers, 2 Say. 206. 2 East, P. C. c. 18, s. 6, p. 824, 825.

(*d*) 2 East, P. C. c. 18, s. 6, p. 825.

(*e*) Hales's case, *cor.* Pengelly, C. B., and other judges, 1729. 9 St. Tri. 75. 2 East, P. C. c. 18, s. 6, p. 825: a case of misdemeanor at common law, before the statute making the offence felony.

(*f*) Ward's case, 2 Str. 747. And see further the authorities collected upon this subject in 2 East, P. C. c. 18, s. 2, p. 817, note (*a*), and Id. s. 6, p. 825.

(*g*) 2 East, P. C. c. 18, s. 2, p. 818.

falsely affirmed to be a Winchester bushel, whereas it was greatly deficient, and the court said, that this was no more than telling a lie. (*h*) And an indictment was also quashed which charged the defendant with selling to a person eight hundred weight of gum, at the price of seven pounds by the hundred weight, falsely pretending and affirming that the gum was gum seneca, and that it was worth seven pounds by the hundred weight, whereas, in truth, the gum was not gum seneca, but a gum of an inferior kind, and was not worth more than three pounds by the hundred weight. (*i*) And a case was holden not to be indictable where the defendant obtained money of another, by pretending that he was sent by a third person for it; and Holt, C. J., said, "Shall we indict one man for making a fool of another? Let him bring his action." (*k*) In another case the indictment set forth, that the defendant came to the shop of a mercer, and affirmed that she was a servant to the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the queen, endeavouring thereby to defraud the mercer, whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the queen's account; and it was moved, in arrest of judgment, that this was not an indictable offence, there being no false token, nor any actual fraud committed, and the court arrested the judgment saying, that the case was no more than telling a lie. (*l*)

action, holden not to be indictable.

And it appears that the same construction will prevail, though the defendant make use of an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion. (*m*) An indictment at common law charged that the defendant, deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money, subscribed by him the defendant, &c., purporting to be a draft upon his banker for the amount, which he knew he had no authority to draw, and that it would not be paid, but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained possession of tickets, and defrauded the prosecutor of the value. And the defendant having been convicted, the Court of King's Bench arrested the judgment. Grose, J., said, "That, in order to make this case something more than a bare naked lie, it had been said

And the same construction will prevail, though an apparent token be used, if it be of no more credit than the party's own assertion.

Lara's case; where the defendant gave a check upon his banker, which he knew he had no authority to draw, and that it would not be paid.

(*h*) Pinckney's case, 2 East, P. C. c. 18, s. 2, p. 818, cited in 2 Burr. 1129. But see *ante*, p. 280; that this case might have come under a different consideration if the vendor had fraudulently measured the corn.

(*i*) Rex *v.* Lewis, Say. 205. Indictments quashed upon motion may be considered as authorities; but no stress can be laid on several cases to be found in the books, particularly in Mod. Rep., where indictments of this kind were refused to be quashed upon motion, because it was the practice of the court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, but leave the defendants to plead; 2 East, P. C. c. 18, s. 2, p. 818, note (*a*), citing 5 Mod. 13. 6 Mod. 42. 12 Mod. 499.

(*k*) Reg. *v.* Jones, 1 Salk. 379. 2 Lord Raym. 1013. And see also Reg. *v.* Hannon, 6 Mod. 311, and 2 Hawk. P. C. c. 71, s. 2; and Nehuff's case, Salk. 151, where the defendant borrowed 600*l.* of a feme covert, and promised to send her fine cloth and gold dust, as a pledge, and sent no gold dust, but some coarse cloth, worth little or nothing; and the court said that it was not a matter criminal, and that it was the prosecutor's fault to repose such a confidence in the defendant.

(*l*) Rex *v.* Bryan, 2 Str. 866. In the case as cited in 2 East, P. C. c. 18, s. 2, p. 819, it is said that the defendant obtained the goods.

(*m*) 2 East, P. C. c. 18, s. 2, p. 819.

that the defendant used a false token, for that he gave a check on his banker; but that was only adding another lie; and that if the court should determine that this case was indictable, he did not know how to draw the line, for it might equally be said that every person who overdrew his banker used a false token, and might be indicted for it." Lawrence, J., said, "It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable, and, I think, there is nothing in this case beyond the defendant's own false assertion." (*n*) So in a case where the defendant, a brewer, was indicted for a cheat, in sending to the keeper of an alehouse so many vessels of ale, *marked* as containing such a measure, and writing a letter to him, assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, &c.; the indictment was quashed upon a motion, after argument, as containing no criminal charge. (*o*) Foster, J., indeed doubted concerning this case when it was cited, because it seemed to him that the vessels being *marked* as containing a greater quantity than they really did, were *false tokens.* (*p*) But as it does not appear that cheating, by means of mere private or *privy* tokens, was punishable at common law, without the aid of the 33 Hen. 8, c. 1 (now repealed), (*q*) it is well observed, upon this doubt of the learned Judge, that possibly the court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did, in effect, resolve themselves into no more than the dealer's own affirmation, that the vessels contained the quantity for which they were marked. (*r*)

Wilders's case where the defendant sent vessels of ale marked, as containing a certain measure; and wrote a letter affirming that the vessels did contain such measure.

Where an indictment charged the defendant, for that he, keeping a common grist-mill, and being employed by one Bare to grind three bushels of wheat, did, with force and arms, unlawfully take and detain forty-two pounds weight of wheat, judgment was given for the defendant upon a demurrer, there being no actual price laid, nor any charge of taking as for unreasonable toll, and its being a matter of a private nature, for which an action would lie. (*s*)

Channell's case. A miller charged with detaining corn, held matter of a private nature, not indictable.

The following case has been considered to have clearly established the true boundary between those frauds that are, and those that are not indictable at common law. (*t*) The defendant, a brewer, was charged, by an indictment at common law, for that he, intending to deceive and defraud one Richard Webb of his money, falsely, fraudulently, and deceitfully, sold and delivered to him sixteen gallons of amber, for and as eighteen gallons of the same liquor, and received fifteen shillings, as for eighteen gallons, knowing there were only sixteen gallons. And this was holden clearly not to be an indictable offence, but only a civil injury, for which an action lay to

Wheatly's case. Selling sixteen gallons of liquor instead of eighteen, holden to be only an unfair dealing, and imposition on an individual, and not an indictable offence.

(*n*) Rex *v.* Lara, 1796, 6 T. R. 565. 2 Leach, 652. 2 East, P. C. c. 18, s. 2, p. 819. But see in Rex *v.* Jackson, *post*, p. 298, a different doctrine laid down upon an indictment on the statute 36 Geo. 2, c. 24, as to a check drawn on a banker with whom the party keeps no cash. And see Rex *v.* Parker, *post*, p. 298, *et seq.*

(*o*) Rex *v.* Wilders, cited by Lord Mansfield, and supplied by Denison, J., in Rex *v.* Wheatly, 2 Burr. 1128.

(*p*) 2 Burr. 1129.

(*q*) 2 East, P. C. c. 18, s. 9, p. 833, 834.

(*r*) 2 East, P. C. c. 18, s. 3, p. 820.

(*s*) Channell's case, 2 Str. 793. 2 East, P. C. c. 18, s. 2, p. 818. And see Rex *v.* Haynes, *post*, p 285.

(*t*) By Lord Kenyon, C. J., in Lara's case, 6 T. R. 569.

recover damages. Lord Mansfield, C., J., said, "It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he received it, whereas fraud, to be the object of criminal prosecution, must be of that kind which, in its nature, is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy." (*u*)

The doctrine that an indictment for a cheat at common law cannot be maintained upon a mere false affirmation, has been subsequently recognized. (*x*)

Haynes's case. The doctrine of a transaction in the nature of unfair dealing, and imposition upon a particular individual, not being indictable at common law, further established in this case; where a miller was charged with receiving good barley to grind at his mill, and delivering meal in return different from the produce of the barley, and musty, &c., and it was holden not to be indictable.

And in a case of recent occurrence, the doctrine of a transaction in the nature of an unfair dealing, and imposition upon any particular individual, not being an indictable offence at common law, was still further established. The indictment, in substance, charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome; and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. As to one of the grounds upon which it was contended that the offence charged was not indictable, namely, that the statement should have been, that the defendant delivered the barley "to be eaten as for food," and that it was "not fit to be eaten by man;"(*y*) Lord Ellenborough, C. J., said, that if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained, but that he could not say that its being musty and unwholesome, necessarily, and *ex vi termini*, imported that it was for the food of man, and it was not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley-meal. As to the other point, that this was not an indictable offence, because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; his Lordship said that, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect, but, as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in *Rex* v. *Wheatly*, and the other cases, as not being indictable. (*z*)

Pywell's case. Selling an unsound horse not indictable.

Again, in a still more recent case, where the indictment against the defendants was for a conspiracy to cheat and defraud the prosecutor by selling him an unsound horse; and the case did not,

(*u*) Wheatly's case, 2 Burr. 1125, 1 Black. Rep. 273. 2 East, P. C. c. 18, s. 2, p. 818. And see *ante*, 280, *et seq.*

(*x*) By Lord Kenyon, C. J., in Rex v. Gibbs, 1 East. R. 185.

(*y*) See Treeve's case, *ante*, 276.

(*z*) Rex v. Haynes, 4 M. & S. 214. *Qu.* therefore the case of Rex v. Wood, 1 Sess. Cas. 217, where the defendant, being a miller, and indicted for changing corn delivered to him to be ground, and giving bad corn instead of it; a motion was made to quash the indictment, because the transaction was only a private cheat, and not of a public nature; but it was answered that, being a cheat in the way of trade, it concerned the public; and the court were unanimous not to quash it. And see the observations as to the authority of cases of this kind, in which the court refused to quash the indictment, *ante*, p. 283, note (*i*).

upon the evidence, assume the shape of a conspiracy; Lord Ellenborough, C. J., said, that if such a transaction were to be considered as an indictable offence, then, instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats; and that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud. And the defendants were, accordingly, acquitted. (*a*)

These cases seem sufficiently to support the definition above adopted, (*b*) and to shew that the cheat or fraud must be effected by some deceitful and illegal practice or token, *which affects, or may affect the public*, in order to be indictable at common law. And it seems also to result from these cases that a cheat or fraud, in order to be punishable by the common law, must be such against which common prudence could not have guarded. (*c*) Indeed it can hardly be supposed that a cheat will much affect the public which is open to the detection of any man of common prudence.

Indictment.

With respect to the indictment for a cheat or fraud at common law, it may be briefly observed, that where the transaction has been effected by false tokens, and the offence is so charged, it is necessary to specify and set forth what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. (*d*) But it does not seem to be necessary to describe them more particularly than they were shewn or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth shew a false token. (*e*) An objection appears to have been made to one of the counts of an indictment for a cheat at common law, that it charged the false pretence to have been made to one person, and the deceit to have been practised on a different person. (*f*)

Punishment.

The punishment of this offence at common law is, as in other cases of misdemeanor, by fine, imprisonment, or further by infamous corporal pain, in aggravated cases. (*g*)

SECTION II.

Of Cheats and Frauds by means of False Pretences, within the Statute 7 & 8 Geo. 4, c. 29, s. 53.

7 & 8 Geo. 4, c. 29, s. 53. Obtaining money, &c., by

THE 7 & 8 Geo. 4, c. 29, s. 53, reciting that a failure of justice frequently arose from the subtle distinction between larceny and fraud, for remedy thereof, enacts "that if any person shall by any

(*a*) Rex *v.* Pywell and others, 1 Stark. R. 402.

(*b*) *Ante*, p. 282.

(*c*) 1 Hawk. P. C. c. 71, s. 1, 2. Rex *v.* Wheatly, 2 Burr. 1125, *ante*, p. 284. By Fielding *arguendo* in the case of Rex *v.* Young and others, 3 T. R. 99, assented to by Buller, J., id. 104, but see *post*, p. 289.

(*d*) 2 East, P. C. c. 18, s. 13, p. 837.

(*e*) 2 East, P. C. c. 18, s. 13, p. 838

(*f*) Lara's case, 2 Leach, 647, but see Rex *v.* Douglas, 1 Campb, 212, *post*, p. 301, where the pretence was made to a servant, but the money of the mistress obtained.

(*g*) 1 Hawk. P. C. c. 71, s. 3. 2 East, P. C. c. 18, s. 13, p. 838.

false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award: provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by *certiorari*; (*a*) and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

false pretences a misdemeanor. — See 308. infra

No acquittal on the ground that the case proved amounts to larceny.

The enactments of the 7 Geo. 4, c. 64, as to the statement in the indictment of the ownership of property in particular instances of partners, counties, parishes, turnpike-trustees, &c., have been stated in the preceding chapter upon larceny. (*b*)

Statement of ownership of property.

Some of the cases decided upon the repealed act, 30 Geo. 2, c. 24, may assist in the construction of the recent statute.

Cases upon the repealed statute 30 Geo. 2, c. 24.

That act, after reciting that evil disposed persons had, by various subtle stratagems, &c. fraudulently obtained divers sums of money, goods, &c. to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacted "that all persons who, knowingly and designedly, by false pretence or pretences should obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same, should be deemed offenders against law and the public peace," and should be punished, &c., as therein mentioned.

Rex *v.* Young, and others. Indictment on the repealed act 30 Geo. 2, c. 24, for obtaining money under the false pretence of sharing a supposed bet, said to have been before laid with another; and which was to be decided the next day.

In an indictment framed on this repealed statute, the first count charged that the four defendants, Young, Randal, Mullins, and Osmer, fraudulently intending to obtain the money of the king's subjects, by false colours and pretences, unlawfully and knowingly, &c., did falsely pretend to one Thomas, that Young had made a bet of five hundred guineas on each side, with a colonel in the army, then at Bath, that one Wm. Lewis would, on the next day, run on the high road, leading from Gloucester to Bristol, ten miles in length, within one hour; and that Young and Mullins did go two hundred guineas each in the bet, and Randall did go the other hundred guineas: and that, under colour and pretence of such bet, they obtained from Thomas, as a part of such pretended bet, twenty guineas of the five hundred guineas; by which said false pretences the defendants unlawfully, &c., obtained from the said Thomas the said twenty guineas, with intent to cheat and defraud him thereof; whereas, in truth, no such bet had been made, &c., against the form of the statute, &c. A second count stated the bet to have been made between Young and Osmer. The defendants having been convicted, it was objected upon error that the supposed false pretences shewn in the first and second counts were neither

(*a*) These words prevent the issuing of a certiorari in every case of indictment for obtaining goods by false pretences. Reg. *v.* Butcher, 9 Dowl. P. R. 135, Patteson, J.

(*b*) *Ante*, p. 101, *et seq.* The property itself may be described asin larceny. See *ante*, p. 107, *et seq.*

contrary to the 33 Hen. 8, c. 1, (now repealed) or the 30 Geo. 2, c. 24, (now repealed) or any other statute. And it was argued that the transaction itself was not the subject matter of a criminal prosecution, for that it did not affect the public; and that it was one against which common prudence might have guarded: for, as it was the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and that therefore it was his own fault if he were deceived: but the objection was overruled. Lord Kenyon, C. J. said, "Undoubtedly this indictment, being founded on the statute of 30 Geo. 2, c. 24, is different from a common law indictment. When it passed it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The statute of 33 Hen. 8, c. 1, requires a false seal, or token, to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the statute 30 Geo. 2, c. 24, introduced another offence, describing it in terms extremely general. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it." His Lordship then adverted to the facts of the case before the court; and after saying that the defendants, morally speaking, had been guilty of an offence, proceeded thus: "I admit that there are certain irregularities which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute." Ashurst, J. said, in giving his opinion, "The statute 30 Geo. 2, c. 24, created an offence which did not exist before, and I think it includes the present. The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind. (c) The words of it are very general, 'All persons who knowingly by false pretences shall obtain from any person money, goods, &c., with intent to cheat or defraud, &c.,' and we have no power to restrain their operation." And Buller, J., after observing upon the 33 Hen. 8, says, "The Legislature thought that the former statute was too limited; and therefore the 30 Geo. 2, c. 24, was passed; which enacts, 'That all persons who shall obtain money from others by *false pretences*, with intent to cheat or defraud such persons, shall *be deemed offenders against the public peace*.' The statute, therefore, clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are, the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient: but some pretence must be used, and that pretence false; and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute." (d)

(c) See the observations of Lord Denman, C. J., in Reg. v. Wickham, *post*, p. 289.

(d) Rex v. Young and others, 1789. 3 T. R. 98.

It was argued in this case, that even the generality of the term "false pretences," in the 30 Geo. 2, c. 24, did not extend the law to cases against which common caution might guard: but Ashurst, J., said, as we have seen, that as all men were not equally prudent, this statute was passed to protect the weaker part of mankind; still, however, it has been observed, that it might have been a question whether the statute extended to every false pretence, either absurd or irrational upon the face of it, or such as the party had, at the very time, the means of detecting at hand; or whether the words, which were general, should have been construed co-extensively with the cheat actually effected by means of the false pretence used. And it was suggested, that these might perhaps, be matters proper for the consideration of the jury, with the advice of the court. (*e*)

Question made upon the repealed act 30 Geo. 2, c. 24, whether it extended the law to cases against which common prudence might guard?

It should seem that a pretence to come within the meaning of the new statute need not be such an artful device as will impose upon a man of ordinary caution. In a late case where it was said in argument that an opinion had always prevailed that the fraud, to constitute an indictable offence, must be such an artful device as would impose upon a man of ordinary caution; Lord Denman, C. J., said, "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?" It was answered that the law prescribed it. *Regina v. Jones*, (*f*) was then cited; in that case the defendant was indicted for having obtained money by pretending to be sent for £20 for the use of J. S., and Holt, C. J., said, "It is no crime unless he came with false tokens. Shall we indict a man for making a fool of another? Let him bring his action." Upon which Lord Denman, C. J., added, "Why is it the prosecutor's folly more than the defendant's fraud? This point is sometimes put as if a lie were something laudable. There are indeed cases, where the pretence is so very foolish that it is difficult to say that an imposition is practised; but still who is to give the measure?" (*g*)

It seems the new act does extend to such cases.

A pretence that the party would do an act which he did not mean to do, (as a pretence that he would pay for goods on delivery) was holden not to be a false pretence within the repealed statute. The prisoner bargained for the carcases of three sheep and some other meat, and the seller having refused to trust him, promised to pay for them on delivery; but he did not mean to do so, and when

A pretence that the party would do an act he does not intend to do.

(*e*) 2 East, P. C. c. 18, s. 8, p. 828.

(*f*) 2 Lord Raym. 1013.

(*g*) Reg. v. Wickham, 10 Ad. & E. 34. It is submitted that the jury are the proper persons to give the measure, and that it is for them to say whether or not the pretence used were the means of obtaining the property. Any rule founded upon the pretence being such as would impose upon persons of ordinary caution, would leave all such as were unfortunately gifted with a less degree of caution at the mercy of the fraudulent and designing. And as in robbery it would be absurd to lay down any rule which defined the force necessary to constitute a robbery with reference to the ordinary strength of mankind; so in false pretences it would be equally absurd to establish a rule with reference to the ordinary capacity of mankind. On the other hand, as in robbery, the correct rule clearly is that any force sufficient to overcome the bodily resistance of the party robbed constitutes the offence, whether that party be a powerful man or a feeble woman; so it is submitted that any pretence sufficient to overcome and impose upon the mind of the party to whom it is made, ought to be considered to constitute an offence within this statute; and that whether it were of such a character or not, ought to be left to the determination of the jury with reference to all the facts of the particular case. C. S. G.

they were delivered, sent back an evasive letter. The indictment was for obtaining the carcases and meat by falsely pretending he would pay for them on delivery, whereas he did not, and never meant to do so; and he was convicted; but upon a case reserved, the Judges thought this was not a pretence within the statute; that it was merely a promise for future conduct; and that common caution would prevent any injury from the breach of it; and, therefore, that the conviction was wrong. (*g*)

Prisoner pretending that he will tell where the prosecutor's horses are if he will give him a sovereign.

So an indictment averring that the prisoner falsely pretended that he *would tell* the prosecutor where his mare and gelding were is bad. The indictment stated that a mare and gelding of one E. Young had strayed to a place unknown to E. Young, and that the prisoner unlawfully did falsely pretend to the said E. Young that he would tell him where the said mare and gelding were, if he would give him a sovereign, whereas in fact the prisoner would not tell the said E. Young where the said mare and gelding were, if he would give him a sovereign. It appeared that the prosecutor having lost a mare and gelding, went in search of them to Lincoln; where the prisoner, on being introduced to the prosecutor, said he knew where they were, and would tell him if he would give him a sovereign; the prosecutor hesitated to give the sovereign, but the prisoner refusing to give the information unless the sovereign was delivered into his hands, the prosecutor reluctantly put two half-sovereigns into his right hand, which the prisoner immediately put into his pocket. The prosecutor then required the prisoner to give him the information he had promised, which he refused to do or to return the money, saying he had no information to give him. The jury having found the prisoner guilty, upon a case reserved upon the question, whether this was a false pretence within the 7 & 8 Geo. 4, c. 29, s. 53, the judges held that the indictment should have stated that the prisoner pretended he knew where the horses were, and that the conviction was wrong. (*h*)

A pretence to a parish officer, as an excuse for not working, that the party had no clothes when he really had, though it induced the officer to give him clothes, was holden not to be obtaining goods by false pretences within the meaning of the repealed statute, 30 Geo. 2. The overseer of the prisoner's parish asked him why he did not work to support his family, which received parish relief; the prisoner said he had no shoes: upon which the overseer gave him a pair; but the prisoner had at the time two good pairs. Upon a case reserved, the Judges thought that this was not within the act, and that the conviction was wrong; for it was rather a false excuse for not working, than a false pretence to obtain goods. (*i*)

Count Villeneuve's case. Money obtained by the false pretence of being intrusted by a foreign noble-

In the case of Young and others, abovementioned, Buller, J., cited the following, as a case in point: the defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent; by which representation Sir T.

(*g*) Rex *v.* Goodhall, Mich. T. 1821, MS. Bayley, J., and Russ. & Ry. 461.

(*h*) Rex *v.* Douglas, R. & M. C. C. R. 462. See Rex *v.* Parker, *post*, p. 298, *et seq.*

(*i*) Rex *v.* Wakeling, Hil. T. 1823. Russ. & Ry. 504.

Broughton was induced to advance some money to him; after which it turned out that the prisoner never had been employed by the Duke de Lauzun, and that his whole story was a fiction. For this offence he was convicted, and sentenced to hard labour on the Thames. (*j*)

man to take horses from Ireland to London, and that his money was spent.

It was agreed upon by all the Judges, that a case was within the 30 Geo. 2, c. 24, where the *credit was created by means of the false pretence;* and they held that in the following case the prisoner would not have obtained the credit but for the false account which he delivered. The prosecutors, from whom the prisoner was charged with obtaining money by false pretences, were clothiers; the prisoner was a shearman, in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; at the end of each week he was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorized to draw from the clerk for money generally on account, but *merely for the sums actually earned by the shearmen;* and the clerk was not authorized to pay him any sums except what he carried in his account or note as the amount of what was due to the shearmen for the work they had done. The prisoner on the 9th of September, 1796, delivered to the prosecutors' clerk a note in writing in the following form, "9th September, 1796, Shearmen 44*l.* 11*s.* 0*d.*," which was the common form in which he made out his account of the amount of their week's wages. And in a book in his handwriting, which it was his business to keep, (of the men employed, of the work they had done, and of their earnings), there were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. Upon this evidence the jury found the prisoner guilty; but sentence was respited in order to take the opinion of the Judges, whether this case were within the statute 30 Geo. 2, c. 24, the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here. The Judges, after some difference of opinion, ultimately all agreed on the principle, that if the false pretence created the credit, the case was within the statute; and they considered that in this case the defendant would not have obtained the credit, but for the false account which he had delivered in, and, therefore, that he was properly convicted. (*k*)

Witchell's case. A superintendant in a clothing manufactory having to keep an account of the number of shearers employed, and the amount of their earnings and wages, and to deliver it in every week, delivered in a false account, by which he obtained a larger sum than was due, and it was holden to be within the 30 Geo. 2, c. 24.

In the following case it was contended, that where a party obtained money, by assuming a character which did not belong to him, *without making any false declarations or assertions*, the re-

Story's case. The prisoner obtained

(*j*) Villeneuve's case, *cor.* Moreton, C. J., of Chester, and Buller, J., Chester, 1778. 3 T. R. 104, 105.

(*k*) Witchell's case, East. T. and Trin. T. 1798. 2 East, P. C. c. 18, s. 8, p. 830. One of the judges observed, that the prisoner was not to have any sum he thought fit, on account; but only so much as was worked out.

money from the keeper of a post office, by assuming to be the person mentioned in a money order, which he presented for payment: but he did not make any false declaration or assertion in order to obtain the money.

pealed statute of 30 Geo. 2, did not apply. The indictment charged, that the prisoner fraudulently and deceitfully produced and delivered to E., the wife of John Rayner, which John Rayner was employed in the business of the post office, as deputy postmaster of the town of Nottingham, an order for payment of money, commonly called a money order, to wit, for the payment of the sum of one pound, to one John Storer; and that he unlawfully, &c., pretended to the said E. Rayner, that he was the person named in the same order, by means of which false pretence, he unlawfully, &c., obtained from the said E. Rayner, the sum of one pound of the monies of the said John Rayner, with intent to cheat and defraud the said John Rayner; averring also, that the prisoner was not the person named in the order, nor the person entitled to receive the money therein mentioned. There was a second count differing from the first only in alleging the money to be John Storer's, and the intent to be to cheat him. It appeared that the prisoner went to the post office at Nottingham, and inquired of Mrs. Rayner, who transacted the business there for her husband, if there were any letters directed to "John Story, post office, Nottingham, to be left till called for." Mrs. Rayner finding amongst the letters one directed for "John Storer, to be left till called for, Nottingham," and supposing it to be the letter for which the prisoner enquired, delivered it to him. The direction then upon the letter was a re-direction of it from Northampton, to which place it had been originally sent from Nottingham. The prisoner, on receiving it, objected to the payment of two shillings for the postage, saying, "It was too much from Manchester;" but he paid the money, and went with the letter into the office passage, where he remained a sufficient time to have read it, after which he returned into the office with the money order in question, which had been enclosed in the letter, and offered it to Mrs. Rayner. Mrs. Rayner told him, he must write his name on the back of the order before she could pay him the money, upon which he wrote his real name, John Story, and she paid him with a one pound note. He then told her, that if she would look again she would find another letter for him, from Manchester, which she did, and he paid for it. The order in question (which was signed by Mrs. Rayner in the name of her husband), was in the following form:

"No. 52. Order given by one Deputy on another.
"£1. Post Office, Nottingham, Augt. 2nd, 1804.
"At sight, pay John Storer, according to my letter of advice of the number and date, the sum of one pound, and place the same to the account of the money order office,

"J. Rayner."

"To the Post Master of Northampton.

"This order must be signed by the person to whom it is made payable, and sent up with the quarterly account, as a voucher for the payment."

The terms of the letter clearly explained, that the order could not have been intended for the prisoner: and it was proved, that when he was first apprehended, he denied having received the

money, or having ever seen Mrs. Rayner: but he afterwards assigned a want of money as a reason for his conduct. In the conversation with Mrs. Rayner, she never asked him if he was the person for whom the letter and order were intended; nor did he say that he was so. The prisoner's counsel contended, that as the order was given to the prisoner by Mrs. Rayner herself, and the prisoner had merely presented it to her for payment, without making any untrue declaration or assertion, the case was not within the statute. The learned Judge left it to the jury to find against the prisoner, if they were satisfied, that by his conduct he had fraudulently assumed a character which did not belong to him, although he had made no false assertions: and the jury found him guilty. But the sentence was respited, in order to take the opinion of the Judges, as well upon the objection made, as upon a further doubt, whether the signature of the prisoner's name, under the circumstances, did not amount to a forgery of a receipt for money, in which the lesser offence was merged. All the Judges were of opinion that this did not appear to be a forgery, the prisoner having signed his own name, which was not the same name as that of the person to whom the note was payable: and upon the other objection, they held that the prisoner was properly convicted of obtaining the money by a false pretence, because by presenting the order for payment, and signing at the post office, he represented himself to Mrs. R. as the person named in the note. (*l*)

Freeth's case. The fact of uttering a counterfeit note as a genuine note, held to be tantamount to a representation that it was so.

There might be a sufficient false pretence within the same repealed statute 30 Geo. 2, by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. The count in the indictment upon that statute stated, that the prisoner, intending to cheat and defraud John Beebee, of his monies, goods, and merchandises, on, &c., did falsely, &c., utter, publish, offer, and tender to the said J. B. a false, forged, and counterfeit paper, as and for a true paper, and did then and there falsely, knowingly, and designedly, fraudulently and wickedly, pretend to the said J. B. that the said false, &c., paper was a true paper, and signed by one Wm. Sparrow, which paper was as follows:

"Wolverhampton, 27 Feb. 1807.

"I promise to pay the bearer on demand the sum of ten shillings and sixpence.

"WM. SPARROW."

with intention the monies, goods, &c., of the said J. B. to obtain, well knowing such paper to be forged and counterfeit; by means of which false pretences, he did obtain from the said J. B. a sum of money, to wit, nine shillings and tenpence, against the form of the statute, &c. The third count stated, that the prisoner, contriving and intending to cheat and defraud the said J. B. of his monies, goods, &c., on, &c., did fraudulently and wickedly utter, publish, offer, and tender to the said J. B., a false, forged, and counterfeit paper, as and for a true paper, and which he then and there did pretend and represent to the said J. B. to be a true paper, subscribed, &c., (and setting forth the paper) with inten-

(*l*) Rex *v.* Story, East. T. 1805, MS., and Russ. & Ry. 81.

tion to cheat and defraud the said J. B. and the monies, goods, &c., of the said J. B. fraudulently to obtain, well knowing the said paper to be forged, &c., by means of which last mentioned false pretences, he did then and there fraudulently obtain from the said J. B. a sum of money, to wit, nine shillings and tenpence, of the money of the said J. B. It appeared by the evidence of John Beebee, that the prisoner came to his shop at Bilston, on a Saturday night, and asked for a loaf; that he served him with one for fivepence; that the prisoner then asked for some tobacco, and the witness served him with an ounce for threepence, upon which the prisoner thew down a note for ten shillings and sixpence. The witness said he had no change, but in copper, which the prisoner said would do; and the witness then gave him nine shillings and tenpence, in copper, which he took, together with the loaf and tobacco, and went away. The note was that which was set forth in the indictment, and was a forged note: and it was proved that the prisoner, in the course of the same evening and the next morning, put off several other notes of the same kind and amount, and all forged. Sparrow was a person of good credit; and his notes under twenty shillings were generally circulated in that neighbourhood, as it was found impracticable to pay in cash, or larger notes, the wages of the numerous day-labourers engaged in the iron manufactories. But by the 15 Geo. 3, c. 51, s. 1, promissory notes, &c., negociable for any sum less than twenty shillings, were declared absolutely void and of no effect; and the second section of that act declared, that if any person should publish or utter such notes, &c., for a less sum than twenty shillings, or should negociate the same, he should forfeit any sum not exceeding twenty pounds, nor less than five pounds; the third section gave directions as to the form of conviction. The counsel for the prisoner objected, first, that this was not a case within the 30 Geo. 2, c. 24, the general expressions of that statute being confined to cases of false suggestions of fact, as in *Rex* v. *Young*; (*m*) to cases where the party falsely represents himself to be in a situation which he is not, as a servant of another, or as having his order or authority, or produces a false account of disbursements, on the face of which the party would be entitled to be reimbursed, as in *Witchell's case*; (*n*) and to those cases where credit is acquired, and the monies, &c., are obtained by the false pretence. And it was urged, that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned Judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken, as to this being a cheat at common law, upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment: and the jury found the prisoner guilty on both these

(*m*) *Ante*, p. 288. (*n*) *Ante*, p. 291

counts; and the learned Judge respited the sentence, for the purpose of submitting the points to the consideration of the twelve Judges. All the Judges, (except Rooke, J.) being present, the majority of them thought that the conviction was right, and that it was a false pretence, although the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. Lawrence, J., was of a different opinion, and thought that the shop-keeper was not cheated if he parted with his goods for a piece of paper, which he must be presumed in law to know was worth nothing if true. (*o*)

Flint's case. Indictment for delivering, in payment for a horse, certain promissory notes as and for good and available promissory notes, which the prisoner knew to be not good nor of any value. The notes purported to be the notes of a country bank, which was supposed to have failed. Held, that at all events it was necessary to prove the notes were bad, and of no value.

The prisoner was tried on an indictment, which charged that he did falsely, fraudulently, and deceitfully, deliver to one Joseph Blood, certain papers, purporting to be promissory notes of bankers at Oundle, as and for good and available notes (one of which was set out;) and that Blood believing them to be good and available, delivered to the prisoner a gelding, of the price of 12*l.* his property; whereas the notes were not good and available, but of no value, as the prisoner then well knew; and so the prisoner, by colour of the said papers, unlawfully, &c. did obtain, and get into his possession from Blood, the said gelding, with intent to cheat him of the same, and of his said gelding, did cheat and defraud him, &c. It appeared that the prisoner, on the 4th of June, 1821, bought of the prosecutor, at Rugeley fair, the gelding in question, for the price of 12*l.*, and tendered in payment, notes to that amount on the Oundle bank. On the prosecutor's objecting to accept these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the gelding. It further appeared, that these notes had never been presented by the prosecutor at Oundle, or at Sir James Esdaile's, in London, where they were made payable. A witness stated, that he recollected Rickett's bank at Oundle, that he knew nothing but what he saw in the papers, and heard from people who had bills there. The notes appeared to have been exhibited under a commission of bankrupt against the Oundle bank; the words importing the memorandum of exhibit, had been attempted to be obliterated; but the names of the commissioners remained on each of them. The jury found the prisoner guilty; and said, they were of opinion, that when he bargained for, and obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor of his horse. But the learned Judge respited the judgment, and submitted the case to the consideration of the Judges, who held the conviction wrong; being unanimously of opinion, that the evidence was defective, in not sufficiently proving that the notes were bad. No opinion was given whether this would have been an indictable fraud, if the evidence had been sufficient. (*p*)

Not sufficient to prove that two out of three partners in a bank have failed.

So where an indictment stated that the prisoner unlawfully pretended that a promissory note of Coleman, Smith, and Morris, for the payment of 1*l.* as copartners and bankers trading under the firm of Coleman, Smith, and Morris, was a good and available note, whereas it was not a good and available note, &c., and it appeared that the prisoner had been told that the bank from which the note issued had stopped payment; and the banking house was shut up, and Coleman

(*o*) Freeth's case, 1807, MS., and Russ. & Ry. 127.

(*p*) Rex *v.* Flint, December, 1821. Russ. & Ry. 460

and Morris had become bankrupts, but Smith had not become bankrupt; and it was objected that as one of the partners had not become bankrupt, the note remained an available note as it respected him; and *non constat*, that if presented to him it would not have been paid. Gaselee, J., said, "On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away." (*q*) So where on an indictment for obtaining a bull by falsely pretending that a promissory note of Vincent and Co. was a good note, it appeared that the prisoner uttered the note to the prosecutor at Bracknell fair, in payment for his bull, and in answer to his inquiry whether the note was good, said it was a very good one: and when asked where he lived he gave a false address. It was also proved that the bank of Vincent and Co. had ceased business above twenty years ago, and one of their then clerks swore that the note uttered by the prisoner had been regularly cancelled and withdrawn from circulation, by the makers having drawn a large cross across the face of it; and the note was old and discoloured, of the date of 1816, and a large hole through the middle had taken away the middle part of the cross, leaving however the ends of it quite distinct. The proceedings in bankruptcy against Vincent and Co. were not produced. Coleridge, J., held that there was no evidence to go to the jury that the prisoner knew the note to be cancelled and unavailable at the time he uttered it, so as to constitute a false pretence within the statute. (*r*)

Insufficient evidence of a bank-note being valueless.

(*q*) Rex *v.* Spencer, 3 C. & P. 420.

(*r*) Reg. *v.* Clark Dick. Q. S. by Talf. 315. The first count stated that the prisoner did deliver to one J. F. N. a certain paper writing, partly written and partly printed, purporting to be a promissory note, made by one O. V., for certain persons therein described, as using the names, style, and firm of Vincent, Baily, and Vincent, for the payment by the makers thereof to A. G., or bearer on demand, of five pounds, at the Hon. B. D. &c., bankers, London, or on demand in Newbury, value received, as and for a good and available promissory note of the said makers thereof, and the said prisoner then and there unlawfully and falsely did pretend to the said J. F. N. that the said paper writing was a good and available promissory note of the said persons so using the names, style, and firm of the said V. B. and V.: by means of which said false pretence the said prisoner did then and there unlawfully obtain from the said J. F. N. a bull, the property of the said J. F. N., with intent then and there to cheat and defraud him, the said J. F. N., of the same: whereas in truth and in fact at the time the said prisoner so delivered the said paper writing, and made the said false pretence as aforesaid, the said paper writing was not a good and available promissory note of the said persons using the names, style, and firm of V. B. and V., but on the contrary thereof, at that time was and from thence hitherto hath been and still is a cancelled, bad, and unavailable promissory note of the said V. B. and V., and of no value, as he the said prisoner then and there well knew." The second count was like the first, except in omitting the makers' names, and stating them to be "certain persons therein more particularly described as makers thereof, for the payment by the makers thereof," &c. The third count was for a cheat at common law, and charged the prisoner with uttering and delivering to the prosecutor a certain other paper writing (setting it out as in the first count), as and for a good and available promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof were there and at that time liable, with intent then and there to cheat and defraud the said prosecutor, and did then and there and thereby cheat the said prosecutor to the amount of the said sum of 5*l.*; said prisoner then and there well knowing that the said last-mentioned paper writing was there, and at that time a bad, cancelled, and unavailable promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof, were not there and at that time liable, against the peace, &c The next case tried was Reg. *v.* Meshech Ferris, on a similar indictment. As the evidence closely resembled that in the last case, the counts for the false pretences were abandoned, and the opinion of the court was taken whether the facts did not constitute a cheat at common law as laid in the last count; and the third count in Rex *v.* Freeth, to which no objection was made at the trial or before the judges, was mentioned. Coleridge, J.,

In a case where the defendant was charged in an indictment that he, being a common carrier, had received goods to carry and deliver at a certain place; and that afterwards contriving and intending to cheat the consignor of his money, he pretended to him that he had carried and delivered the goods to the consignee, and that the consignee had given to him (the said carrier) a receipt expressing the delivery of the goods; but that he had lost, or mislaid, the receipt; and then demanded sixteen shillings for the carriage of the goods, and by means of such false pretences, (which were expressly stated to be false) obtained the sum of sixteen shillings from the consignor, it was holden that the offence was sufficiently brought within the words and meaning of the statute. (*s*) So where the defendant in the assumed character of a porter from an inn, delivered a parcel as from the country, with a printed ticket, with writing charging carriage and porterage, and received the money charged; and the parcel turned out to be a mock parcel, worth nothing; and part of the false pretences charged in the indictment was taken from the porter's ticket; and it was objected that the defendant had not uttered these words; Lord Ellenborough, C. J., said, "I take the defendant to have uttered every word contained in the ticket which he brought with the parcel." (*t*) So if a person go to a shop dressed in the costume of a particular class of persons for the purpose of fraudulently obtaining goods, this is a pretending that he is a person of such class, although he makes use of no words. The indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford and a commoner of Magdalen College, and it appeared that the prisoner went to a bootmaker's, wearing a commoner's cap and gown, and ordered boots, which were not sent to him, and straps which were sent to him; and he stated that he belonged to Magdalen College. The prisoner, however, did not belong to that college. Bolland, B., "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the University, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so has been held to be a false pretence without any words being used." (*u*)

Airey's case. Where a carrier pretended to a consignor of goods that he had delivered them to the consignee, and thereby obtained money for the carriage, it was holden within the 30 Geo. 2, c. 24.

Assuming the dress of a particular class for the purpose of fraud.

Where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half-a-guinea's worth of silver, and that she would send the half-guinea presently; upon which she obtained the silver, went away with it, and never returned; the case was holden not to amount to felony. (*v*) And it is said that, in truth, this was a loan of the silver, upon the faith that the amount would be repaid

Coleman's case. Pretence of being sent by a neighbour to borrow money.

was of opinion that the facts did not constitute an indictable cheat, and the prisoner was acquitted.

(*s*) Rex *v.* Airey, 2 East. R. 30.

(*t*) Rex *v.* Douglas, 7 C. & P. 785, note (*a*).

(*u*) Rex *v.* Barnard, 7 C. & P. 784. And see Reg. *v.* Wickham, 10 Ad. & E. 34, where the defendant pretended that he was a captain in the East India service, and Coleridge, J., after citing this case added, "Suppose in the present case the defendant had not stated that he was an officer, but merely appeared in uniform."

(*v*) Coleman's case, O. B. 1785. 2 East, P. C. c. 16, s. 104, p. 672. 1 Leach, 303, note (*a*).

at another time; it was money obtained by a *false pretence;* and that the same determination had been made in similar cases at the Old Bailey. (*w*) So where the prisoner borrowed half a sovereign of the prosecutor under the pretence that he wanted to buy some tea, but never returned any money to the prosecutor, and the pretence made use of was stated to be fictitious: Parke, J., told the grand jury, who asked his opinion on the case, that he thought this was not a larceny, and advised them to ignore a bill for larceny of the half-sovereign. (*x*)

Fraudulently obtaining goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

We have seen, that it was holden that an indictment for a cheat or fraud at common law could not be supported against a person for delivering a draft on a banker, which he knew he had no authority to draw, and would not be paid, and thereby obtaining certain lottery tickets. (*y*) But a different doctrine appears to have been laid down in a case of an indictment on the repealed statute 30 Geo. 2, c. 24. The prosecutor was a jeweller at Cheltenham, who was defrauded of goods to a considerable value by the defendants. Among other things, for the purpose of deceiving him, they gave him in payment for the goods a cheque upon certain bankers in London, with whom it was proved they kept no cash, and had no account. It was contended on behalf of the defendants, that as far as the cheque was concerned, they were not criminally liable. But Bayley, J., is reported to have said, "This point has recently been before the Judges; and they were all of opinion that it is an indictable offence, fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid." (*z*) And the defendants were convicted and sentenced to seven years' transportation. (*a*)

Obtaining goods by payment of a cheque drawn by the prisoner on bankers, with whom he has neither funds or an account, he representing that he has an account, is within the 7 & 8 Geo. 4, c. 29, s. 53. The indictment may state the pretence to be that the

It is an offence within the 7 & 8 Geo. 4, c. 29, s. 53, to obtain goods by payment of a cheque drawn by the prisoner on bankers, to whom he is unknown and with whom he has no account, he representing that he has an account, and knowing that the cheque will not be paid; an indictment may allege the false pretence to be that the cheque was a good and genuine order for the payment of, and of the value of, the sum specified. The first count stated that the prosecutor, a gold and silversmith, had agreed to sell the prisoner a watch and watch chain for 25*l.*, and to deliver the same on payment of the said 25*l.*, and that the prisoner had agreed to buy such watch and chain on the said terms; that the prisoner intending to cheat &c., on the 27th of December produced and tendered a certain paper writing as and for a true and valuable order for payment of 25*l.*, and as payment of the said watch and chain, which writing was as follows:

(*w*) 2 East, P. C. c. 16, s. 104, p. 673.

(*x*) Rex *v.* George Bromley, Hereford Spr. Ass. 1829, MSS. C. S. G. An indictment was afterwards preferred for obtaining the half-sovereign by false pretences, and on the trial it appeared that the pretence was true. C. S. G.

(*y*) Rex *v.* Lara, *ante*, p. 284.

(*z*) The case here alluded to was Rex *v.* Freeth, *ante*, p. 295. See R. & M. C. C. R. 229, note (*a*).

(*a*) Rex *v.* Jackson and another, *cor.* Bayley, J., Gloucester Lent Ass. 1813. 3 Campb. 370. In Rex *v* Henry Jackson, Matth. Dig. 167, the same learned judge held the same where the bankers had no effects of the prisoner. And see Lockett's case, 1772. 1 Leach, 94. 6 T. R. 567, note (*c*). 2 East, P. C. c. 19, s. 38, p. 940, where upon an indictment for forging an order for payment of money, being in truth a draft upon a banker drawn in the name of a fictitious person, the judges held that it was immaterial whether such person existed or not, it being sufficient that the order on the face of it imported a right, on the part of the drawer, to direct such a transfer of his property.

"£25. "6th January, 1837.

"To Messrs. Stuckey & Co., bankers, Bristol, pay the bearer twenty-five pounds.

R. C. C. SMYTHE PARKER."

cheque was a good and genuine order for the payment of a certain sum, and of the value of that sum. Representations as to a future event seem to be not within the statute.

And did unlawfully pretend to the prosecutor that the said paper writing would be a true and genuine order for payment of 25*l.*, and of the value of 25*l.*, and that 25*l.* would be payable on the day of the date of the said paper writing to the bearer of the same upon presentment at the banking house of V. Stuckey and others: by means, &c. The second count stated that the prisoner produced and tendered a certain other paper writing as and for a true and genuine order for payment of money, setting it out, and did by such tendering and production unlawfully pretend that such paper writing was a true and genuine order for the payment of the money specified on the face of it at the banking house of V. Stuckey and others. The third count was similar, stating that the prisoner pretended the paper writing was a true and genuine security for the payment of 25*l.* And the fourth count charged that the prisoner unlawfully did pretend to the prosecutor that a certain other paper writing, which he then produced to the prosecutor, and which was as follows (setting the cheque out) was a good and genuine order for payment of the said 25*l.*, and of the value of 25*l.*, by means of which said last mentioned false pretence he obtained a watch of the value of 20*l.*, and a watch chain of the value of 5*l.* The prisoner, on the 27th of December, 1836, selected a watch and chain at the prosecutor's shop, which the prosecutor agreed to let him have for 25*l.* down. The prisoner requested some paper to write a cheque, and on being asked on what bank, he said "on a Bristol bank," and that any of the coachmen would take it down and get it cashed; he then commenced writing a cheque, and whilst so doing he asked the prosecutor to keep the cheque till the 6th of January, to which he ultimately agreed. The cheque was then finished and dated the 6th of January. On receiving it the prosecutor delivered the watch and chain to the prisoner. The prisoner on different occasions, before the 6th of January requested the prosecutor to delay presenting the cheque, promising to bring the money before, and saying at one time that he had 1000*l.* in Stuckey's bank, which he did not wish to disturb; but no money was paid to the prosecutor; the cheque was presented after the 6th., and dishonoured. The prisoner had no account with Messrs Stuckey, and was an entire stranger to them. An objection was taken by the prisoner's counsel to the first count of the indictment on the ground that the false pretence therein stated was not a false pretence of an existing fact, and that the other counts were not proved. The learned judge thought it right to take the opinion of the jury on the facts, there being, as it seemed to him, a question as to the meaning of the terms, "true, good, and genuine," in the third and fourth counts; whether they meant merely that the instrument was signed by the person whose name it bears, or that it was drawn by a person having funds in the banker's hands, or having a right to draw such a draft; and the learned Judge left two questions to the jury: who found, 1st.

That the prisoner, before the completion of the sale by the delivery of the goods, represented to the prosecutor that he then had an account with bankers at Bristol, trading under the firm of Stuckey & Co., and then had a right to draw on them, though he postponed the date of the cheque for his own convenience only to a future day; that such representation was false; and that the prisoner at the time of making such representation knew it to be so. 2d. That he represented to the prosecutor before the completion of the sale by the delivery of the goods, that the cheque would be paid on presentment on or after the day of the date, and that he then had no reasonable ground to believe that it would be paid at that time, or that he would be able to provide funds to pay it. Upon a case reserved, it was contended that the first count was bad, as the pretence referred to a future period, and in order to bring the case within the statute the pretence must be of some fact either existing or past. (*b*) As to the second and third counts that the meaning of the words "true and genuine order," and "good and genuine security," was the same, namely, that the cheque on the face of it was what it purported to be, the prisoner's order for the payment of money and so genuine. As to the fourth count that the addition of the words "of the value of 25*l.*" did not carry the case any further; they only meant that the liability on the cheque was for 25*l.*, and though the cheque might be dishonoured the drawer would still be liable. On the part of the crown it was submitted that the first count was good; and that under the 7 & 8 Geo. 4, c. 29, s. 53, every false representation of a state of things whether past, present, or future, was an offence; that the mischief in the one case was as great as in the other, as a person had as little means of ascertaining the truth of a representation as to a future fact as he could have as to a past or present transaction. (*c*) At least the fourth count was good: it alleged the pretence to be that the order was a good and genuine order for 25*l.*, and it never was good for any sum whatever. The count also alleged that the order was pretended to be of the value of 25*l.*, which was negatived by the jury. Eight of the learned judges (*d*) were of opinion that the conviction was good on the fourth count; six of the judges (*e*) were of a contrary opinion; and the conviction was affirmed. (*f*)

(*b*) Rex *v.* Goodall, *ante*, p. 290, and Rex *v.* Douglas, ibid., were relied upon as in point.

(*c*) Rex *v.* Young, *ante*, p. 288, and Coleman's case, *ante*, p. 297, were relied upon, as showing that a pretence of a *future* race, and of *future* repayment of money lost, was a false pretence: and the precedent 2 Stark. Cr. Pl. 496, and Rex *v.* Scott, *post*, p. 307, were also referred to.

(*d*) Lord Denman, C. J., Tindal, C. J., Vaughan, J., Bolland, B., Patteson, J., Williams, J., Coleridge, J., and Coltman, J.

(*e*) Lord Abinger, C. B., Park, J. A. J., Littledale, J., Parke, B., Bosanquet, J., and Alderson, B.

(*f*) Rex *v.* Parker, 2 Moo. C. C. R. 1. 7 C. & P. 825. In the course of the argument Alderson, B., said, "The fourth count might have charged that the prisoner pretended that he had a right to draw the cheque:" Tindal, C. J., "or that he had money at the bankers." And Parke, B., said, "There was enough proved at the trial to show that the prisoner pretended he kept an account at Messrs. Stuckey's." If a similar case should occur it would be prudent to aver that the prisoner pretended that he kept an account with the bankers, on whom the cheque was drawn, that he had funds in their hands, that he had full power, right, and authority to draw cheques upon the bank, and thereby to draw out the money held to his credit, and that the cheque was a good, valid, and available order for the sum specified, and for the purpose of drawing the same out of the bank, and of the value specified; and it might be well in one count at least to add that the prisoner pretended it would be paid on presentment. C. S. S.

It was said, that though a man cannot be guilty of forgery, merely by passing himself off for the person whose real signature appears to a written instrument, although for the purpose of fraud, and in concert with such real person, there being no false making, yet that this appeared to be a false pretence within the 30 Geo. 2, c. 24. (*g*)

Rex *v.* Douglas. Where a porter delivered along with a basket of fish a false ticket, denoting that 9*s.* 10*d.* instead of 6*s.* 6*d.* was to be paid for it, it was held that the basket was well described in the indictment as a parcel: but that it would have been otherwise, if the indictment had been on a public local act, 39 Geo. 3, c. 58, which enumerates baskets, packages, parcels, &c., specifically. Where an indictment averred that the defendant obtained a sum of money, being the proper monies of A., and the money was obtained from B., A.'s servant, who had not at that time in his possession any money belonging to A., but afterwards was repaid by him the sum delivered to the defendant, the variance was considered fatal: but the

Several points were ruled in a modern case, upon the same repealed statute 30 Geo. 2, c. 24. The indictment charged that the defendant having in his custody and possession a certain parcel, to be by him delivered to Maria, Countess Dowager of Ilchester, upon the delivery of which he was authorized and directed to receive and take the sum of six shillings and sixpence and no more, for the carriage and porterage of the same; yet that defendant produced and delivered to Thomas Harris, then being servant to the said Countess of Ilchester, the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and porterage of the said parcel, and unlawfully, knowingly, and designedly, did falsely pretend to the said Thomas Harris, that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged, and was due and payable, for the carriage and porterage of the said parcel; and that defendant was authorized and directed to receive and take the said sum of nine shillings and tenpence for the carriage and porterage of the said parcel; by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said Thomas Harris the sum of three shillings and fourpence in monies, of the monies of the said Countess, with intent to cheat and defraud her of the same: whereas in truth and in fact, &c. The delivering the parcel mentioned in the indictment, and receiving nine shillings and tenpence, instead of that which he ought to have received, namely, six shillings and sixpence, was sufficiently brought home to the defendant. But it appeared that the parcel was a *basket* of fish: upon which it was contended on behalf of the prisoner, in the first place, that the indictment was not upon the 30 Geo. 2, c. 24, but upon a public local act, the 39 Geo. 3, c. 58, (*h*) by which it is enacted, that if any porter, or other person employed in the porterage or delivery of the "boxes, *baskets*, packages, *parcels*, trusses, game, or other things," mentioned in the act, shall demand or receive in respect of such porterage or delivery, any greater sum or sums, than the rates or prices thereinbefore fixed, such person shall for every such offence forfeit not exceeding twenty, nor less than five shillings; and that, being upon such act, the *basket* in question was not properly described as a *parcel;* that parcel was not a generic name, and that the indictment should have described the thing according to the fact. (*i*) Lord Ellenborough, C. J., was of opinion, that if the indictment had been upon the 39 Geo. 3, this would have been a fatal variance; but that, as the indictment was upon the 30 Geo. 2, c. 24, a basket answered the general description of a parcel well

(*g*) 2 East, P. C. c. 19, s. 5, p. 856. See Reg. *v.* Wickham, 10 A. & E. 34. Rex *v.* Story, *ante*, p. 291.

(*h*) Entitled "an act for regulating the rates of porterage to be taken by innkeepers, and other persons within the cities of London and Westminster, the borough of Southwark, and places adjacent."

(*i*) See as to this objection, Cook's case, 1 Leach, 105. 2 East, P. C. 616.

objection was removed upon its appearing that B. had at the time in his possession a sum belonging to A. equal to that delivered to the defendant. The local statute 39 Geo. 3, c. 58, only gives a cumulative remedy.

enough. In the next place it was objected that as the nine shillings and tenpence were paid to the defendant by the servant of the Countess of Ilchester, the indictment had improperly averred that the monies obtained by the defendant, namely, the three shillings and fourpence, were "the monies of the Countess," though she had afterwards repaid the servant the whole sum of nine shillings and tenpence; that in fact the three shillings and fourpence never had been her's, and whether or not she was bound to reimburse her servant, this particular sum of three shillings and fourpence was at the instant the sole property of the servant. And upon this point Lord Ellenborough held, that the subsequent allowance by the Countess of Ilchester did not make the money paid to the defendant her property at the time, that she was not chargeable for more than was actually due for the carriage of the basket, and that it depended upon herself whether she should pay the overplus. But the servant afterwards stated, that at the time of this transaction he had in his hands upwards of nine shillings and tenpence, the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment. In the last place it was objected, that as the offence certainly came within the 39 Geo. 3, c. 58, the defendant ought to have been prosecuted on that statute; but Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed either at common law, or by other acts of Parliament. (*j*)

Obtaining credit in account with a banker by means of a bill of exchange is not sufficient.

Obtaining *credit* in account from a banker by drawing a bill on a person, on whom the party has no right to draw and which has no chance of being paid, is not within the act, though the banker pays money in consequence thereof to an extent that he would not otherwise have done. The prisoner had kept an account with certain bankers for more than three years. They had told him that they could not allow him to overdraw beyond 200*l.* but on the 29th November, 1828, his account was 400*l.* in debt, of which he had had notice and was told he must get them some money: on that day he met Mr. Roe, one of the partners, and told him he had been obliged to give a cheque to Mr. Jacob for 70*l.*; Mr. Roe said we certainly shall not pay it, unless you give us some money first: he said "Sir, I can give you a good bill on Mr. Foster." Mr. Roe said very well. About two hours afterwards the prisoner sent a letter to the bank containing a bill of exchange in his own hand writing, of which the following is a copy:

"Newport, S. W., November, 29th 1838.

"Two months after date pay to my order 200*l.* value received in flour. "THOMAS B. WAVELL."

"Mr. John Foster, Mark Lane."

"London."

(Indorsed) "Thomas B. Wavell."

After this, cheques drawn by the prisoner were brought in and paid

(*j*) Rex *v.* Douglas, *cor.* Lord Ellenborough, C. J., 1808. 1 Campb. 212. But *qu.* whether the offence charged in the indictment is within the 39 Geo. 3, c. 58. It certainly is not within the section cited, which relates only to an overcharge for the porterage.

there on that day, and amongst others that in favour of Jacob for 70*l.* Mr. Jacob banked with the prosecutors, and they placed the amount to his credit, which Roe swore he should not have done unless he had met the prisoner and received the bill. Several other cheques were afterwards paid, or placed to the credit of parties, on whose behalf they were sent in. The bill was not accepted, and searches were made in vain for a person of the description of John Foster, and the bill was not paid. The prisoner endeavoured to prove that at the time he drew the bill he had reason to expect that it would have been accepted, but the jury disbelieved the defence; and upon a case reserved, it was objected that no chattel, money, or valuable security was obtained by the prisoner, by means of the false pretences; he only obtained such credit with the bankers as to induce them to honour his cheques; and the Judges held that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained by him was credit in account; somebody else received the money: and therefore the conviction was wrong. (*k*)

Selling an estate with a covenant for title where the party has previously sold his interest to another person.

If one professes to sell an interest in property, and receives the purchase money, the vendee taking the usual covenant for good title; and it turns out that the vendor has in fact previously sold his interest in the property to a third person; this is not sufficient to support an indictment for false pretences. The indictment charged that the defendant obtained 29*l.* 3*s.* by falsely pretending to one Varlow, that he was intitled to a reversionary interest in one seventh share of a sum of money left by his grandfather, whereas in fact he was not entitled to any interest in any share, &c. negativing the pretences. To prove the pretence, a deed, assigning the defendant's interest in his one-seventh share of the money to Varlow, was put in, and in this deed there was the usual covenant for title. It was objected that this deed was no evidence of any false pretence, for if it was every breach of covenant would be indictable. Littledale, J., "Certainly a covenant in a deed cannot be taken to be a false pretence." The prosecutor was then called, and he proved that the defendant asked him to purchase a seventh share of some money that he would be entitled to under his grandfather's will on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and he thereupon paid the money. A previous assignment by the defendant of all his interest to one Pick was also put in. It was then objected that the prosecutor did not advance the money in consequence of the verbal pretence used by the defendant, but took the covenant as his security: what passed between the parties by parol was afterwards embodied in the deed; it was a mere breach of covenant. For the crown it was urged that the indictment charged that the defendant obtained the money by pretending that he was entitled to this reversionary interest; and that pretence was proved to be false; and it could not become no offence because the pretence was reiterated in the deed. Littledale, J., "The doctrine contended for on the part of the prosecution would make every breach of warranty or false assertion at the time of a bargain, a transportable offence. Here the party bought the property and took as his security a covenant that the vendor had a good title.

(*k*) Rex *v.* Wavell, R. & M. C. C. R. 224. A point was also reserved, *viz.*, whether pretending that the prisoner had shipped flour to Foster, the drawer of the bill, was anything more than a naked lie: but no opinion was given upon it.

If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action." (*l*)

Cheating by false warranty of a horse.

So an indictment will not lie, it should seem, for a false pretence by a deceitful representation and warranty of the soundness of a horse. Upon an indictment for conspiring to defraud General Maclean, by selling him an unsound horse, it appeared that one of the defendants had advertised the sale of horses, undertaking to warrant them. Upon application by General Maclean at this defendant's stables, another of the defendants stated that he had lived with the owner of the horse, and that he knew the horse to be perfectly sound, and as the agent of the other defendant warranted him to be sound; and a written warranty of soundness was given. It was discovered very soon after the sale that the animal was nearly worthless. Lord Ellenborough, C. J., intimated that the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. If this (he said) were to be considered to be an indictable offence, then instead of all the actions which had been brought on warranties, the defendants ought to have been indicted as cheats. And that no indictment in a case like this could be maintained, without evidence of concert between the parties to effectuate a fraud. (*m*)

Money obtained in the character of an attorney.

Upon an indictment for obtaining a sovereign by false pretences, it appeared that the defendant, an attorney, had appeared before the magistrates as attorney for the prosecutor, who kept a house for the sale of beer, and who was fined 2*l.* by the magistrates. The defendant afterwards called on the wife of the prosecutor, and said he had been with a person from Frankwell to the magistrates, which person had been fined 2*l.* for a similar offence, and he had prevailed on the magistrates to take 1*l.* instead of 2*l.*; and if she could make it convenient to give him a sovereign, he would go and do the same for her. She gave him a sovereign. The defendant had never made any application to either of the magistrates respecting any person in Frankwell, or either of the fines, and both the person residing in Frankwell and the prosecutor had been obliged to pay their full fines of 2*l.* each. It was submitted that this was not a false pretence within the statute; but a matter of bargain between an attorney and his client. But it was held to be a case clearly within the statute, as under the guise of an attorney the money was obtained. (*n*)

Obtaining a loan to pay a bill of exchange.

Obtaining as a loan from the drawer of a bill accepted by the prisoner part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, is within the new statute, if it be proved that the prisoner was not so prepared, and did not intend so to apply the money. The indictment stated that the prosecutor had drawn a bill of exchange upon the prisoner for 2638*l.*, which the prisoner had accepted, and that when it became due, the prisoner, by falsely pretending that he was then provided with sufficient funds to pay the full amount of the bill, excepting 300*l.*, obtained

(*l*) Rex *v.* Codrington, 1 C. & P. 661. See the observation of Patteson, J., on this case, in Rex *v.* Crossley, *post*, p. 305.

(*m*) Rex *v.* Pywell, 1 Stark. N. P. R. 402.

(*n*) Rex *v.* Asterley, 7 C. & P. 191, Park, J. A. J.

the last mentioned sum from the prosecutor; and it was proved that the prisoner had accepted a bill, drawn on him by the prosecutor for 2638*l.* the amount he then owed to the prosecutor; the bill was put into circulation, and when it became due, the prosecutor became anxious about its being duly taken up by the prisoner, and applied to him on the subject, asking him whether he was prepared to pay it. The prisoner answered that he was prepared with sufficient funds all but 300*l.*, and that he expected to get the loan of that sum from a friend. The prosecutor expressed his willingness to advance the 300*l.* himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the 300*l.* to his own purposes, and suffered the bill to be dishonoured, and the prosecutor ultimately had to pay it. There was evidence that at the time the prisoner obtained the money he was not in possession of funds sufficient to make up the balance between the 2638*l.* and the 300*l.*, but was in insolvent circumstances. It was objected that the prisoner's statement, that he could take up the bill, formed a mere misstatement: at the worst a naked lie; and *Rex* v. *Wakeling*, (*o*) and *Rex* v. *Codrington* (*p*) were cited. Secondly, that the statute did not extend to cases where the prosecutor had only lent, not parted with the property of the money. Patteson, J., "The words of this act are very large, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* by a deliberate falsehood, averring that he had all the funds to take up the bill except 300*l.* when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes and not to take up the bill, the jury ought to convict the prisoner. In *Rex* v. *Codrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate that he was selling. Then as to the money being advanced by the prosecutor only as a loan, the terms of the act embrace every mode of obtaining money by false pretences, by loan as well as by transfer."(*p*)

By reference to the decisions upon the repealed statute 30 Geo. 2, c. 24, it seems to be clear that the indictment upon the 7 & 8 Geo. 4, c. 29, should state what the false pretences are. (*r*) They should be set out, in order that the court may see what they are, and whether they come within the statute. (*s*) But it does not appear to be necessary to describe them more particularly than they were shewn or described to the party at the time; and in consequence of which he was imposed upon: and it does not seem to be necessary to make any express allegation that the facts set forth shew a false pretence. (*t*). In a case upon the repealed statute, where it was assigned for error that it was no where alleged in the

As to the statement of the false pretences in the indictment.

(*o*) R. & M. C. C. R. 504. *supra*, p. 290.

(*p*) 1 C. & P. 661, *supra*, p. 304.

(*q*) Rex *v.* Crossley, 2 M. & Rob. 17. But *qu.* the last point. The correct distinction between larceny and false pretences seems to be that in the former the property was not parted with, in the latter it was. See Rex *v.* Davenport, Arch. Peel's Acts, 4; Rex *v.* Savage, 5 C. & P. 143; Rex *v.* Robson, R. & R. C. C. R. 413; Rex *v.* Nicholson, 2 East, P. C. 669; Rex *v.* Adams, R. & R. C. C. R. 225. But if these cases show that it would not be obtaining by false pretences, still if the jury found that the prisoner obtained the loan with intent to steal, that would be larceny, and he might be convicted of that upon this indictment. See *ante*, p. 28. C. S. G.

(*r*) Rex *v.* Mason, 2 T. R. 581.

(*s*) Fuller's case, 2 East, P. C. c. 18, s. 13, p. 837.

(*t*) 2 East, P. C. c. 18, s. 13, p. 837, 838. Terrey's case, Cro. Car. 564.

indictment that the defendant "did *falsely* pretend," the judgment was nevertheless affirmed. The indictment alleged, in substance, that the defendant unlawfully, knowingly, and designedly pretended certain things, "by means of which said *false pretences*" he obtained the money; and, in the subsequent part of the indictment, all the pretences were averred to be false; and the court held this to be sufficient. And it seems also to have been their opinion, that the indictment would have been good if it had only alleged that the defendant obtained the money by such and such pretences, (stating them;) and then averred that those pretences were false. (*u*) But a special averment, that the pretences, or some of them, are false, cannot be dispensed with; and, in a case upon the repealed statute, where it was omitted, and an exception taken on a writ of error, the judgment was reversed. The court considered the case by analogy to the necessary averments in an indictment for perjury, framed under the 23 Geo. 2, c. 11, (*v*) and were decidedly of opinion that, where a party was charged with obtaining money, &c., by false pretences, and the matter charged as the pretence, contained more than one proposition, the indictment ought to announce the precise charge by distinct averments, and state in what particular such pretences are false. Lord Ellenborough, C. J., said, "To state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity; are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and, in furtherance of that convenience, it is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend; and, to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood. The Legislature have expounded their understanding of the matter in the case of perjury; and I am at a loss to discover why, in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury." (*w*) It appears from this case that it is not necessary that the whole of what is stated in order to obtain the property should be false: it is sufficient if part is false; provided that part has a material effect in inducing the party defrauded to give up his property. (*x*)

The indictment must state that the pretences, or some of them, are false.

As to the certainty with

In a case which has been previously mentioned, on another point, (*y*) an objection was taken that the pretence was not stated

(*u*) Rex *v.* Airey, 2 East, R. 30, *ante*, p. 297.

(*v*) *Post*, Book V., Chap. on *Perjury*.

(*w*) Rex *v.* Perrott, 1814. 2 M. & S. 379, 386.

(*x*) And see Rex. *v.* Hill, *post*, 310.

(*y*) Rex *v.* Young and others, *ante*, 288, *et seq.*

with sufficient *certainty*, inasmuch as a wager therein mentioned was stated only to have been made "with a colonel in the army, then at Bath," without setting forth the colonel's name. (*z*) But the objection was overruled; and Lord Kenyon, C. J., said, that the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for; and that perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence.

which a false pretence should be stated.

It is sufficient to state the effect of the pretence correctly, and the very words used need not be stated. The indictment alleged that the prisoner did falsely pretend that he was the servant of one T. Groves, of Gloucester, butcher, and that he was sent by the said Groves to look at two heifers, the property of the prosecutor, for the said Groves, and that he was sent by the said Groves to buy the said heifers of the prosecutor for the said Groves, and that the said Groves would buy the said heifers for the sum of 23*l.* 10*s.*, and that the said Groves would pay the prosecutor the said sum of 23*l.* 10*s.* for the said heifers, and that the said Groves would be over on the next Thursday, and would pay the prosecutor for the said heifers on that day. The evidence was, that the prisoner said he came from Groves, &c., and that either Groves or himself would be over the following Thursday; and it was submitted that the indictment was supported; first, it was sufficient to state the effect of the evidence correctly, and that the allegation that the prisoner was sent by Groves was supported by proving that he said "he came from Groves." Secondly, that the alternative that the prisoner would himself come was a mere naked lie, on which no indictment could be supported, and, therefore, it was unnecessary to state it in the indictment; and Littledale, J., held that the evidence was sufficient to support the indictment; and the prisoner was convicted. (*a*)

It is sufficient to state the effect of the pretence correctly.

An indictment for obtaining goods by false pretences must state them to be the property of some person, and it is not sufficient to state that they were obtained from a person with intent to defraud that person of the same. The indictment stated that the defendant made certain false pretences, by means of which he obtained from S. Yates a certain sum of money, with intent to cheat and defraud the said S. Yates of the same. Alderson, B., "There is an objection to the indictment in this case. The money which has been obtained is not laid to be the property of any person, which it ought to be in order to exclude a subsequent indictment for larceny. It would be impossible to plead an acquittal or conviction on this indictment in bar to a prosecution for larceny under the provisions of the statute." And the court ordered the indictment to be quashed. (*b*) And if such an indictment omit to state to whom the goods belonged, it is bad upon error, and the defect is not cured by the 7 Geo. 4, c. 64, s. 21. (*c*). The indictment stated that the

Indictment must state the goods to be the property of some person.

If it do not it is bad after verdict.

(*z*) See the abstract of the indictment, *ante*, p. 287.

(*a*) Rex *v.* John Scott, Hereford Spr. Ass. 1832, cited in Rex *v.* Parker, *ante*, p. 300.

(*b*) Reg. *v.* Norton, 8 C. & P. 196, Alderson, B., Williams and Coltman, Js.

(*c*) *Ante*, p. 115.

defendants made certain false pretences, and that they thereby obtained from W. J. Holt, divers goods and merchandises, with intent then and there to cheat and defraud the said W. J. Holt of the same; and the defendants having been convicted and sentenced to be transported, error was brought upon the judgment, on the ground, among others, that it was not stated in the indictment that the goods were the property of any person; and the court held that the indictment was clearly bad upon the face of it, and that it was not made good after verdict by the 7 Geo. 4, c. 64, s. 21; for that enactment assumes that the words shall be so employed as to shew that some offence has been committed; and there were many instances in which, if merely the statutory form were followed, no offence would be charged, in which cases it would not be sufficient to describe the offence in the words of the act. Thus it would not be enough to charge the stealing goods in a dwelling-house, the destroying a will, the taking pigeons, without adding whose goods, whose will, whose pigeons. (*c*)

Reed's case.

Where an indictment alleged that the prisoner having in his possession a certain iron weight, of the weight of twenty-eight pounds and no more, on, &c., did falsely pretend that a certain quantity of coals, which he then and there delivered to and upon the premises of the prosecutor, weighed sixteen cwt., (meaning one thousand seven hundred and ninety-two pounds weight); that the said coals were worth the sum of 1*l.*, and that the said iron weight was a half-hundred weight, (meaning of the standard weight of fifty-six pounds); by means of which false pretences he unlawfully obtained one sovereign, with intent to cheat the prosecutor of part thereof, to wit, of the sum of 10*s.*, (*d*) and then negatived the pretences: after a verdict of guilty, it was moved in arrest of judgment, that all the false pretences, except that relating to the false weight, were no more than false affirmations; and that as to the weight there was no allegation to connect the sale of the coals with the use of the weight; and, upon a case reserved, the judges held that the indictment was bad, and the conviction wrong. (*e*)

Tully's case.

Where the first count of an indictment charged that the prisoner did falsely pretend to J. Lovelock that he was sent by W. P. for an order to go to Bracey's (meaning J. Bracey, a shoe factor) for a pair of high shoes: by means of which false pretence he unlawfully obtained from the said J. Bracey one pair of shoes of the goods and chattels of the said J. Bracey, with intent to cheat the said *J. Lovelock of the price and value of the said shoes,* to wit, of the sum of nine shillings of the monies of the said J. Lovelock; and the second count charged that the prisoner did falsely pretend to the said J. Lovelock that W. P. had said that the said J. Lovelock was to give him an order to go to Bracey's for a pair of high shoes; by means of which false pretence he unlawfully obtained from the said J. Bracey, in the name of the said J. Lovelock, one pair of shoes, of *the goods and chattels of the said J. Bracey, with intent to cheat the said J. Lovelock* of the same; the prisoner having pleaded guilty, judgment

Can old for bar. same being the Goods of the old Bracey." — what it be been sufficient?

(*c*) Reg. *v.* Martin, 8 Ad. & E. 481.

(*d*) *Quære*, whether the indictment was not bad, on the ground that it did not state the intent to be to cheat the prosecutor of the sovereign: the words of the act are with intent to cheat "of the same." See *ante*, p. 287. C. S. G.

(*e*) Rex *v.* Reed, 7 C. & P. 848.

was arrested, on the ground that neither count charged an offence within the 7 & 8 Geo. 4, c. 29, s. 53. (*f*)

It has been held that if the indictment state that the prisoner *feloniously* pretended, it is bad. The indictment alleged that the prisoner "unlawfully, knowingly, and designedly did feloniously pretend;" and Law, R., thought that the indictment was bad, and after consulting Bosanquet and Taunton, Js., stated that they were of the same opinion, and the prisoner was therefore acquitted. (*g*)

"Feloniously" pretend is bad.

It has been held that several defendants might be charged jointly in the same indictment, if they were all present and in concert together, taking part in the same transaction. (*h*) And it was holden also to be no objection in arrest of judgment, that the indictment contained several charges of the same nature in the different counts. Lord Kenyon, C. J. said, "This objection would be well founded if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But, in this case, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they may be joined in the same indictment." (*i*)

Several defendants may be charged jointly in the same indictment, if they were all present, and taking part in the transaction.

In general on an indictment against two, charging them with a joint offence, either may be found guilty. But they cannot be found guilty separately of separate parts of the charge: yet if they be found guilty separately, upon a pardon or *nolle prosequi* as to the one who stands second upon the verdict, judgment may be given against the other. Hempstead and Hudson were indicted for stealing in the dwelling-house value 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles value 6*l.*, and Hudson guilty as to the residue. On case, the Judges held, that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson, it might be given against Hempstead. (*j*)

Where the goods are obtained by a forged instrument, which falls within the class of instruments, the forging of which is made felony by statute, the indictment must be for forging the instrument, as the misdemeanor is merged in the felony. (*jj*) The prisoner was indicted for obtaining goods by the following counterfeit instrument:

If the goods were obtained by an instrument, which it is felony to forge, an indictment for false pretences cannot be supported.

"MR. BROOKS,

"Please to let the bearer, William Turton, have for J. Roe four yards of Irish linen and a waistcoat.

"JOHN ROE."

"Jan. 6, 1833."

Taunton, J., held that this was a forged request for the delivery of goods within section 10 of the 1 Wm. 4, c. 66; that it was a felony and not a misdemeanor, and that the prisoner must be acquitted. (*k*)

(*f*) Reg. *v.* Tully, 9 C. & P. 227, Gurney, B., after consulting Patteson, J.

(*g*) Rex *v.* Walker, 6 C. & P. 657; but see Rex *v.* Carradice, Russ & Ry. 205, *ante*, p. 149, where an indictment for taking fish alleged them to have been "feloniously" taken, and the judges thought that did not vitiate the indictment. C. S. G.

(*h*) See Reg. *v.* Martin, 8 A. & E., 481, where husband and wife were convicted.

(*i*) Rex *v.* Young, *ante*, p. 287.

(*j*) Rex *v.* Hempstead, Mich. T. 1818, MS. Bayley, J., and Russ & Ry. 344.

(*jj*) Foster, 373.

(*k*) Rex v. Evans, 5 C. & P. 553. See other similar cases in the Chapter on *Forgery, post.*

The pretences must be proved as laid.

Upon an indictment for obtaining money by false pretences, the pretences which, as we have seen, must be distinctly set out, (*l*) must at the trial be proved as laid: so that, where the indictment stated that the defendant pretended *that he had paid a sum of money into the Bank of England*, and it appeared upon the evidence that he did not say that *he paid* the money, but that he said generally that *the money had been paid* into the bank, Lord Ellenborough, C. J., held this to be a fatal variance; and said, that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual. (*m*) But it is not necessary to prove the whole of the pretence charged: proof of part of such pretence, and that the money was obtained by such part is sufficient. An indictment on the repealed statute 30 Geo. 2, charged the prisoner with obtaining money under colour of obtaining a pension for a discharged seaman, by falsely pretending that the prisoner had received an answer by letter, in reply to an application he had made on the seaman's behalf, that two guineas must be sent to the under clerks as fees, *which they always expected, and that nothing could be done without it.* There was no evidence that the prisoner used that part of the pretence in italics, but there was evidence that he used the residue, and by means thereof obtained the money: and on point saved, the court held it not necessary that the whole of the pretence charged should have been proved, and that the conviction was right. (*n*)

Not necessary to prove all the pretences; proof of part, and that the money was obtained by that part is sufficient.

Proof of part of pretences so connected together that they cannot be severed is not sufficient.

But the rule that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together upon the record that one cannot be separated from the other, and the statement of one of those pretences is insufficient in point of law, no judgment can be given upon the other pretence. The indictment stated that the prisoner "did falsely pretend to W. Walker that he was a captain in the service of the East India Company, and that a certain promissory note, which he then and there produced and delivered to the said W. Walker, purporting to be made for the payment of the sum of 21*l.*, was a good and valuable security for the sum of 21*l.*;" "whereas the defendant was not a captain in the service of the East India Company, and whereas the said promissory note was not a good and valuable security for the sum of 21*l.*, or for any other sum of money whatsoever." Upon error it was objected, amongst other things, that the allegations respecting the note were too loose. No description of the note was given. The record did not shew who was the maker, nor when the note was payable. Something ought to have been stated to identify it, and the indictment ought to have shewn how the note proved not to be a valuable security. It might have been a forgery, or invalid for want of a stamp. The record ought to shew that the defendant knew the instrument to

(*l*) *Ante*, 306.

(*m*) Rex *v.* Plestow, *cor.* Lord Ellenborough, C. J., 1808. 1 Campb. 494.

(*n*) Rex *v.* Hill, East. T. 1811, MS. Bayley, J., and Russ & Ry. 190. In Rex *v.* Ady, 7 C. & P. 140, Patteson, J., said, "It is not necessary that all the pretences should be false. If you believe that any one of them was false, and that the mind of the prosecutor was operated upon by it, then you will find the defendant guilty." See per Coleridge, J., in Rex *v.* Dale, *post*, p. 310.

be worthless. It might have been a note drawn by himself, and then so far as it was a token, it was a true one. On the part of the crown it was admitted that the defendant's knowledge was not alleged, except by the words "falsely" and "fraudulently," which were not sufficient, and the note was not set out so as to identify it. But the false pretence of being a captain in the East India Company's service was properly alleged, and bore out the conviction. The crime as charged being made up of two false pretences it must be presumed that the Judge would tell the jury that one of them was so laid as not to call for an answer. (*o*) Lord Denman, C. J., "The indictment here omits to say in what respect the note was not valuable. It may have been for want of a stamp, or from other causes. We do not mean to throw any doubt on the late decisions, and there is much of the argument for the defendant below in which we do not concur. But the pretences stated in this indictment must be taken together, and the falsification as to that part which relates to the note, is not sufficient. The judgment must therefore be reversed." Patteson, J., "I do not know that I should have gone the whole length of reversing this judgment if the note had appeared to be that of another person; but consistently with this indictment, the note may have been the defendant's own, and then the pretences are so connected together that we cannot separate them." (*p*)

The goods must be obtained by means of some of the pretences laid in the indictment.

It must be shewn that the prisoner obtained the goods by means of some of the false pretences laid in the indictment. The indictment stated that the prisoner did falsely pretend that he was a gentleman's servant, that he had lived in Brecon, and that he had bought twenty horses in Brecon fair, and that he thereby obtained a filly from the prosecutor. The pretences were proved to have been made by the prisoner as stated in the indictment, but it was also proved that the prosecutor sold the filly to the prisoner for 11*l.*, and that the prisoner said he had twenty other horses at the Cross Keys at Brecon, and that if the prosecutor would take the horse that the prisoner had got to the Cross Keys, he would come down there in about half an hour, and pay the prosecutor for the filly. The prosecutor thereupon delivered the filly to the prisoner, and took the prisoner's horse to the Cross Keys, where he ascertained the prisoner's statement to be false. In his cross-examination the prosecutor said, that he delivered the filly to the prisoner, because he believed that the prisoner would call at the Cross Keys and pay him, and not because he believed him to be a gentleman's servant, or lived at Brecon, or had purchased twenty horses. Coleridge, J., told the jury, "The question for you to consider is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner. It is sufficient for the prosecutor to prove that any one of the false pretences charged in the indictment was false, and that he parted with his filly by reason of such false pretence, the prisoner intending to defraud him thereby. However, in this case, the prosecutor himself says that he parted with his filly because the prisoner promised to pay him, and not on account of any

(*o*) Lord Denman, C. J., observed, "Can we presume on a writ of error? On a special verdict it might have been stated that the jury convicted as to one pretence, but negatived the other."

(*p*) Reg. *v.* Wickham, 10 Ad. & E. 34. Littledale and Coleridge, J's., concurred.

of the false pretences charged. If you think that was so you will acquit the prisoner." (q)

The money must be delivered through the imprudence of the prosecutor.

The money must be proved to have been obtained by means of the false pretences used, and not delivered through the imprudence of the prosecutor. The prisoner was indicted for obtaining a 10*l.* note by false pretences from James Barnett, and it appeared that the prisoner had gone to Barnett, and said his (the prisoner's) master wanted two or three pounds to pay for some wheat; Barnett said he had no small money, but he had a 10*l.* note, and he would let him have that; which he did, and he said the reason he did so was, that he had no small change, and in consequence of what the prisoner said. Taunton, J., expressing doubts whether the 10*l.* note was obtained by the false pretence; it was submitted that if the pretence had not been used the prisoner would not have obtained the note; the note therefore was obtained by means of the pretence, which was all the indictment alleged. Taunton, J., "The prisoner asks for one thing and obtains another: he did not obtain the 10*l.* note by means of the pretence, but through the imprudence of the prosecutor. I think that that is not sufficient." (r)

The property must not only be obtained by false pretences, but there must be an intent to defraud.

It is not sufficient to prove that the prisoner knowingly made use of false pretences, and by them obtained the goods, it must also be shewn that he did so with intent to cheat the owner of them. Upon an indictment for obtaining two sacks full of malt, by pretending that the master of the prisoner had bought them, it appeared that the prosecutor owed the prisoner's master a sum of money, of which he could not procure payment, and that the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in his absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, and thereupon she delivered the two sacks of malt to the prisoner, who carried them to his master. The pretence was false, and the prisoner knew it to be so at the time he used it. It was submitted that the prisoner must be acquitted, as he had no intent to defraud; it was replied, that every one must be taken to intend the natural consequence of his own act, and the natural consequence of the prisoner's act was to defraud the prosecutor. Coleridge, J., told the jury, "Although *primâ facie* every one must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud the prosecutor." (s)

It is no defence to show that a plan was laid to entrap the prisoner.

If a party obtain money by false pretences, it is no defence to shew that the party, from whom he obtained the money, laid a plan to entrap him into the commission of the offence. Upon an indictment for obtaining a sovereign, it appeared that the prosecutor and a magistrate went and saw the defendant in consequence of a letter, which had been previously received, stating that the writer was able to give information of something to the prosecutor's advantage, and

(q) Rex v. Dale, 7 C. & P. 352.
(r) Rex v. George Smith, Hereford Spr. Ass. 1832. MSS. C. S. G.
(s) Rex v. Williams. 7 C. & P. 354.

that the prisoner said J. Laurie was his partner, and was the brother of Sir P. Laurie, neither of which was the fact. The prosecutor paid him a sovereign, upon which he gave him a paper containing some information, which turned out to be useless. The defendant refused to return the money. For the defence an endeavour was made to shew that the prosecutor and the magistrate went together to the defendant, well knowing who he was, for the purpose of making evidence to support a case against him. Patteson, J., "If I understand the defence set up, it is nothing more nor less than this, that a conspiracy existed between the prosecutor and the magistrate to entrap the defendant into the commission of the offence. You will judge for yourselves whether it be so or not. But still if the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not." (*t*)

Where the false pretence was in writing, and it has been lost, parol evidence of its contents may be given in evidence. On an indictment for false pretences it appeared that the prisoner had obtained the goods by a false letter, which had been lost before the trial; and Tindal, C. J., allowed parol evidence of its contents to be given. (*u*)

Restitution by the court of goods obtained by false pretences.

In cases where goods had been obtained from another by mere fraud, the court had formerly no power of awarding restitution on conviction of the offender, as in cases of felony; (*v*) though the obtaining goods by false pretences did not in general change the property in the goods. (*w*) But the statute 7 & 8 Geo. 4, c. 29, s. 57, in order to encourage the prosecution of offenders, enacts, "that if any person, guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatever, shall be indicted for any such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the Court, before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negociable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security." (*x*)

(*t*) Rex *v.* Ady, 7 C. & P. 140.

(*u*) Rex *v.* Chadwick, 6 C. & P. 181.

(*v*) Parker *v.* Patrick, 5 T. R. 175; and Rex *v.* De Veaux and Others, 2 Leach, 585.

(*w*) Noble *v.* Adams, 7 Taunt. 59. Stephenson *v.* Hart, 4 Bing. 476.

(*x*) See *ante*, p. 131.

SECTION III.

Of Cheats and Frauds Punishable by Other Statutes.

The few statutes by which, in addition to those which have been already mentioned, cheats and frauds are subjected to punishment, will be mentioned according to the order of the time at which they were passed.

13 Eliz. c. 5. For the avoiding fraudulent conveyances, judgments, &c. enacts, that they shall be void:

The statute 13 Eliz. c. 5, intituled, "An Act against Fraudulent Deeds, Gifts, Alienations, &c.," recites, "that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, had been and were devised and contrived of malice, fraud, covin, collusion, or guile; to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs;" and then enacts, in the first place, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, writ, judgment, and execution shall be deemed and taken;" (only as against that person, his heirs, executors, assigns, &c., whose actions, suits, &c., by such fraudulent devices, and practices, as aforesaid, shall or might be in any ways, disturbed, delayed, or defrauded,) "to be clearly and utterly void." The third section then enacts, "that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them; which shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had or made *bonâ fide*, and upon good consideration; or shall alien, or assign any of the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;" one moiety to the crown, the other to the party grieved, to be recovered in any of the Queen's courts of record, by action, &c.: "and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise." (*y*)

And that the parties to them shall incur a forfeiture of a year's value of the lands, &c.; and suffer imprisonment for one half year.

(*y*) See 1 Chitty's Statutes, 385, for the cases decided on this statute, to which may be added Shears *v.* Rogers, 3 B. & Ad. 362. Gale *v.* Williamson, 8 M. & W. 405. Martindale *v.* Booth, 3 B. & Ad. 498. Bowen *v.* Bramidge, 6 C. & P. 140. Butcher v. Harrison, 4 B. & Ad. 129.

The statute 27 Eliz. c. 4, recites, that subjects and corporations, "after conveyances and purchases of lands, tenements, leases, estates, aud hereditaments, for money, or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made of in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be, meant and intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased, or shall purchase, the same; or else, by the secret intent of the parties, the same to be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance, and show of words and sentences, as though the same were made *bonâ fide*, for good causes, and upon just and lawful considerations." The second section then enacts, "that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of in or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee-simple, fee tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken" (only as against that person, body politic, &c., their heirs, successors, executors, &c., and persons lawfully claiming under them, which so purchase for money or other good consideration, the same lands, &c.,) "to be utterly void." And the third section enacts, "that all and every the parties to such feigned, covinous, and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them as true, simple, and done, had or made, *bonâ fide*, or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by, from, or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, so purchased or charged;" (the one moiety to the crown, and the other moiety to the party grieved, to be recovered in any of the Queen's courts of record, by action, &c.,) "and also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise." (*z*)

27 Eliz. c. 4, recites the mischief of fraudulent and covinous conveyances, &c.,

And enacts, that fraudulent conveyances made to deceive purchasers shall be void:

And that the parties to such conveyances, who avow the same, shall incur the forfeiture of a year's value of the lands, &c., and suffer imprisonment for one half year.

The statutes relating to those cheats which are effected by means of cards, dice, and other kinds of *gaming* (and particularly the statute 9 Anne, c. 14,) have been mentioned in a former part of this treatise. (*a*)

9 Ann. c. 14, and other statutes relating to gaming.

(*z*) See 1 Chitty's Statutes, 387, for the cases decided on this statute: to which may be added Doe dem Tunstill *v.* Bottriell, 6 B. & Ad. 131. S. C. 2 N. & M. 64, and Kerrison *v.* Dorrien, 9 Bing. 76.

(*a*) *Ante*, vol. 1, p. 455.

9 Geo. 2, c. 5, s. 4. Persons pretending to exercise witchcraft, &c., tell fortunes, &c., and being convicted, are to be imprisoned for a year, &c.

The 9 Geo. 2, c. 5, repeals certain acts relating to conjuration, witchcraft, &c., and then, for the more effectual preventing and punishing of *any pretences* to any acts or powers of witchcraft, sorcery, inchantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded; enacts, "that if any person shall pretend to exercise or use any kind of witchcraft, sorcery, inchantment, or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted (on indictment or information in England, or on indictment or libel in Scotland), shall, for every such offence, suffer imprisonment by the space of one whole year without bail or mainprise, and once in every quarter of the said year in some market town of the proper county upon the market day, there stand openly on the pillory by the space of one hour, (*b*) and also shall (if the court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties shall be given."

32 Geo. 3, c. 56, offences relating to the giving of false characters to servants made punishable by a penalty on conviction before two justices.

The 32 Geo. 3, c. 56, entitled, "An act for preventing the counterfeiting of certificates of the characters of servants," after reciting the great and increasing evil occasioned by false and counterfeit characters of servants being given either personally, or in writing, by evil disposed persons, enacts, that any person falsely personating any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant, of a master or mistress, and, either personally or in writing, giving a false character to a servant; or pretending, or falsely asserting in writing, that a servant had been hired for a period of time, or in a station, or was discharged at any other time, or had not been hired in any previous service, contrary to truth; and any person offering himself or herself as a servant, pretending to have served where he or she has not served, or with a false certificate of character, or who shall alter such certificate; and any person who having before been in service shall pretend not to have been in any previous service; shall, on conviction before two justices, forfeit the sum of twenty pounds. (*d*)

56 Geo. 3, c. 63, s. 12. Officers or servants of the Penitentiary at Millbank, making any

The statute 56 Geo. 3, c. 63, which was passed for regulating the general penitentiary for convicts at Millbank, in the county of Middlesex, enacts by sec. 12, that if the committee (appointed by the act) shall suspect any fraudulent or improper charges in any accounts of the governor, or other officer or servant, or any omission therein, they may examine on oath, &c.; and in case there shall appear any

(*b*) The punishment of the pillory is abolished by the 1 Vict. c. 23.

(*d*) See the different sections of the statute, the substance of which only is here given. The statute provides also that the informer may be a witness, and indemnifies offenders discovering accomplices before information. It also gives a form of conviction, provides for the recovery of the penalties, and gives an appeal to the quarter sessions. An abstract of the statute is given in 5 Burn's Just. *Servants*, sec. 11. In 8 Ev. Col. Stat. Pt. VI. Cl. xxxi. No 12, p. 909, note (*l*), the learned editor says, that a case which he had lately known to occur, is not within the provisions of the act, although attended with all the mischiefs intended to be provided against by it, *viz.*, the case of assuming the name of another person who has been a servant in the same place with the offender. As to the civil consequences of knowingly giving a false character, see 1 Black. Com. 432, note (13).

false entry, knowingly made, or any fraudulent omission, or other fraud or collusion, they may dismiss the officer, &c., and cause an indictment to be preferred against them at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or any other adjoining county, and that in case the person indicted be found guilty of such offence, he shall be punished by fine and imprisonment at the discretion of the court.

false entry or fraudulent omission in their accounts, &c., may be indicted.

We have already seen the provisions relative to the fraudulent omissions in the schedules of insolvent debtors. (*e*)

The annual mutiny acts usually contain clauses providing for the punishment of apprentices and other persons fraudulently enlisting themselves. (*f*)

Mutiny acts.

Cheats and frauds and false personation, for the purpose of obtaining the pay, prize-money, &c., of soldiers or sailors are mentioned in subsequent Chapters. (*g*)

In addition to the statutes which have been thus mentioned there are others relating to cheats or frauds practised by servants and others, in particular trades, and punishable by pecuniary fines or summary proceedings, before magistrates, which will be found arranged under their proper titles in that very excellent work, "Dr. Burn's *Justice of the Peace.*"

Cheats and frauds in particular trades.

(*e*) *Ante*, p. 235.

(*f*) As to similar offences by persons enlisting into the *marine* forces, see the annual acts relating to those forces. We have seen that it was a cheat or fraud at common law for an apprentice to enlist as a soldier, and obtain the King's bounty. Jones's case, *ante*, p. 278. And see Burn's Just., *Military Law.*

(*g*) See *post*, Chap. XXXIII. *On the Forgery of Official Papers, &c.*; and Chap. XXXV. *On False Personation.*

CHAPTER THE THIRTY-SECOND.

OF FORGERY.

Definition of the offence.

FORGERY at common law has been defined as "the fraudulent making or alteration of a writing to the prejudice of another man's right;" (a) or, more recently, as "a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit:" (b) the word "making" in this last definition being considered as including every alteration of, or addition to, a true instrument. (c) Besides the offence of forgery at common law, which is of the degree only of misdemeanor, there are a great many kinds of forgery, especially subjected to punishment by the enactments of a variety of statutes, which many years ago were spoken of as so multiplied as almost to have become general. (d)

These statutes, which, for the most part, made the forgeries, to which they related, capital offences, were consolidated by the 1 Wm. 4, c. 66. At present it will be attempted briefly to review the doctrine of forgery at common law, together with such principles and decided points as (though some of them may have arisen in prosecutions upon particular statutes) appear to be of general application. And, pursuing the order of the definitions above given, we may consider, I. Of the *making or alteration* of a written instrument necessary to constitute forgery; II. Of the *written instruments* in respect of which forgery may be committed; and III. Of the *fraud and deceit* to the prejudice of another's right. We may then briefly treat, IV. *Of principals and accessories;* and V. Of the *indictment, trial, evidence, and punishment.*

A publication or uttering of the forged instrument is not necessary to complete the offence of forgery.

In the first place, however, it should be observed that the offence of forgery may be complete, though there be no publication or uttering of the forged instrument. For the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law, or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. (e) Thus, in a case where the note, which the

(a) 4 Black. Com. 247.

(b) 2 East, P. C. c. 19, s. 1, p. 852. Rex v. Parkes and Brown, 2 Leach 785. 2 East, P. C. c. 19, s. 49, p. 965.

(c) *Id. ibid.* As to the word *forge*, it is said in 3 Inst. 169, "To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius;* and the Latin word to forge is *falsare*, or *fabricare*."

(d) 4 Black. Com. 248.

(e) 2 East, P. C. c. 19, s. 4, p. 855.

prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (*f*) At the present time most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive offence.

SECTION I.

Of the Making or Alteration of a Written Instrument necessary to constitute Forgery.

Of the making or alteration of a written instrument necessary to constitute forgery.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, although it be afterwards executed by another person ignorant of the deceit. (*g*) And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versâ*, will also be forgery. (*h*) Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it of his own head. (*i*) So if a man insert in an indictment the names of those against whom, in truth, it was not found; (*k*) Or, if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he caused the letter to be cut off, and a general release to be written above the name, and then take off the seal, and fix it under the release. (*l*) And in a late case it appears to have been considered that if a party make a copy of a receipt, add to such copy material words, not in the original, and then offer it in evidence on a suggestion of the original being lost, he may be prosecuted for forgery. (*m*) The fraudulent alteration of a material part of a deed is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S.; or the making a bond for five hundred pounds, expressed in figures, seem to have been made for five thousand: (*n*) and though it seems to have been thought that a deed, so altered, is more properly to be called a false than a forged deed, not being forged in the name of another, nor his

(*f*) Elliott's case, 1777, 1 Leach, 175. 2 East, P. C. c. 19, s. 44, p. 951. 2 New R. 93, note (*a*). And see also Crocker's case, Russ. & Ry. 97. 2 Leach, 987, where it appears to have been holden by Le Blanc, J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury under all the circumstances of the case, whether the note had been made innocently, or with an intent to defraud.

(*g*) 2 East, P. C. c. 19, s, 4, p. 855.

(*h*) Id. ibid.

(*i*) Noy. 101. Moor, 759, 760. 3 Inst. 170. 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A).

(*k*) Rex *v.* Marsh and others, 3 Mod. 66. 1 Hawk. P. C. c 70, s. 2,

(*l*) 3 Inst. 171. 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A).

(*m*) By Lord Ellenborough, C. J., in Upfold *v* Leit, 5 Esp. 100. The words inserted were "in full of all demands."

(*n*) Moor, 619. 1 Hawk. P. C. c. 70, s. 2. So in Elsworth's case, 2 East, P. C. c. 19, s. 58, p. 986, where a cypher being added after the figure 8, the bill, which was for 8*l.*, became a bill for 80*l.*

seal nor hand counterfeited; (o) yet, according to the better opinion, such an alteration amounts to forgery; on the ground that the fraud and villany are the same, as if there were an entire making of a new deed in another's name; and also that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stanger's. (p) Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would come within the same rule. (q) So altering a bill payable at three months, into a bill payable at twelve months is forgery. (r) And, upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; it was holden, in a modern case, that where a note of country bankers was made payable at their house in the country, or at their banker's in London, and the London banker had failed, it was forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequent to the failure. The Judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house. (s) And upon the general principle that the alteration of a true instrument makes it, when altered, a forgery of the whole instrument, it was holden that where the indictment charged the prisoner with "making, forging, and counterfeiting" a bill of exchange, and with uttering it, knowing it to be forged; and the evidence was of an alteration of the bill of exchange from 10*l.* to 50*l.* in the part of it in which the sum is expressed in figures, and also in the part in which it is expressed in letters, the prisoner was properly convicted; though the statute, on which the indictment proceeded, 7 Geo. 2, c. 22, contained the word *alter* as well as the word *forge;* "if any person shall falsely make, alter, forge, or counterfeit, or utter, or publish, as true, any false, altered, forged, or counterfeited, &c.;" from which it was contended that to *alter* a bill of exchange was made a distinct offence. (t) So altering a banker's one pound note by substituting the word ten for the word one, was held to be forgery. (u) And discharging one indorsement and inserting another, or making it thereby a general instead of a special indorsement, has been holden to be altering an indorsement. (v)

It is forgery for a person

So if a person gives another a blank acceptance, and at the time limits the amount either by writing upon it or otherwise, and if in

(o) 3 Inst. 169.

(p) 1 Hawk. P. C. c. 70, s. 2. Bac. Ab. *Forgery* (A), in the notes.

(q) Master v. Miller, 4 T. R. 320. 2 East, P. C. c. 19. s. 4, p. 853.

(r) Rex v. Atkinson, 7 C & P. 669, Park, J. A. J.

(s) Rex v. Treble, 2 Taunt. 328, 2 Leach, 1040. Russ. & Ry. 164. The alteration was effected by pasting a slip of paper bearing the words Ramsbottom and Co., over the words Bloxam and Co., in the same manner as the prosecutors had themselves altered their re-issuable notes after the failure of their first London bankers, Bloxam and Co.

(t) Teague's case, *cor.* Le Blanc, J., Hereford Sum. Ass. 1802, Mich. T. 1802. 2 East, P. C. c. 19, s. 55, p. 979. Russ. & Ry. 33. The judges held that the point was governed by Dawson's case, Mich. 3 Geo. 1. 1 Str. 19. 2 East, P. C. c. 19, s. 55, p. 978, where the prisoner having altered the figure of 2 in a bank note to 5 (220*l.* to 520*l.*) ten of the judges agreed that it was forging and counterfeiting a bank note; and that 3 Inst. 171, 172, was not law in this respect; for *non assumpsit* might be pleaded to such a note.

(u) Rex v. Post, East. T. 1806, and Russ. & Ry. 101.

(v) Rex v. Birkett and Brady, Russ. & Ry. 251.

the filling up of the acceptance that amount be exceeded, with intent to defraud either the acceptor or any other person, that is forgery. The prisoner was indicted for forging the following bill of exchange.

having authority to fill up a blank acceptance for one sum only, to fill up the bill for a larger sum.

"London, August 20, 1836.

"£500.

Two months after date pay to my order the sum of five (*v*) hundred pounds value received.

"C. TAYLOR."

"To the Rev. C. H. Jenner,
No. 1, Chesterfield-street, May Fair."

It appeared that in consequence of an advertisement offering to lend money, Mr. Jenner wrote a letter, stating that he was anxious to borrow 500*l.*, and afterwards saw the prisoner. Mr. Jenner told him he wanted money; the prisoner asked what sum; Mr. Jenner said 200*l.* for one twelvemonth, and some discussion arose as to Mr. Jenner's means of repaying it. The prisoner said he had the money, and appointed to meet Mr. Jenner the next day in London. Mr. Jenner on the next day saw the prisoner, who took from his pocket book a stamped piece of paper, and wrote something on the upper corner of it on the left hand, which Mr. Jenner could not then distinguish, and which he handed to Mr. Jenner, and requested him to write on it "accepted" and his name; which Mr. Jenner did, and also wrote on it "at the Bank of England," at the prisoner's desire. The prisoner said he should leave Mr. Jenner for some purpose; Mr. Jenner said "then of course you will leave the cheque with me." The prisoner said that was unnecessary, and said "to shew you there can be nothing wrong there are the figures denoting 200*l.* written in the corner." Mr. Jenner then looked at the corner and observed written in the corner 200*l.*; which figures Mr. Jenner stated must have been written before he wrote his acceptance. The prisoner then took the cheque away, and the parties were to meet at the bank coffee-house in half-an-hour. Mr. Jenner went there but the prisoner did not come. Mr. Jenner stated that he mentioned 500*l.* in the letter as a nominal sum, wishing to know what the expense of that might be, not having exactly made up his mind when he wrote what sum he wanted; but it did not appear that he gave that explanation to the prisoner. Mr. Jenner stated he never gave the prisoner any authority to fill up that paper for a greater sum than 200*l.*, but it did not appear that he made any such distinct declaration to the prisoner. Early in August the prisoner told one Edwards he had an acceptance of Mr. Jenner's for 500*l.* which he wished him to buy, and at a subsequent time Edwards agreed to buy the bill for five shillings in the pound. He then saw it, and it was perfectly blank, with the exception of the acceptance: there was a stamp on it, and he noticed a stain in the left hand upper corner. The prisoner afterwards produced the blank acceptance with the name C. Taylor as drawer, and C. Taylor as indorser: nothing else was then written: Edwards then desired the prisoner to draw the body of the bill, which he did. Edwards made some observations on the bill being for 500*l.* The prisoner produced the letter from

(*v*) It is "two," by mistake, in the report in R. & M. C. C. R.

Mr. Jenner in corroboration that the bill was for 500*l.* It was proved that an acid had been used on that part of the paper where the stain was, and that an acid applied there would have the effect of discharging ink. The jury found the prisoner guilty and said that they were of opinion that the figures denoting 200*l.* were in the corner of the paper when it was taken away by the prisoner from Mr. Jenner, and also that the authority to fill up the bill was confined to 200*l.* Upon a case reserved it was contended that the facts amounted only to a fraud, and did not constitute the crime of forgery. The prisoner had authority to draw a bill, and a mere excess of authority was a fraud only, and not forgery. That the 200*l.* in the margin were no part of the bill, and did not limit the acceptance; but the Judges were unanimously of opinion that filling up the bill for 500*l.*, the prisoner having no authority beyond 200*l.*, was a false making of a bill for 500*l.*, and that the conviction was therefore right. (*w*)

Filling up a blank cheque to which there is a signature, is forgery.

Filling in the body of a blank cheque to which a signature is attached, without any authority, is a forgery. The prisoners were indicted for uttering a forged cheque, and it appeared that one Townsend was in the habit of signing blank cheques, and leaving them with his clerk when business called him away from home; one of these cheques fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it; it was objected that the signature being genuine, it could not be said that the prisoner had uttered a forged instrument; but Bayley, J., held that it was a forgery of the cheque. By filling in the body and dating it, it was made a perfect instrument, which it previously was not, and although it was not in point of fact made entirely by the prisoners, yet it had been held that the doing that which is necessary to make an imperfect instrument a perfect one is a forgery of the whole. (*x*)

A bill of exchange must be complete at the time an acceptance is written on it, or it is not a forgery of the acceptance.

But where the instrument is imperfect as a bill, when the name of another is written upon it, it is not a forgery of the acceptance. Upon an indictment for forging and uttering a forged acceptance of a bill of exchange, an accomplice proved that the prisoner produced a blank stamp from his pocket, and wrote the names "Stiff and Sims" across it, and then gave it to the witness, who two days after in the absence of the prisoner drew the bill for 1000*l.* on the stamp, Patteson, J., doubted whether the charge of forgery could be supported; because at the time when the names "Stiff and Sims" were written on the stamp by the prisoner, it was a blank paper. (*y*) And where the prisoner was indicted for forging an acceptance of a bill of exchange, and it appeared that at the time when the prisoner caused a lad to write the name of "John Chapman" across the bill, as the acceptor thereof, (which the lad innocently did,) a blank was left in the bill for the drawer's name; Parke, B., held that the indictment was not supported, as the instrument, to which the forged

(*w*) Rex *v.* Hart, R. & M. C. C. R. 486. S. C. 7 C. & P. 652.

(*x*) Wright's case, 1 Lew. 135. The learned judge also was of opinion that if the bankers had paid the cheque, they might have recovered the amount from the prosecutor, as he was in the habit of leaving blank cheques out with his name written at the bottom.

(*y*) Reg. *v.* Cooke 8 C. & P. 582 His lordship did not think the point material, because the prisoner had uttered the bill afterwards, and, as he wrote the names on it, he must have known the acceptance to be a forgery.

acceptance was affixed, was not, at the time of such supposed forgery, a bill of exchange, there being no drawer's name. His Lordship referred to the terms of the 1 Wm. 4, c. 66, s. 4, which do not make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange. (z)

Expunging an indorsement on a bank note.

The expunging, by means of lemon juice (laid in the indictment to be a certain liquor unknown to the jury,) an indorsement on a bank note, was holden to be a *raising* of the indorsement within the 8 & 9 Wm. 3, c. 20, s. 36, (now repealed) which related to the altering or raising any indorsement on any bank bill, &c. (a)

Forgery and subsequent alteration of the deed.

In a case where the prisoner procured a deed to be forged, as from one J. M. and his son, conveying a certain estate for life to M. K.; and, after the death of one of the supposed grantors, had procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was convicted of forging and uttering it in the state to which it was so altered; this was holden to be well by all the Judges; as being no less a forgery after than before such alteration. (b)

As to forgery by fraudulent omission in written instrument.

It seems that a man cannot be guilty of forgery by a bare *non feasance*; as if in drawing a will he should omit a legacy which he was directed to insert: but it appears to have been holden that if the omission of a bequest to one cause, a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery. (c)

Making a false deed in a man's own name.

A man may be guilty of forgery by making a false deed in his own name. Thus it has been holden to be a forgery for a person to make a feoffment of certain lands to I. S., and afterwards to make a deed of feoffment of the same lands to I. D. of a date prior to that of the feoffment to I. S.; for herein he falsifies the date in order to defraud his own feoffee, by making a second conveyance, which at the time he had no power to make. (d) And it is also said that his crime would have been the same if, by his conveyance, he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antedated conveyance endeavoured to avoid it. (e)

Indorsing a bill of exchange by a person of the same name as the payee.

If a bill of exchange, payable to A. B. or order, get into the hands of another person of the same name with the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, indorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (f)

Uttering a note made in the same name as that of the prisoner.

The uttering of a note, as the note of another person, has been holden to be forgery, though such note was made in the same name as that of the prisoner.

(z) Reg. v. Butterwick, 2 M. & Rob. 196. Rosc. Cr. Ev. 474. The bill when produced had upon it the names "Elstob and Butterwick," as the drawers. There seems to have been no count for uttering in this case. C. S. G.

(a) Rex v. Bigg, 3 P. Wms. 419.

(b) Kinder's case, 1800. 2 East, P. C., c. 19, s. 4, p. 855.

(c) Moor. 760, Noy. 101. 1 Hawk. P. C., c. 70, s. 6. Bac. Ab. *Forgery*. 2 East, P. C., c. 19, s. 4, p. 856.

(d) 3 Inst. 169. Pult. 46 b. 1 Hawk., P. C., c. 70, s. 2. Bac. Ab. *Forgery* (A).

(e) 1 Hawk., P. C., c. 70, s. 2. Bac. Ab. *Forgery* (A) in the notes. Moor, 655.

(f) Mead v. Young, 4 T. R. 28.

Parkes' and Brown's case. Holden to be forgery to utter a note as the note of another, though made in the prisoner's own name.

The point arose in the following case: two prisoners, named Parkes and Brown, were indicted for forging a promissory note, of which the following is a copy:—

Ringhton, Salop, April 20, 1796.

No. B. 248.

I promise to pay to bearer, on demand, at Messrs. Down, Thornton, and Co.'s, bankers, London, the sum of Five Guineas, for value received. For Self and Co.

THOMAS BROWN. (*g*)

FIVE GUINEAS.

Entered, T. B.

There was a second count for uttering the same, knowing it to be forged. The following facts appeared in evidence: the prisoner, Brown, uttered the note to one Hulls, a shoemaker, in part payment for a quantity of boots and shoes which he had bought, under a pretence that he was a Captain Brown of the 17th regiment, and going immediately to the West Indies. At the time when he bargained for the articles at Hulls's shop, he told Hulls that if he would send his boy with him he would send back the money: but Hulls declined this, and went himself with the prisoner. While on their way, Brown said that his brother was agent to the 17th regiment, and would buy all the shoes Hulls had: and upon their coming to a public-house, he invited Hulls to go in, saying, he should see his brother presently. They then sat down together, on a bench in the garden of the public-house; and Brown proceeded to speak further of his brother, who, he said, had just married a lady with a fortune of 15,000*l.*, and had deposited it in the hands of Down and Thornton. After some time, the brother not appearing, Brown went into the house, and returned again, using expressions of disappointment at the absence of his brother, and added: "I am sorry I cannot pay you in gold: but I can give you what is just as good, one of my brother's drafts, for which I have been into the house to get cash, but the landlord has not enough by him." He then produced the note in question, and gave it to Hulls, who asked if it was on the money lodged with Down and Co.'s, Brown said that it was; and added, that his brother and he always paid in that manner on demand, for they wanted no credit. He then appointed Hulls to meet him in the afternoon, at another place, where he would pay him the balance. The note was soon discovered to be a forgery, and Hulls could hear nothing more of Brown. It further appeared, that Parkes and Brown were connected together; and that when Parkes was taken up, more than forty of these five-guinea notes, in blank, were found upon him, dated Ringhton, Salop; and a few of the same sort of notes were also found concealed under a board in a shop where the prisoner Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the hand-writing of Parkes; and the name Thomas Brown was also in the hand-writing of Parkes. In Parkes's pocket-book was found a receipt under a cover, addressed to Thomas Brown, at the Compter,

(*g*) The words "I promise to pay the bearer on demand;" and also the words, "the sum of five guineas, for value received for Self and Co.," were *printed* in the note.

(the prison to which Brown had been committed,) for 21*l.*, for four five-guinea bills. It was also proved that Down and Co. had no such customer as Thomas Brown, of Ringhton, in Shropshire; and there was no evidence that the prisoner Brown had any residence or connection at that place. Upon this evidence the jury found both the prisoners guilty; and stated that they thought Parkes signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were then taken by the counsel for the prisoner: first, that the name *Thomas Brown* was the real name of one of the prisoners; secondly, that it was no forgery in Parkes to sign the name of Thomas Brown, with his consent; thirdly, that if Parkes were not guilty of forgery, Brown could not be guilty of uttering the note knowing it be forged; and fourthly, that the subsequent misrepresentation of Brown ought not to affect Parkes, as there was no evidence that he was aware of the fraudulent circumstances under which Brown would utter the note: the principle being, that misrepresentations do not amount to forgery, or make that a forgery which was not so at the time of the original making. These points were submitted to the consideration of the twelve Judges, who held the conviction wrong as to Parkes, on a ground irrelevant to the subject now under consideration; but all of them held the conviction right as to Brown; and Grose, J., afterwards delivered their opinion. He observed, "as to the first objection, that the definition of forgery was, 'the false making a note, or other instrument, with intent to defraud;' (*h*) which might be done either by using the name of one who did not exist, or of one who did exist, without his consent. That this was of the former description; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist: and that the circumstance of its being made in the same name as his own could not make any difference; being uttered as the note of another, and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown, for whose note it purported to be given. For the person in whose name the note was made, was, according to the description of him in the note, then a resident at Ringhton, in Salop; and it imported that he was a correspondent of Down, Thornton and Co., and had money in their hands; and he was also represented to be the brother of the prisoner; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged;* and, therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it." (*i*)

(*h*) *Ante*, p. 318.

(*i*) Rex *v.* Parkes and Brown, 1796, 1797. 2 Leach, 775. 2 East, P. C., c. 19, s. 49, p. 963. Brown accordingly received sentence of death, but was not executed. 2 Leach. 788.

Doubt suggested upon the preceding case.

The foregoing case has been observed upon by a learned writer, who says that, though supported by the highest authority, it has always appeared to him to rest upon very questionable principles. (*j*) And he cites a case, where upon the facts that a bill made by the prisoner D. Walker, (who was a pauper at Manchester) was dated Liverpool, signed D. Walker and Co., and drawn on Devaynes and Co., London; and that similar bills had been before drawn in the same manner, and, being provided for before due, had been regularly paid, although the drawer was unknown to the house; the case in question was cited as an authority; but the learned Judge ruled, that the evidence was not sufficient to go to the jury. (*k*) And, in discussing the effect of a false representation, he refers to the following case, where the prisoner assumed to be the real indorser of a bill: yet, as there was no false making, it was holden not to be forgery; though the act was done in concert with the real indorser, and for the purpose of fraud. (*l*)

Hevey's case. The prisoner assumed to be the real indorser of a bill: but as there was no false making, it was holden not to be forgery, though the act was done in concert with the real indorser and for the purpose of fraud.

The prisoner, John Hevey, was indicted for forging an indorsement on the back of a bill of exchange, in the name of Barnard M'Carty, with intent to defraud Wm. Masters and Edward Beauchamp, &c.; and the indictment contained a second count, for uttering and publishing a forged indorsement in the name of Barnard M'Carty, with the like intention. The bill of exchange in question was in the following form:—

"No. 59. £30.

"Bath Bank, Nov. 19, 1781.

"Thirty-one days after sight, pay Mr. Barnard M'Carty, or order, thirty pounds value received, for Smith, Moore, and Co.

"JER. CONNELL.

"To Rich. Beatty, and Co.
"No. 19, Great St. Helen's, London."

It appeared in evidence, that the prisoner came to the shop of Beauchamp and Masters, who were pawnbrokers, to buy a watch, and offered them the bill in question, with the indorsement then written on it; that they hesitated about taking it, upon which he told them it was a good bill, that his name was Barnard M'Carty, that he had indorsed it, and that Beatty and Co., by whom the bill purported to be accepted, were agents to the Bath Bank. The pawnbrokers were not satisfied, and sent their servant to St. Helen's, to inquire about the acceptance; but upon his returning and saying that he had seen a person at St. Helen's, who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. It was then proved that the prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies; that he had always been known by the name of John Hevey; and that no such person as Smith, Moore, and Co. could be found in Bath, though there were such names put on the door of

(*j*) 6 Ev. Col. Stat. Pt. V. Cl. xii., p. 580.

(*k*) Walker's case, *cor.* Chambre, J., Lancaster, about the year 1807. Id. ibid.

(*l*) This appears to have been a false pretence within the statute 30 Geo. 2, c. 24. And see now 7 & 8 Geo. 4, c. 29, s. 53. *Ante*, p. 286.

a house, from whence the person who had been there had run away. It was proved also, that the names of Beatty and Co. were on a counting-house door in Great St. Helen's, where a man of the name of Beatty, who said he was a clerk, had lived; but was since taken up and lodged in prison. And it further appeared, that there was such a man as Barnard M'Carty, and that the indorsement was in fact of his handwriting. Upon this evidence, the jury, under the direction of the learned Judge who tried the prisoner, found a verdict of guilty, and found specially that there was such a person existing as Barnard M'Carty, and that the indorsement was of his handwriting; that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment. The case was afterwards submitted to the consideration of the twelve Judges, who were all of opinion that it did not amount to forgery, for there was no false indorsement, the jury having found that the indorsement was truly made by a real person whose name it purported to be. (*m*)

Webb's case. False description of the acceptor, but not a false name, held not to be forgery.

And in a more recent case, it was holden by a majority of the Judges, upon a case reserved, that the adopting a false description and addition, where a false name was not assumed, and where there was no person answering the description or addition, was not a forgery. The bill of exchange upon which the indictment proceeded, was addressed to Mr. Thomas Bowden, Baize Manufacturer, Romford, Essex; and drawn by the prisoner in his own name. It was proved that the prisoner uttered this bill, with an acceptance thereon in the handwriting of Thomas Bowden, whom the prisoner had known for many years, but who never had carried on the business of a baize manufacturer at Romford, nor ever resided there. The bill was accepted by Bowden, payable at No. 40, Castle-street, Holborn; and the person who lived at that house, and who knew Bowden, and was well acquainted with his handwriting, stated that he was surprised at Bowden's accepting the bill, payable at his house, as he did not reside there, and had no authority from the witness to make any bills payable at that house. The learned Judge left it to the jury, in the first place, to consider whether there was any such person as Thomas Bowden; and, if there was, whether the acceptance was his, and that if there was no such person, or the acceptance was not his, and the prisoner at the time he offered the bill to the prosecutors knew either that there was no such person, or if there was, that he had not accepted it, they should find him guilty. He also gave them other directions, but the jury found that there was no such person as Thomas Bowden, and the prisoner was convicted. The learned Judge, however, being of opinion, from the evidence, that there was such a person, and that the acceptance was his handwriting, reserved the case for the opinion of the Judges, on the point, whether assuming that the acceptance was the handwriting of Bowden, the prisoner, by the giving on the face of the bill a false description of Bowden, and uttering the bill after it was accepted by Bowden, with this false description, with intent to defraud, brought himself within any of the counts of the indictment which charged a forgery of the bill, and an uttering and publishing the

(*m*) Hevey's case, *cor.* Ashhurst, J. O. B. 1782, and considered by the judges in Hil. T. 1782. 1 Leach 229. 2 East, P. C., c. 19, s. 5, p. 856.

forged bill, and also a forging of the acceptance, and the uttering and publishing such forged acceptance. And a majority of the Judges held the conviction wrong. (*n*)

Watts's case.

A bill was addressed to Messrs. Williams and Co., bankers, Birchin-lane, London; and it appeared that possibly the figure 3, on the lower left-hand corner of the bill, might have been inserted originally as part of the address, but the evidence left that matter in doubt. The prisoner was asked at the time when he was drawing the bill, whether the acceptors were Williams, Birch, and Co., and his answers imported that they were. Williams, Birch, and Co. lived at No. 20, Birchin-lane; and it was proved not to have been their acceptance. There were no known bankers in London using the style of Williams and Co. except Williams, Birch, and Co.; but at No. 3, Birchin-lane, the name "Williams and Co." was on the door; and some bills addressed to Messrs. Williams and Co., bankers, Swansea, had been accepted, payable at No. 3, and had been paid there. There was no evidence as to the person who lived at No. 3; but another bill, of the same tenor as that in question, drawn by the prisoner, had been accepted there. It was holden upon these facts, that the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged. (*o*)

Cases in which a party committing forgery has used a name different from his own. Assuming the name of a person really existing.

The cases in which a party committing forgery has used a name different from his own, consist either of those in which the name used has been of a real existing person, or those in which the name used has been of a person non-existing and fictitious.

It is said to be clearly settled, that in the case of forgery committed in the name of a person really existing, it matters not, whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such, the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be. (*p*)

Dunn's case. Where a note charged to be forged, though made by the prisoner in an assumed name and character, was her own note made and offered as her own, and not as the note of another in contradistinction to herself, the offence was holden to be forgery.

The prisoner, Elizabeth Dunn, was indicted for forging the following promissory note, with intent to defraud Edward Hooper.

"London, 27th July, 1765.

"I promise to pay to Mr. Edward Hooper, the sum of *three* (the word *pounds* being omitted) thirteen shillings and sixpence, or order, seven days after date, value received by me,

"her
"Mary ⋊ Wallace.
"mark."

"Witness John Whattal."

The facts were, that in June 1765, the prisoner applied to Hooper, at his office for receiving seamen's wages, calling herself Mary Wallace, and desired him to advance her money to pay the fees for the probate of her husband's will, which was in the hands of a proctor. She returned soon after with the probate of the will of John Wallace, therein described to be a seaman on board the Epreuve; when Hooper required her to produce a certificate, to

(*n*) Rex *v.* Webb, Russ. & Ry. 405.
(*o*) Rex *v.* Watts, Russ. & Ry. 436.
(*p*) 2 East, P. C., c. 19, s. 49, p. 962.

shew that she was the Mary Wallace named in the will. A few days afterwards she brought a certificate, and pressed Hooper to lend her money on the credit of the wages due to J. Wallace, when he let her have three guineas and-a-half, and wrote the body of the promissory note in question, to which she subscribed her mark, after which his clerk attested it. She was then asked what name he was to put to her mark, to which she answered, "You know my name, you may write Mary Wallace," which he did. It was proved clearly that her name was Elizabeth Dunn, and that the whole account was a fabrication. Upon this evidence, the jury were directed to find the prisoner guilty, if they believed that she subscribed the note produced in a false name, either by a mark intended by her to express such false name, or by words at length, with intent to defraud Hooper, and the jury accordingly found her guilty. Judgment was then respited upon a doubt, whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another, in contradistinction to herself, the offence amounted to forgery. But upon the case being submitted to the consideration of the Judges, nine of them were of opinion that the prisoner was properly convicted. (*q*)

If a note be given in the name of a person existing or represented so to be, and in that light it obtain superior credit, it is a forgery.

This case appears to have proceeded upon the ground of the prisoner having assumed the character of executrix of Wallace, a real person actually entitled to wages. Amongst the principles there laid down, it appears to have been holden, that if a note be given in the name of another person who is either really existing, or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery; and that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him, for then he could not know that such impostor was not really the person whose name he assumed, and therefore, the other would be equally deceived. (*r*) But this case occurred before any decision had established the principle, which will be presently noticed, of the use of a mere fictitious name being of itself sufficient to constitute a forgery. (*s*) And it is observed, that after the authorities by which it was settled, that such a case was within the acts respecting forgery, it would have been quite sufficient to have shewn, that the prisoner, with a fraudulent intent, signed a promissory note in the name of Mary Wallace, and it

(*q*) Dunn's case, O. B. 1765, and Mich. T. 1765. 1 Leach 57. 2 East, P. C., c. 19, s. 49, p. 962. Two of the judges were absent, and Aston, J., did not concur in the opinion.

(*r*) 2 East, P. C., c. 19, s. 48, p. 961.

(*s*) Indeed the contrary proposition appears to have been taken for granted, in one report of this case, where, in the opinion of the nine judges who thought the case amounted to a capital forgery, the following passage occurs. "In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a fictitious name, without any relation to a different person; for there the whole credit is given to the party himself; the lender accepts the security, as the security of that person only; he has no other remedy in view but merely against the man he is dealing with; and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded." Dunn's case, 1 Leach, 60.

would have been unnecessary to resort to the additional circumstance of the fraudulent object being to obtain credit in respect of money actually due to the deceased John Wallace, of whom Mary was falsely alleged to be the representative. (*s*)

If a person write an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person.

Writing the acceptance of an existing person to a bill of exchange without authority, or the name of a firm or person non-existing in acceptance of a bill, with intent to defraud, is forgery; and if a person write an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for, if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person. The prisoner was indicted for uttering a forged acceptance of a bill of exchange, and it appeared that the prosecutor, in consequence of an advertisement in a paper, went to No. 3, Jewin-court, Jewin-street, and there saw the prisoner, and said he called in reference to an advertisement, stating that money was to be obtained on freehold property, life interest, &c.; the prisoner inquired the nature of the property, which the prosecutor described, and told the prisoner he wanted 150*l.*; the prisoner said he had clients at Ipswich, who would purchase the property, and desired the prosecutor to call again in a few days, which he did; and the prisoner said he had seen his clients, and he would give the prosecutor 100*l.*, which the prosecutor agreed to, and the prosecutor ultimately agreed to take two 50*l.* bills in payment. On the second visit to Jewin-street, the prisoner said he had received the bills from his clients at Ipswich, and he produced them ready prepared, with the exception of the signature of the prosecutor as drawer; the prosecutor inquired who "Nicholson and Co.," the acceptors were, and what they were, the prisoner said they were general merchants, and that they resided at Ipswich, and were highly respectable men, and the bills would be paid on the day they were due. There was no address on the bill but "3, Jewin-court, Jewin-street," as their address. The prosecutor inquired how it was that the address was Jewin-court, when the prisoner had just informed him that they lived at Ipswich; he said they lived at Ipswich, and they would be in town, and the bills would be paid at Praed and Co.'s, Fleet-street, where they were made payable; the prosecutor then at the desire of the prisoner, put his name on the bills as drawer; and signed a deed and memorial. When the bills became due they were presented at Praed and Co.'s, but not paid. A clerk from Praed's banking-house proved that no firm of the name of Nicholson and Co. banked there, nor any person of the name of Nicholson. A witness from Ipswich proved that he was well acquainted with the town and neighbourhood of Ipswich, and knew nothing of any firm of Nicholson and Co., general merchants there, and that he had made inquiry of the tax collectors and at the post office, and had not been able to find any such firm or any general merchant of the name of Nicholson. It was further proved that the whole of the bills except the acceptance was in the handwriting of the prisoner, and that he had deposited the deed and memorial as a collateral security for a joint note of hand. For the defence, it was stated, that the acceptance would be proved to be in the handwriting of one T. Nicholson, and it was submitted, upon the

(*s*) 6 Ev. Col. Stat. Pt. V. Cl. xii., p. 579.

authority of *Rex* v. *Webb*,(*t*) that the acceptance could not then be deemed to be forged, as in that case it was held that the adopting a false description or addition was not forgery. A witness for the prisoner proved that he had seen a Thomas Nicholson at the prisoner's offices many times, but was not positive whether he had been there when the prosecutor was, nor had he seen him write. In reply, the application of *Rex* v. *Webb* was denied as the addition of "and Co." even if the jury should be of opinion that the acceptance was written by *a* T. Nicholson, rendered the acceptance that of a fictitious firm, and the false making of a note or acceptance in the name of a non-existing firm was a forgery; and *Rex* v. *Parkes* (*u*) was relied on as an authority. Bosanquet, J., told the jury, "The first question is, whether this acceptance is a forgery. Upon that point, if you think that it was not written by T. Nicholson, the case is relieved from doubt or difficulty. But it is said, on the part of the prisoner, that if it was written by T. Nicholson it is no forgery. I have no doubt, however, that the writing of an acceptance of an existing person without authority, or of the name of a firm or person non-existing, in acceptance of a bill of exchange, with intent to defraud, is a forgery; and my opinion is, that if this acceptance was written by Nicholson to represent a fictitious firm, and with intent to defraud, it would amount to a forged acceptance. If you think that the acceptance represents a fictitious firm, it is the same thing as if it represented a fictitious person, and I should recommend you to find the prisoner guilty of having uttered a forged acceptance, if the evidence satisfies you that he knew it was forged, and that he uttered it with intent to defraud the prosecutor." (*v*)

Hadfield's case. Assuming the name and character of an existing person, and drawing a bill of exchange, holden to be forgery.

In a case where the prisoner was convicted and executed, for forging a bill of exchange, the facts were, that he had appeared in the neighbourhood of the lakes in Cumberland, pretending to be the Hon. Alexander Augustus Hope, brother of the Earl of Hopetoun, and in that name induced a young woman to marry him, and imposed upon several persons in the neighbourhood; and that, during such residence, he drew the bill in question upon a gentleman to whom he was known by that name, and who probably would have paid the bill, if the grand deception had not in the mean time been discovered. It is observed, as a material ingredient in this case, that the prisoner assumed the name and character of a really existing person. (*w*)

Assuming the name of a non-existing fictitious person.

With respect to the cases in which the name used has been that of a non-existing and fictitious person, it is laid down, as a clear proposition, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery, as if it had been made in the name of one who was known to exist, and to whom credit was due. (*x*)

Lewis's case. Uttering a forged deed

In a case where the prisoner was indicted on the statute 2 Geo. 2, c. 25, (now repealed), for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her father

(*t*) *Ante*, p. 327.

(*u*) *Ante*, p. 325.

(*v*) Reg. *v.* Rogers, 8 C. & P. 629, *cor.* Bosanquet, Coleridge and Coltman, J's. The jury found the prisoner guilty of uttering the acceptance, knowing it to be forged, and that it was not written by T. Nicholson.

(*w*) Hadfield's case, Carlisle, 1803. 6 Ev. Col. Stat. Pt. V. Cl. xii. p. 580.

(*x*) 2 East, P. C. c. 19, s. 46, p. 957.

purporting to be a power of attorney from a non-existing person.

Richard Tingle, deceased, late a marine belonging to his Majesty's ship the Hector, to F. Predham, of Bernard's-inn, &c. impowering the said Predham to receive all prize-money due to her, &c. the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained, whether as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve Judges. Eleven of them were very clearly of opinion, that the case was within the letter and meaning of the act. (*y*)

Indorsing a fictitious name on a bill of exchange may be forgery.

A person indorsing a fictitious name on a bill of exchange to give it currency, will be guilty of forgery; and in a case which was stated to the Judges, they were all of opinion, that a bill of exchange drawn in fictitious names, when there are no such persons existing as the bill imports, was a forged bill within the 2 Geo. 2, c. 25, now repealed. (*z*)

Bolland's case. The use of a mere fictitious name is sufficient to constitute forgery.

In the following case, the general proposition, that the use of a mere fictitious name is in itself sufficient to constitute forgery, was first established. (*a*) The prisoner, James Bolland, was indicted for forging an indorsement in the name of James Banks, on the back of a promissory note for 100*l.* drawn by Thomas Bradshaw, and indorsed by Samuel Pritchard; with intent to defraud F. L. Cardeneaux. Another count charged him with uttering the same, knowing, &c. It appeared that the drawer and payee of the note in question were real persons; and that when the note came into the hands of Bolland, he indorsed it in the first instance with his own name, and attempted to negotiate it to one Jesson, with whom he had had money transactions: but that, upon Jesson saying that he should not be able to negociate the note with Bolland's indorsement on it, he said, he could take his name off. Immediately another person in company began to erase the name. After he had scratched off all but the initial letter B., Bolland said, "Don't scratch it all out; it may disfigure or cancel the note; I will think of some other name that begins with a B;" and immediately made the name *Banks*. Jesson then took the note; and saying that he should be asked who James Banks was, Bolland said, he was a publican of Rathbone-place. Jesson soon afterwards applied to Cardeneaux to discount the note, and obtained from him some money on the credit of it; and being pressed by Bolland shortly after for the amount of the note, he took him to Cardeneaux, and introduced him as the owner of the note. Cardeneaux inquired who Banks was; to which Bolland answered that he was a man of property, who dealt largely in wines and spirits, and lived in Rathbone-place. Cardeneaux then gave him the amount of the note, in notes and cash; and did not ask him to indorse the note, Jesson having before told him, that it was better that Bolland's name should not appear on it, as he had been a sheriff's officer, and the note would not pass properly with his name upon it. It further appeared, that Bradshaw and Pritchard having become bankrupts before the note

(*y*) Lewis's (Anne) case, O. B. 1754. Fost. 116. It is stated that the doubt arose from the passage in 3 Inst. 169, where Lord Coke, speaking of forgery, says, "this is properly taken when the act is done *in the name of another person*." But it was thought that Lord Coke's description of the offence, on which the doubt was grounded, was apparently too narrow. Fost., 116, 117.

(*z*) Wilks's case, Bodmin, 1767. In consequence of this opinion, the prisoner was tried *cor.* Yates, J., but the jury acquitted him. 2 East, P. C. c. 19, s. 46, p. 957.

(*a*) See Dunn's case, *ante*, p. 329, note (*q*).

was payable, Cardeneaux applied to Bolland, when Bolland denied having discounted any note with him, and said, that his name was James Bolland, that he had never seen Cardeneaux before in his life, and that he had no note with his indorsement on it; and when Cardeneaux insinuated that he was acquainted with his having altered his name, he disregarded it. After the prisoner was taken up, some person paid the 100*l.* to Cardeneaux, in the name of James Banks; but no such person as James Banks of Rathbone-place appeared to exist. The jury found the prisoner guilty. After conviction and judgment of death, the case was referred to the Judges: and the prisoner was afterwards ordered for execution, and suffered accordingly. (*b*)

Lockett's case. A forged order on a bank, in a fictitious name, amounts to forgery.

Very shortly afterwards a case occurred in which it was holden that a forged order on a banker, for the payment of money, purporting to be made by one who kept cash with him, was within the 7 Geo. 2, c. 22, (now repealed) though made in a fictitious name, or in the name of one who had no authority to draw on him. (*c*)

It is agreed to be immaterial whether any additional credit be gained by using the false name.

Taft's case. It is forgery to indorse a bill in a fictitious name, although the money might have been as well obtained by indorsing it in the real name of the person who uttered it. It is immaterial, therefore, whether any additional credit be gained by using the false name.

The prisoner, Edward Taft, was tried for forging an indorsement on a bill of exchange, for fifty pounds, in the name of John Williams: and, having been found guilty, the following case was submitted to the consideration of the twelve Judges. The bill of exchange was drawn payable to the order of Messrs. Renwicke and Mee, by whom it was indorsed generally, and it afterwards became the property of one *William Wheewall*, out of whose pocket it had been picked or lost, with other things, at Leicester races, on the 16th September, 1776. The prisoner had, on the same night, endeavoured to negociate it at Leicester; but, being disappointed, he proceeded to Market Harborough, where he bought a horse of the landlord of the inn, and offered him the bill to change. The landlord, not having cash sufficient in the house, carried it to a banker's in the town, where the clerk told him that it was very good paper, for that he knew the payee who had indorsed it, and that if he, (the landlord,) would put his name on the back of it, it should be immediately discounted. The landlord, however, not knowing the person from whom he had received it, refused to indorse it; but told the clerk that the gentleman was then at his house, and he would go and fetch him. He accordingly went to the prisoner, who accompanied him to the banker's, where the clerk told the prisoner that it was the rule of their house never to take a discount-bill unless the person offering such bill indorsed it: but that if he would indorse the bill in question, it should be discounted. The prisoner immediately indorsed it by the name of "*John Williams*;" and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not John Williams. The Judges were unanimously of opinion that this was a forgery within the statute on which the indictment was framed; for, although the fictitious

(*b*) Bolland's case, O. B. 1772, 1 Leach, 83. 2 East, P. C. c. 19, s. 46, p. 958.

(*c*) Lockett's case, 1772, 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940; and S. P. in Abraham's case, 1774. 2 East, P. C. ibid. 941.

signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill, and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real indorser, if by accident the prior indorsements should have failed. (*d*)

Taylor's case. It is forgery to give to the drawee of a bill of exchange a receipt in a false name, as for the prisoner's own name, for the contents of the bill, such bill being indorsed in blank, if it be done fraudulently and to escape detection, although no additional credit be thereby gained to the prisoner.

In a case which occurred shortly afterwards, it was holden that a receipt, indorsed on a bill of exchange in a fictitious name, is a forgery, although it do not purport to be the name of any particular person. The prisoner, Taylor, was indicted for that he having in his possession a bill of exchange, in the words and figures following—

"SIR, Tamworth, 2d August, 1779.

"One month after date please to pay to my order, the sum of Twenty Pounds, value received, as per advice from

"THOMAS HARPER."

"To Mr. JOSEPH CUFF,
No. 125, Whitechapel,
London."

feloniously did make, forge, and counterfeit, a receipt and acquittance, for the said sum of twenty pounds, as followeth, "Recd., W. Wilson;" with intention to defraud the said Joseph Cuff. A second count stated an uttering with the like intention; and the third and fourth counts were, for forging and uttering it with intent to defraud John Briggs and Henry Sutton. The facts were, that the bill was indorsed in blank, and delivered to Sutton, out of whose possession the prisoner obtained it by some undue means, (which did not appear,) and presented it for payment when it wanted two or three days of becoming due; that he offered to give a trifle to adjust the difference, and accordingly gave the drawee, Cuff, a shilling for the discount; that Cuff then desired him to write a receipt on the back of the bill, which he did, by writing the receipt in question, in the fictitious name of Wilson. Upon this evidence, it was submitted to the Court that this was not a receipt for money within the meaning of the statute, for that it was essential to the commission of forgery that the act should be done in the name of another; but that, in the present case, for any thing that had appeared to the contrary, there never was such a person existing as the "William Wilson," whose name was supposed to have been forged. It was also submitted, that the name "William Wilson" could not have been used with an *intention to defraud*, because no receipt at all was necessary, nor was the prisoner compellable to give a receipt, and he might as well have procured payment of the bill by writing the receipt in the name of "John Taylor," as in the name of "William Wilson;" the possession of the bill being a sufficient discharge to the drawee. That, therefore, as the discharge to the drawee was not any way strengthened

(*d*) Taft's case, 1777, 1 Leach, 172. 2 East, P. C. c. 19. s. 47, p. 959. The judges also referred to the case of Rex *v.* Lockett (*ante*, p. 333,) as having decided that the forging a name either of a real or of a fictitious person, with intent to defraud, was forgery.

by the receipt the prisoner had given, the use of the fictitious name, which was not necessary to the accomplishment of any fraud, was of no effect. And it was further urged, that the prisoner gained no additional credit by the name he assumed; and that what he had written was a mere memorandum, and did not operate as an acquittance against any person but the man himself who received the money, and who would be equally estopped by it as if he had written his own name. But the objections were overruled by the Court, upon the ground that, as this was a *false receipt*, the case was clearly within the statute on which the indictment proceeded. And, after observing that the prisoner knew he had obtained the bill fraudulently; that the better to elude inquiry after him it was necessary to conceal his name; and that his object was to defraud the real owner of the bill of its value; they held that, if he intended to defraud any body by the fictitious signature, it was sufficient to constitute forgery. The jury having found the prisoner guilty, the judgment was respited, and the case referred to the consideration of the twelve Judges; eleven of whom were of opinion that, though the prisoner did not gain any additional credit by signing the name "W. Wilson" to the receipt, as the bill was not by the indorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money from being so readily traced. (*e*)

The following proposition is stated as having been the subject of much difference of opinion:—"That, if a person give a note or other security, as his own note or security, and the credit thereupon be personal to himself, without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for, in such a case, it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view." (*f*)

Sheppard's case; holden to be forgery to draw a draft upon a banker in a fictitious name, assumed by the party at the time for the purpose of fraud, and to avoid detection, though the credit were given to the person of such party.

In one case, where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the Judges agreed unanimously that the offence amounted to forgery. The prisoner was indicted for uttering the following order for payment of money, knowing it to be forged, with intention to defraud James Elliot. (*g*)

Green-street, 31st July, 1781.

"SIRS,—Pray pay to Mr. John Atkins, or bearer, Six Pounds, Six Shillings; value received.

Your's, &c.
"H. TURNER."

"To Messrs. Brown, Collinson, and Co., Lombard-Street."

The following facts appeared in evidence. The prosecutor was a silversmith; and the prisoner, having looked out several goods at

(*e*) Taylor's case, O. B. October, 1779, and M. T. 1779. 1 Leach, 214. 2 East, P. C. c. 19, s. 46, p. 960. Buller, J., doubted.

(*f*) One of the principles laid down in Dunn's case, 1765. 2 East, P. C. c. 19, s. 48, 961. *Ante*, p. 329, *et seq.*

(*g*) In the report of the case in 2 East, P. C. c. 19, s. 50, p. 967, it is stated that the prisoner was indicted for forging the order. Probably there were counts for forging, and for uttering the order, knowing it to be so forged.

his shop, to the amount of six guineas, pulled out his purse, as if going to pay for them, saying, "I believe I have not cash enough about me, but here is a draft on a banker, which is the same thing as money, for it will be paid when presented." He accordingly laid the draft on the counter, and desired to see some silver spurs; but the prosecutor not having any of the kind which he described, the prisoner said that he must send him a pair. Mr. Elliot looked at the draft as it lay on the counter; and seeing it was upon a house he knew, he took it, the sum being a small one, and the prisoner having a genteel appearance: and he then took his order-book, for the purpose of making a memorandum of the prisoner's direction; and supposing his name to be the same as that in which the draft, which he conceived to be the prisoner's, was signed, he wrote, "H. Turner, Esq." The prisoner looked over him, and desired him to add "Junior, Noah's Row, Hampton Court," and then went away. Mr. Elliot further stated, that he gave credit to the prisoner, and not to the draft. It appeared that no person of the name of H. Turner, kept cash at Brown and Collinson's, or lived in Green-street; nor could such a place as Noah's Row, or such a person as H. Turner, jun., be found at Hampton Court. Upon these facts the jury found the prisoner guilty, and he received judgment of death; but the execution of the sentence was respited on a doubt, whether, as Mr. Elliot had sworn that he gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery. The twelve Judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such person as it purported to be, and the using a fictitious name was only for the purpose of deceiving. (*h*)

But the following case, which occurred only a few years afterwards, is mentioned as one in which the Judges were much divided in opinion, though not easily to be distinguished in principle from that which has been just cited.

Aickles's case. It appears to have been doubted whether it was forgery where the prisoner, whose name was Aickles, had a month before taken the house in which he lived in the name of Mason, and passed off a promissory note in that name, which he avowed to be his, dated some time before, but not payable till

The prisoner, J. H. Aickles, was indicted for forging a promissory note, in the following form, with intent to defraud one R. H. Gedge. A second count charged him with uttering such note, knowing it to be forged.

"London, Dec. 18, 1786.

"Three months after date, I promise to pay to H. Byron, Esq., or order, 25*l.* 10*s.* 0*d.* value received."

"25*l.* 10*s.* 0*d.* "JOHN MASON,

"No. 4, Argyle-street, Oxford-road."

It appeared that the note in question was, on the 9th of January, 1787, tendered by Byron to Gedge's shopman, in payment for some linens that were shewn by him to Byron. Upon being asked who John Mason was, Byron described him as a gentleman of fortune, with whom he was concerned in a coal-mine, living at No. 4, Argyle-street. The shopman declined leaving the goods with him; but promised to send them, if, upon inquiry, the note was good. He immediately went to No. 4, Argyle-street, and inquired for Mr.

(*h*) Sheppard's case, O. B. Sept. 1781, Mich. T. 1781. 1 Leach, 226. 2 East, P. C. c. 19, s. 50, p. 967, where it is said that Taylor's case, (*ante*, 335,) Lockett's case, (*ante*, 333,) and Dunn's case, (*ante*, 329,) were relied on.

Mason; the prisoner appeared, and said his name was John Mason, and that the note was drawn by him, and should be paid when due. It was proved that, before the 9th of January, the prisoner had taken the house No. 4, Argyle-street, in the name of John Mason, Esq., and that the person who let the house had inquired concerning him, by this description, at the British Coffee-house, and received a favourable account of his character. It was then proved that he had always passed by the name of John Henry Aickles, and had been tried several times at the Old Bailey, and was known by that name since the year 1780, until the present time. Upon this evidence, Grose, J., who tried the prisoner, entertained some doubt, and directed the jury that they could only convict the prisoner in case they believed that this note was drawn by him, in consequence of a concerted scheme between him and Byron to defraud Gedge, that the prisoner had never gone by the name of John Mason before, and had assumed it for the purpose of this fraud. And he said, that if they were satisfied on these points, they might find the facts, and he would state them to the Judges. Thereupon the jury found specially, that the prisoner intended to defraud Gedge, and assumed the name of Mason for the purpose of this fraud; that he had never gone by that name before; and that they disbelieved a witness on the part of the prisoner, who had deposed that two years before he was inquired for and known by that name at the British Coffee-house. On this a verdict of guilty was taken by consent, subject to the opinion of the Judges on the case.

after the time of his trial: though the jury found that he assumed the name of Mason, by which he was never known before, for the purpose of the fraud.

The opinion of the Judges was pronounced upon this case by Ashurst, J., to the effect that it did not amount to forgery. But the judgment appears to have been given under a misconception that the Judges had so decided; when, in fact, the case had been adjourned for further consideration. (*i*) It afterwards underwent further discussion, when many of the Judges seemed to entertain an opinion that it was forgery; but several thought otherwise; and they never came to any final resolution on the matter. (*j*)

The following reasons are given as those upon which Gould, J., and the other Judges who coincided with him, thought that the case amounted to forgery. There was an apparent design for fraud in general; and the jury were satisfied that the prisoner had assumed the name of Mason, which was not his name, nor had ever been used by him before, but always Aickles, with intent to defraud Gedge. He, therefore, made the note in the name of another, as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay his bills; or, giving notes, took care to pay them when due. But the prisoner, having no such intention, but, on the contrary, to defraud the party, by making the note under such disguised name, by which, after he left the place of concealment, he could not be traced; the case amounted to forgery.

Reasons upon which it was thought that the foregoing case amounted to forgery.

(*i*) 2 East, P. C. c. 19, s. 50, p. 969. 1 Leach, 440.

(*j*) Aickles's case, 1787, 1 Leach, 438. 2 East, P. C. c. 19, s. 50, p. 968. The prisoner was remanded upon a former sentence; having, previously to the present charge, been tried for returning from transportation, and acquitted.

There was no ground, he thought, to distinguish this from the common case where the draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas, in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

Reasons against the conviction.

The Judges, who inclined against the conviction, went on the doubt whether, to constitute forgery, it was not necessary that the instrument should be made as the act of another, (*k*) according to the definition of Lord Coke, whether that other existed or not. Whereas, here the note was made as the prisoner's own, and avowed by him to be so. The credit was given to the person, and not to the name; and the person, and not the name, was the material thing to be considered. (*l*)

Sir E. H. East enters at some length into the discussion of this point; and endeavours to ascertain the grounds upon which the Judges, who inclined against the conviction, might possibly have proceeded. But he again repeats, that it seems very difficult to distinguish the case from that of Sheppard: and he says that he cannot help suspecting that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together. (*m*) A learned writer, who has been several times referred to in the latter part of this work, observes, that it may be difficult to admit that the case involved any real ground of doubt when the specific fraudulent intention was expressly found, and the taking the house was only a part of the machinery of the fraud: and, with respect to Sir E. H. East's suggestion, that the difficulty may have arisen from mistaking matters of fact for matters of law, he further observes, that this seems to be the true view of the case: for, if the use of the assumed name is intended to commit a fraud in the particular instance, there is no reason for not treating it as a forgery, although that may only be part of a more general system of fraud, which such assumption is intended to carry into effect. (*n*)

Whiley's case. conviction of forgery holden to be right where the name made use of by the prisoner in the forged instrument was assumed by him with the intention of defrauding the prosecutor, though the prisoner's real name would have carried with it as

In a more modern case, where the indictment charged the prisoner, Samuel Whiley, with forging a bill of exchange for 60*l.* dated Bath, Jan. 5th, 1805, drawn in the name of Samuel Milward, payable to his own order on Messrs. Stephenson & Co., bankers, in London, with intention to defraud H. Thurston; and (in a second count) with uttering such bill knowing it to be forged; the following facts appeared in evidence. The prosecutor was an upholsterer in Bath: and on the 27th Dec., 1804, the prisoner, being at that time a stranger to him, came to his house, and applied to take a coach-house and stable, which the prosecutor let him for three months. The prisoner then bespoke some goods of the prosecutor to the amount of 16*l.* 2*s.*, which he directed to be sent to him, writing his direction in the prosecutor's book, "Samuel Milward, No. 12, Kensington-place, Bath." In the course of three days the goods were sent, and the prisoner came shortly afterwards and ordered more goods; and before all the goods were delivered, he told the prosecutor to get his

(*k*) See Lewis's case, *ante*, p. 332, note (*y*).
(*l*) 2 East, P. C. c. 19, s. 50, p. 970.
(*m*) 2 East, P. C. c. 19, s. 50, p. 970.
(*n*) 6 Ev. Col. Stat. Part V. Cl. xii., p. 580; and Hadfield's case is cited. See *ante*, p. 331.

bill ready by four o'clock, on Old Christmas eve, at which time he would call for it. He called at the time appointed; and the bill, amounting to 49*l.* 10*s.* was given to him. He said the bill was very right; that it was his rule to discharge all bills on Old Christmas eve; and that he would return again in ten minutes; which he did, bringing with him the bill of exchange in question; and saying that he would give the prosecutor a draft on his banker in London for 60*l.* The prosecutor looked at the bill of exchange, which was indorsed with the name "Samuel Milward," and, upon the prisoner saying it was a good one, gave him the balance of ten guineas. The prisoner then told the prosecutor that he should want more goods, and should be a very good customer to him. The bill of exchange having been sent to the bankers, in London, was returned to the prosecutor on the 25th Jan., dishonoured, and the prosecutor went immediately to the prisoner's house, in Bath, but he found it shut up, and saw nothing more of the prisoner till about three weeks afterwards, when he was in custody. A clerk from the London bankers, Messrs. Stephenson and Co., proved that they knew no such person as Samuel Milward. And it was satisfactorily proved that the prisoner's real name was Samuel Whiley; that he was baptized as the son of persons of that name, was married by that name, had gone by the same name at Bath, when he lodged there for about a week in the July preceding this transaction; and at Bristol in the following October; as also at Bath again on the 4th of December; and further, that on the 20th of December (which was about a week before he first came to the prosecutor) he had taken a house in Worcestershire, under the same name. But on the 28th of December (the day after his first application to the prosecutor) he ordered a brass plate to be engraved with the name of "Milward," which was fixed on the door of his house on the following day. The prisoner stated in his defence that he had understood from his father that he was christened by the name of Samuel Milward; and that, being under difficulties, and afraid of arrests, he had omitted the name of Whiley. In answer to questions put by the learned Judge who tried the prisoner, the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary: but that if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods, and have taken the draft from him and paid him the balance as he had done when he came under the name of Milward. The learned Judge left it to the jury to say whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the draft, with intention to defraud the prosecutor. And the jury saying, that they were satisfied of that fact, found the prisoner guilty. The case was afterwards submitted to the consideration of the twelve Judges; who were of opinion that the question of fraud being so left to the jury, and found by them, the conviction was right. (*o*)

In a case which occurred a few years afterwards, the prisoner was indicted for forging an order for the payment of money, in which,

much credit as the assumed name.

Not giving an opinion that this finding on such circumstances was right or not.

Francis's case.

If the name

(*o*) Whiley's case, *cor.* Thomson, B., Somersetshire, Spr. Ass. 1805; and before the judges, Trin. T. 1805, MS., and Russ. & Ry. 90. S. P. Rex *v.* Marshall, Russ. & Ry. 75; and Rex *v.* Francis, id., 209, and *infra.*

used by the prisoner be assumed for the purpose of fraud, and to avoid detection, it will be as much a forgery as if the assumed name were the name of a person of known credit.

by the name of James Cooke, junior, he requested Messrs. Praed & Co., bankers in London, to pay Mrs. Ware, or bearer, fifteen pounds. It appeared in evidence that on the 15th August, 1808, the prisoner took lodgings at the house of Mrs. Ware, by the week, and continued there till the 9th of September following, on which day he gave Mrs. Ware the order in question for a bank note of fifteen pounds, which she advanced to him upon his applying to her for change. Mrs. Ware paid the order away to a neighbour, who took it to the bankers; and, upon payment being refused, brought it back to Mrs. Ware, who immediately informed the prisoner of its being returned. The prisoner, first reading over the order, said that he saw he had made a mistake, and had forgotten to put the word "junior," which word he then added, and said that Mrs. Ware would find it would be right. Shortly afterwards the prisoner left the house, saying he should return to tea; but he never did return. The order, with the addition, was presented at Messrs. Praed & Co.'s the next morning, and payment refused, the drawer not being known at that house, and no person of that name keeping cash there. It was satisfactorily proved that the prisoner's real name was John Francis, though he had occasionally gone by other assumed names. The case was left by the learned Judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of James Cooke, junior, with a fraudulent purpose; and they found a verdict of guilty: but upon some doubts occurring whether the facts in evidence went to establish a forgery, or only a fraud, the case was referred to the consideration of the twelve Judges. Mansfield, C. J., the Chief Baron, Grose, J., and Lawrence, J., were absent when the case was debated; but the Judges, who were present, held the conviction right; and were of opinion that if the name were assumed for the purpose of the fraud, and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit; though the case would have been different if the party had habitually used and become known by another name than his own. (*p*) But it seems that it must satisfactorily appear that the fictitious name was assumed for the purpose of fraud, in the particular instance of the forgery in question, and that it will not be sufficient to shew that the fictitious name had been assumed for general purposes of concealment and fraud: as in a subsequent case, in which the prisoner was charged with forging an acceptance upon a bill of exchange in the name of Scott, the majority of the Judges being of opinion that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name of Scott before the time of accepting the bill in that name, or that he had assumed the name for that purpose, held that a conviction for such forgery was wrong. (*q*)

The fictitious name must be assumed for the purpose of fraud in the particular instance.

* * *
18 supra.

But forging in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the

(*p*) Francis's case, Old Bailey, July, 1811; and before the judges, December, 1811, MS., and Russ. & Ry. 209.

(*q*) Rex v. Bontien, December, 1813, Russ. & Ry. 260.

time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question. (r)

If a person put the name of another on a bill of exchange as acceptor without that person's authority, expecting to be able to meet it when due, or expecting that such other person will overlook it, this is forgery. But if the prisoner either had authority from such other person, or from the course of their dealings *bonâ fide* considered that he had such authority, it is not forgery. The prisoner was charged in some counts with forging, and in others with uttering a forged acceptance to the following bill of exchange,

If a party either have authority to use the name of another, or *bonâ fide*, considers that he has such authority, it is not forgery to use such name.

"£25. "Cheltenham, July 16th, 1834.

"Three months after date pay to my order twenty-five pounds, for value received.

"JOHN FORBES."

"WILLIAM PROSSER, jun., Esq., Cheltenham."

"Accepted, payable at Messrs. Esdaile & Co., bankers, London.

"WILLIAM PROSSER, jun."

The prisoner had paid away this bill, with the acceptance upon it, to a butcher to whom he owed about 4*l.*, and taken the difference. Mr. Prosser proved that the acceptance was not in his handwriting, and that he had never given the prisoner authority to put his name on any bill or security of any kind. The prisoner was an architect at Cheltenham, and was engaged in building houses for Mr. Prosser, who had recommended the prisoner to raise money, which, when raised, the prisoner was to draw upon, under the superintendance of Mr. Prosser, and it was sought on the part of the prisoner to raise an inference that he considered he had a right to use Mr. Prosser's name. Coleridge, J., "If the prisoner drew the bill mentioned in the indictment, and which he knew could not become due for some months after he did so, and then put Mr. Prosser's name on it without his authority, either intending to meet it, or trusting that he should have money to do so, or trusting that Mr. Prosser would overlook it, the prisoner is guilty of forgery; but if you think that the state of affairs between the prisoner and Mr. Prosser was such that he had Mr. Prosser's authority to accept this bill, then it is not a forgery. If a person gives another leave to use his name on bills, and the person thus permitted writes the name of such person on a bill, this is as it were a signing by the person who gave the authority, although he had given no authority for the putting his name on that particular bill. The question which I shall leave to you is this, whether the name of Mr. Prosser was put on the bill mentioned in the indictment without the authority of Mr. Prosser; or was it written on the bill by the prisoner, under such circumstances that he might *bonâ fide* consider that he had Mr. Prosser's authority for doing so, as in the latter case you ought to acquit him." (s)

So where upon an indictment for forging and uttering an acceptance on a bill of exchange in the name of John Woodman, Woodman was called, and proved that the acceptance was not in his handwriting, and that he did not authorize any person to accept

But nothing short of such belief, and a fair ground for that belief from

(r) Rex v. Peacock, Russ. & Ry. 278. (s) Rex v. Forbes. 7 C. & P. 224.

the acts of the party whose name is used, is sufficient.

the bill, but he admitted that he had known the prisoner eight years and had had money transactions with the prisoner, and in 1829 had been connected with him in trade, as a partner in a hat manufactory, and had had many bill transactions with him, and they had trusted each other largely; a mutual accommodation existed between them; none of those bills were accepted by procuration; the prosecutor had accepted for his accommodation since 1836 to take up former acceptances; the prosecutor did not always know what the acceptances were for, as he depended on the prisoner's honour; and he might have drawn on the prosecutor five or six years before without apprising him of it; but the prosecutor had never before paid any bill on which the prisoner had used his name, and he always signed J. Woodman which the prisoner must have known. Coleridge, J., in the course of summing up the case to the jury said, "We now come to the statement Mr. Woodman makes, and upon which it is supposed that the prisoner may rely for an acquittal, because he says that he has been for the last eight years in habits of great intimacy and in partnership with him. Now I put the question whether, though he had not authorized the signing of his name on that particular bill, he had ever given the prisoner a general authority. If he had said to the prisoner 'You may use my name whenever you like,' it would be idle to say that the acceptance was a forgery. It is not merely writing another man's name, but writing it without authority and with intent to defraud. But I go further, because I think that if a person had reasonable ground for believing, from the acts of the party, that he had authority to accept, and did in point of fact act upon that, it would not be forgery. Put the case that upon a former occasion the prisoner had done what he is supposed to have done here, and on the bill being presented Mr. Woodman had paid it without remark or remonstrance. If he had done that on three or four occasions, he might fairly say, I infer that he authorized me to do it, and after that he could not be said to come within the description of a person who forged. But I cannot go the length which has been suggested. Let me suppose one or two cases:—Suppose the prisoner to have meant to raise 200*l.* for two or three months, and trusted that at the end of the time he should receive 1000*l.* and would be able to repay it, if he used another person's name without authority, and not believing that he had authority, that would be a distinct forgery. No man has a right to use another's name, trusting that he may be able to take up the bill. So, if a person having no authority were to say, I want to raise a sum of money, and I am sure my father is so fond of me that he will not proceed against me criminally, and were to write his father's name to an acceptance, that would be forgery. No man has a right to trust to the kindness of another man. If you are of opinion that the prisoner acted in either of those ways, knowing that he had no authority, but meaning to repay the bill or trusting that Mr. Woodman would not prosecute, in either of those cases this would be forgery. There can be nothing short of the person believing that he had authority, and having a fair ground for that belief from the other party. The authority need not be express, it may be implied from acts. I put the question to see whether the prisoner had any reason for thinking that he had authority to use Mr. Woodman's name. Now you are to judge whether you have any reason to believe, looking at the circumstances fairly between the crown and

the prisoner, not stretching it on one side or on the other, that the prisoner believed that he had authority and from circumstances had reasonable grounds for so believing. There was great intimacy between these parties: there had been great dealings between them. All which is to be taken into account. You certainly find that the moment Mr. Woodman is called upon he does not pay the bill, and he does not in the least adopt the act that was done by the prisoner: that is really the only point in the case." (*t*)

If from the dealings between the parties the prisoner had fair ground to believe he had authority to use the name, it is not forgery.

So where upon a similar indictment for forging and uttering an acceptance of a bill of exchange in the name of John Tyler, Tyler proved that the acceptance was not his, and that he never authorized any one to accept any bill for him, but on cross-examination said, "The prisoner on the same day accepted a bill for 17*l.* 4*s.* for me. I had accepted a bill for 17*l.* 4*s.* and got this bill as a renewal of the former bill, which I had accepted for the prisoner's accommodation. I have many times had money transactions with the prisoner for his accommodation, but never for my own. I had accepted more than one bill for him, as what he could not pay on the first advance I accepted another bill for. The first bill I accepted was for 50*l.* The prisoner had taken the liberty to use my name for 15*l.*, and I paid it. He then used my name without authority. It was an acceptance; I paid it, and the prisoner repaid me in the course of a week. I had no difference with the prisoner about it, and we have been on friendly terms ever since; the prisoner was a particular friend of mine, and I never had any quarrel with him." Lord Abinger, C. B., "If the prisoner had the authority of Mr. Tyler for writing the acceptance, it is no forgery; neither is it if he had no such authority, provided that from the facts that have been proved, it is made out that he had fair ground for considering that he had such authority. These two parties were on very intimate terms; Mr. Tyler had more than once accepted bills for the prisoner's accommodation, and on a former occasion, when the prisoner had used his name, he paid the amount and found no fault, and the prisoner repaid him in the course of a week. You will consider whether the prisoner having to deal with the name of a person with whom he was so very intimate, fairly considered, from what had before occurred, that he had authority to do as he did, and make use of the name of Mr. Tyler upon the face of this bill. If you think so, and that the prisoner acted *bonâ fide* and did not mean to defraud or injure any one, you ought to acquit him." (*u*)

If one of three persons having authority jointly to draw out money from a bank, draw out the money by a cheque signed by himself and two strangers, who personate the two having authority, it is forgery.

If a person having authority in conjunction with two others to draw out money from a bank, draws out such money by means of a cheque in the presence of two other persons, who personate the two persons, in conjunction with whom he had authority to draw out the money, this is a forgery of the cheque, and the intent may be laid to defraud the bankers. The prisoner was indicted for forging a cheque on the prosecutors, Jones, Lloyd & Co., with intent to defraud them. The prisoner and Dawson and Davies were members of the Hydraulic Packers' Society, which was established for maintaining the members of the society, who should, by depression in trade or other circumstances, be thrown out of employ. The funds of the society were provided by weekly contributions, and a sum of 400*l.* was deposited in the bank of Jones,

(*t*) Reg. *v.* Beard, 8 C. & P. 143. (*u*) Reg. *v.* Parish, 8 C. & P. 94.

Lloyd & Co., in the names of the prisoner and Dawson and Davies, and it was not to be paid out unless all three attended to receive it. The bankers were not acquainted with the signatures of any of the three. The prisoner having procured two persons to personate Dawson and Davies went with them to the bank, and drew out the money. The clerk who paid the money asked their names, and the names of the three members were given; and the clerk after referring to the ledger and to the pass book, which was brought by the prisoner, and finding the names to accord, paid the money. It was objected that the bankers would not be liable over to the society, the money having been drawn out by fraud by one of the depositors. Patteson, J., "The bankers being authorized to pay the money to three persons in particular, and to them only, pay it to one of those persons, and to two who are strangers to the transaction, and that without any authority, genuine or colourable, from the real parties. I am therefore of opinion that this was a forgery with intent to defraud Jones, Lloyd & Co." (*v*)

As to the validity of the thing forged, if genuine.

Having thus treated of the name in which a forgery may be committed, we may proceed to consider how far the *validity* in law of the thing forged, supposing it were true, is essential to forgery.

Though it is said to be in no way material, whether a forged instrument be made in such a manner as that, if it were in truth such as it is counterfeited for, it would be of validity or not; (*w*) yet it seems to be material, that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame. (*x*) One of the definitions of forgery is given, as "the false making an instrument, which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud." (*y*)

Upon the ground that it is not material whether a forged instrument be so made as that, if it were in truth such as it is counterfeited for, it would be of validity or not, it has been adjudged that the forgery of a protection in the name of A. B., as being a member of parliament, who in truth at the time was not a member, is as much an offence at common law, as if he were so. (*z*)

In a case, where the defendant was convicted upon an indictment on the 5 Eliz. c. 14, (now repealed) which stated that one Garbut and his wife were seised in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him "all that park called Jawick, in the parish of Clacton, in Essex, containing eight acres in circumference, with all the deer, wood, &c. thereto belonging," it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the court held that it was not necessary, there

(*v*) Dixon's case, 2 Lew. 178. Wright's case, 1 Lew. 135, *ante*, p. 322, was cited to show that the bankers were not liable over to the society.

(*w*) 1 Hawk. P. C. c. 70, s. 7. 2 East, P. C. c. 19, s. 43, p. 948.

(*x*) 2 East, P. C. c. 19, s. 43, p. 948.

(*y*) By Eyre, B., in Jones and Palmer's case, 1 Leach, 367.

(*z*) Deakins's case, 1 Sid. 142. 1 Hawk., P. C. c. 70, s. 7. 2 East, P. C. c. 19, s. 43, p. 948.

should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (*a*)

So where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shown in the indictment that J. S. had any lands, it was holden upon motion in arrest of judgment that the indictment was good, upon the principle that it was not necessary to shew that the party was prejudiced. (*b*)

Forgery may be committed by the false making of the will of a living person; though a will is ambulatory during the life of a party, and can have no validity as a will until his death.

Upon the same principle, the doctrine is established by several cases, that forgery may be committed by the false making of an instrument, purporting to be the will of a person who is still living; notwithstanding the objection, that during the life of a party his will is ambulatory, and can have no validity as a will until his death. Thus, a prisoner was convicted for forging a seaman's will, who it appeared was still alive, and had returned to England two years after the prize money had been received by the prisoner, under a forged will. (*c*) In a subsequent case, where the prisoner was indicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, and convicted, the judgment was respited upon a doubt, whether as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament in contemplation of law, until after the death of the person making it: but the Judges are said to have been unanimously of opinion, that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid, as to the purposes for which it was intended to be made. (*d*) The point was again referred to the consideration of the Judges, in a case where the prisoner was indicted and convicted for knowingly uttering and publishing as true, a certain false and forged will and testament of one J. G., late a seaman belonging to a merchant vessel, &c. and it appeared, that the said J. G. was living. All the Judges held that the conviction was right. It was observed by the learned Judge, who delivered their opinion, that every will must be made in the lifetime of the party, whose will it was; that it existed as a will in his lifetime, though not to take effect till his death; and that the making a false instrument importing on the face of it to be a will, was equally forgery, whether the person whose will it purported to be were dead or alive, at the time of making it. That a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J., thought the very definition of forgery decided the doubt, for it was the making a false instrument with intent to deceive;

(*a*) Crooke's case, B. R. East. T. 4 Geo. 2. 2 Str. 901. 2 East, P. C. c. 19, s. 33, p. 921.

(*b*) Goate's case, 1 Ld. Raym. 737. But it seems clearly to be necessary, that there should be a possibility of prejudice to the party. See the definitions, *ante*, p. 318, and Ward's case, 2 East, P. C. c. 19, s. 7, p. 862, *post*, p. 359.

(*c*) Murphy's case, O. B. 1753. 10 St. Tri 183. (Hargr. ed.) 2 East, P. C. c. 19, s. 43, p. 949.

(*d*) Sterling's case, O. B. 1773. 1 Leach. 99, where it is said, that the case was decided upon the authority of Anne Lewis's case. Fost. 116. *Ante*, p. 332.

soner, was the alteration of a 10*l.* bill of exchange into one for 50*l.*, it was holden to be not less a forgery from the circumstance of the bill having been re-issued three times as a 10*l.* bill without being re-stamped, and being, therefore, not available in a civil action at the time the alteration in it of 10*l.* into 50*l.* was effected. The Judges, on a conference, said that it had been decided that the stamp acts had no relation to the question of forgery; and that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete. (*m*)

The same doctrine acted upon in other cases.

The same doctrine was acted upon in several other cases. (*n*) And it is well observed that if the matter be duly considered, the words of the stamp acts before mentioned can only be applicable to a true instrument; for a forged instrument, when discovered to be such, never can be made available, though stamped: and that the acts, therefore, can only be understood as requiring stamps on such instruments as were available without a stamp before those acts passed, and which would be available afterwards with a stamp. (*o*)

The false instrument should carry on the face of it the semblance of that for which it is counterfeited; so as to deceive persons using ordinary observation.

It has been spoken of as a material circumstance, that the false instrument should carry on the face of it the semblance of that for which it is counterfeited. (*p*) But it is not necessary that the resemblance to the known instrument should be exact: it seems to be sufficient if the instruments be so far alike that persons in general using their ordinary observation upon the subject may be imposed upon by the deception, though it would not impose upon persons having particular experience in such matters. (*q*)

Thus where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution, who came from the Bank of England, stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were very ill executed, Le Blanc, J., proceeded upon the foregoing principles. (*r*)

Elliot's case. A conviction is good for forging a bank note, though in such forged note the word "pounds" be omitted, and though there be no water-mark in the paper.

The doctrine had previously been sanctioned by the opinion of the Judges in the following case. The prisoner, James Elliot, was indicted for forging a bank note of the following tenor.

"No. 17.73.

"I promise to pay to Mr. Jos. Crook or bearer, on demand, the sum of Fifty

London, 20 June, 1775.

£ *Fifty.* For the Govr. and Company of the Bank of England.

"Entd. C. BLEWERT. THOS. THOMPSON."

(*m*) Teague's case, *cor.* Le Blanc, J., Hereford Sum. Ass. 1802, and Mich. T. 1802. 2 East, P. C. c. 19, s. 55, p. 979. Reg. *v.* Pike, 2 Moo. C. C. R. 70.

(*n*) Reculist's case, O. B. 1796. 2 Leach, 703. Davies's case, *cor.* Grose, J., Surry Spr. Ass. 1796. 2 Leach, 707, note (*b*). 2 East, P. C. c. 19, s. 45, p. 956.

(*o*) 2 East, P. C. c. 19, s. 45, p. 956.

(*p*) *Ante*, p. 344.

(*q*) 2 East, P. C. c. 19, s. 6, p. 858, and s. 44, p. 950.

(*r*) Hoost's case, *cor.* Le Blanc, J., Exeter Spr. Ass. 1802. 2 East, P. C. c. 19, s. 44, p. 950.

Some of the counts of the indictment stated the instrument to be a bank note, and others to be a note in the form of a bank note; but the fifth count, which was that on which the question turned, and on which the counsel for the crown relied, charged "that the said James Elliot, on the 14th June, 1777, feloniously did make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, &c., *a certain promissory note for the payment of money*, with the name of *Thomas Thompson* thereunto subscribed, purporting to bear date, &c., and to have been signed by one *Thomas Thompson*, for the Governor and Company of the Bank of England, for the payment of fifty pounds to Mr. Joseph Crook or bearer, on demand, the tenor of which, &c., with intention to defraud the Governor and Company of the *Bank of England*." It appeared that the note had never been published, being found in the prisoner's possession at the time he was apprehended; but the forgery was brought home to him, and he was convicted. The doubt concerning this case arose upon the following facts, which appeared in evidence. The officers of the Bank of England proved that the note was in every respect, both in paper and print, similar to a bank note, both in the written and printed parts of it, except, first, that the number was not filled up; secondly, that the word "pounds" was omitted in the body of the note; thirdly, that the texture of the paper was rather thicker than that used by the bank; and, fourthly, that, in the fabric of it, the water mark, *viz.*, the words "Bank of England," were not inserted: but they said that a bank note, with the like omission of the word "pounds" in the body of it, being regular in other respects, would be paid, by the usage of the Bank, after it had passed the examiner's office. And a real bank note of the same date and tenor, except as above excepted, was produced in evidence. Upon these facts it was contended that this was not a note resembling a bank note for want of the *water mark*; and also that it was not a note for *fifty pounds*, the word "*pounds*" being omitted: and judgment was respited in order to take the opinion of the twelve Judges. The case was considered by them, and they were all (except De Grey, C. J., and Smythe, C. B., who were absent,) of opinion that the conviction was right; as in forgery there need not be an exact resemblance; and it is sufficient if the instrument is *primâ facie* fitted to pass for a true instrument. The majority of the Judges inclined to think that the omission of the word "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; and that it was matter to be left to the jury, as it was done, whether it purported to be a note for fifty *pounds*, or any other sum: and all the Judges agreed that the "fifty" in the margin of it removed every doubt, and shewed that the fifty in the body of the note was intended for fifty *pounds*. (*s*)

Collicott's case. Engraving a counterfeit stamp like in some part to a genuine

Upon the same principles, in a case where the prisoner engraved a counterfeit medicine stamp, so as to be like to a genuine stamp, except only that the centre part, which in a genuine stamp specifies and denotes the duty, was blank in the first instance, but cut out before the counterfeit stamp was used, a paper with the words

(*s*) Elliot's case, Maidstone Sum. Ass. 1777. Mich. T. 18 Geo. 3. 1 Leach, 175. 2 East, P. C. c. 19, s. 44, p. 951. 2 New R. 93, note (*a*).

stamp, and unlike in others, and then cutting out the unlike parts, and concealing the part cut out, and then uttering it, is a forgery and guilty uttering.

"Jones, Bristol," on it being pasted over the vacancy, and then uttered such counterfeit stamp, it was holden that he was guilty of a forgery and uttering. Grose, J., in delivering the opinion of twelve Judges on this case, after stating that it was proved that those parts of the counterfeit stamp which remained were a perfect resemblance of the same parts on a genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer, further said, "An exact resemblance or *fac simile* is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient." (*t*) It has been determined on the statute 25 Edw. 3, (now repealed) that splitting the great seal, and closing it again to a false patent, is a counterfeiting of the seal: (*u*) and that where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the style, or adding others, or making any other minute variation in the counterfeit, which is often done purposely, and by way of eluding the law, will not alter the case. (*v*)

A mere literal mistake will not make any difference.

And it seems that a mere literal mistake in the framing of the instrument itself, well laid in the indictment, will not make any difference. And it is observed, that in a case where the prisoner, in forging an order for the delivery of goods, blundered in spelling the name, using *Desemockex* for *Desormeaux*, no stress was laid on such circumstance, though on other grounds the indictment was holden bad. (*w*)

Fitzgerald and Lee's case. Forgery may be committed of a will, though it be signed in the wrong Christian name of the person whose will it purports to be.

The prisoners Fitzgerald and Lee were indicted for forging the last will and testament of Peter Perry, late a seaman on board his Majesty's ship the Lancaster, with intent to defraud the King. The will began—"In the name of God, Amen, I, *Peter* Perry, &c., and ended *John* his mark Perry." It appeared that the prisoner, Fitzgerald, carried the will to the office of the deputy register, who, on observing the difference of the Christian names, told him that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. Fitzgerald accordingly produced the other prisoner Lee, who, in the name of Welsh, swore that he was one of the subscribing witnesses; that the name of the deceased was Peter Perry; that the said Peter Perry did make his mark to, and deliver the said will; and that he (Welsh) by mistake had written the name John Perry instead of Peter Perry. Upon this a probate of the will was granted. The prisoners having been found guilty, the question was reserved for the consideration of the Judges, whether this was in law a forging of the will of *Peter*

(*t*) Collicott's case, 1812. 2 Leach, 1048. 4 Taunt. 300. Russ. & Ry. 212, 229

(*u*) 1 Hale, 178, 184.

(*v*) Robinson's case, 2 Roll. R. 50. 1 East, P. C. c. 2, s. 25, p. 86. This was an indictment under the statute 1 Mary, c. 6, for counterfeiting the privy signet. In 1 East, *ubi supra*, it is said, "The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye."

(*w*) 2 East, P. C. c. 19, s. 45, p. 952, 953. The case referred to is Clinch's case, 1 Leach, 540. 2 East, P. C. c. 19, s. 37, p. 938.

Perry, as laid in the indictment? And, though no opinion was ever publicly delivered, the prisoners were afterwards executed pursuant to their sentence. (*x*)

Wicks's case. Forged bill of exchange, though no indorsement of the names of the drawers.

In a case where it was proved that the prisoner took a bill of exchange, which he was indicted for forging and uttering, knowing &c., to a banker's, in order to get it discounted, and, upon receiving the discount, indorsed it there, but not in his own name; and it appeared also, that though there was the indorsement of another name upon the bill besides that which the prisoner indorsed, yet there was no indorsement upon it of the names or firm of the drawers who were also the payees; it was objected on behalf of the prisoner that, as there was nothing upon the bill purporting to be an indorsement of the drawers, it could not pass as a bill of exchange, nor was capable of defrauding the persons whose names were forged. (*y*) But the learned Judge who tried the prisoner overruled the objection, and the prisoner was convicted: and, upon the point being afterwards submitted to the consideration of the Judges, they were of opinion that the conviction was right. (*z*)

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time, "without acceptance" is a bill of exchange.

Upon an indictment for forging the following instrument, which was described as a bill of exchange,

"Flintshire District Banking Company.

"Twenty-one days after date pay (without acceptance) to the order of Mr. James Henderson, £70.

For value received,
For the Company,
J. WATKINS, Manager."

"To the London and Westminster Bank,
Throgmorton-street, London."

It was objected that the instrument was not a bill of exchange; to constitute a bill of exchange there must be a person drawing, a person on whom it is drawn and who is to accept, and a person to whom payment is to be made, and here the drawer expressly prohibited acceptance. Patteson, J., "This instrument certainly differs from all others that I have seen as bills of exchange, by reason of the words 'without acceptance.' I do not, however, consider that the insertion of those words alters the character of the instrument, so as to prevent its being a bill of exchange. All that is necessary to constitute a bill is, that the party making the instrument should direct it to some other party, requiring that other party to pay the money therein mentioned to some third person or his order, or to the order of the party so making the instrument. The drawer may in each case prescribe the terms upon which the

(*x*) Rex *v.* Fitzgerald and Lee, O. B. 1741, and Mich. T., 15 Geo. 2. 1 Leach, 20. 2 East, P. C. c. 19, s. 45, p. 953.

(*y*) Amongst other cases, Moffatt's case, *post*, p. 356, and Wall's case, *post*, p. 357, were cited.

(*z*) Rex *v.* Wicks, *cor.* Wood, B., Gloucester, Spr. Ass. 1809, and East. T. 1809, MS., and Russ. & Ry. 149. Bayley, J., was not at the meeting of the judges, but he thought the conviction wrong, on the ground that for want of an indorsement the bill was not negociable, and therefore, if genuine, would not have been of value to the taker of it. And see Rex *v.* Cartwright, Russ. & Ry. 106, where an indictment was held bad, on the ground that the instrument given in evidence was not, as stated, an order for money; and a question by Le Blanc, J., there mentioned in the note (*b*), whether this paper, though not directed to any person as drawer, might not, under the circumstances, have been treated as a bill or order.

payment is to be made. Here he has chosen to prescribe that the drawee is to make the payment 'without acceptance:' the meaning of which I take to be that the holder is not to be put to the trouble of presenting it to the drawee before it becomes due; but still if he should choose to present it, there is nothing to prevent the drawee from accepting it; actual acceptance, of course, is not necessary to make the instrument a bill of exchange. Bills are daily noted and protested as bills for non-acceptance: they must, therefore, be bills before acceptance. Bills at sight are not, in fact, commonly accepted. I think, therefore, that the instrument is properly described as a bill of exchange." (*a*)

Omission of the name of the payee.

Where the prisoner drew a bill upon the treasurer of the navy, payable to blank or order, and signed it in the name of a navy surgeon, it was holden, that to constitute an order for payment of money, there must be some payee; and that a direction to pay to blank or order was not sufficient. (*b*) So where the prisoner was indicted for forging and uttering a navy pay bill, which was made payable to blank or order, it was holden that there must be some payee, and the conviction was held wrong. (*c*)

Omission of the name of the drawee.

It has been holden that an instrument in the form of a bill of exchange with an acceptance on it is a bill of exchange, although there be no person named as drawee in the bill. The indictment charged that the prisoner having in his possession a bill of exchange as follows,

"£ 20.

"Birmingham, 9th August, 1837.

"Two months after date pay to my order the sum of twenty pounds for value received,

EDWARD HAWKES."

"General Provision Warehouse, Baker, &c.,
Unett-street, Well-street, Hockley."

on which was written a forged acceptance, as follows,

"Accepted payable at Messrs. Gillett and Tawney's, Bankers, Banbury, WILLIAM SELLERS,"

uttered the same knowing the acceptance to be forged. Bosanquet, J., thought that the writing upon the instrument purported to be an acceptance by Sellers as drawee of the bill, and if not, that it was an acceptance for the honour of the drawer; and, upon a case reserved, upon the question whether the instrument upon which the forged acceptance was written, was properly described as a bill of exchange, not being addressed to any person as drawee, the Judges were of opinion that the conviction was right, except Parke, B., Patteson, J., and Coleridge, J., who thought otherwise. (*d*)

It may be forgery though the instrument.

It is also laid down as clear, that it is no objection to the charge of forgery that the instrument is not available, by reason of some

(*a*) Reg. *v.* Kinnear, 2 M. & Rob. 117.
(*b*) Rex *v.* Richards, Russ. & Ry. 193.
(*c*) Rex *v.* Randall, Russ. & Ry. 195.
(*d*) Reg. *v.* Hawkes, 2 Moo. C. C. R. 60. Littledale, J., Park, J. A. J., and Bolland, B., were absent.

collateral objection not appearing upon the face of it. (*e*) So that, where a prisoner was indicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid by the provisions of the 32 Geo. 3, c. 34, s. 2, unless made in the manner therein prescribed; the offence was holden to be forgery, the order itself purporting, on the face of it, to be made at another place beyond the limited distance. (*f*)

is not available by reason of some collateral objection.

So it is no defence to an indictment for forging and uttering an order of a board of guardians of a poor law union, to shew that the person who signed the order as presiding chairman was not in fact chairman on the day he signed the order. The indictment against the prisoner was for forging and uttering the following order,

If the instrument be good in form on the face of it, it is sufficient.

"No.

"Aylsham Union, the 14th day of Nov. 1837.

"To John Ringer, Esq. Treasurer.

"Pay to B. P. Drouet, or bearer, the sum of £149. 10*s*. 10*d*.

"John Warnes, Presiding Chairman.

"John Rump } Guardians.
"John Cross }

"HENRY PIKE,

"Clerk to the Board of Guardians of the said Union."

The signatures of Warnes and Rump were proved to have been written by them at a meeting of the guardians of the union, but it was not proved that Warnes was the presiding chairman, when he signed the order. The signature of John Cross was proved to be forged. Upon a case reserved, it was contended that though the instrument purported to be signed by the presiding chairman, and so was on the face of it valid, yet it might be shewn on the part of the prisoner that in fact the person signing and describing himself as presiding chairman did not fill that character, and that the instrument would then be equally invalid, as if the deficiency had been on the face of the instrument; but the Judges were unanimously of opinion that there was nothing in the objection. (*g*)

But the offence will not be forgery where the false instrument does not carry on the face of it the semblance of that for which it is counterfeited, or where it is illegal in its very frame. (*h*)

But it will not be forgery where the false instrument has no semblance of the true one, or is illegal in its very frame.

In a case where the instrument charged to be forged was an order in the name of a creditor to a gaoler, for the discharge of a debtor who was in prison under an attachment for a contempt, it was objected that such instrument was a mere nullity in itself, even if genuine; but it became unnecessary to decide upon the objection. (*i*)

(*e*) 2 East, P. C. c. 19, s. 45, p. 956.

(*f*) M'Intosh's case, *cor.* Le Blanc, J., O. B. 1800, and afterwards considered by the judges, 2 East, P. C. c. 19, s. 39, p. 942. 2 Leach, 883.

(*g*) Reg. *v.* Pike, 2 Moo. C. C. R. 70. Per Lord Abinger, C. B., "It does not lie in the prisoner's mouth to set up that Warnes was not in fact chairman. By uttering the bill he represents the whole as true."

(*h*) *Ante*, p. 344.

(*i*) Fawcett's case, York Spr. Ass., 1793, 2 East, P. C. c. 19, s. 7, p. 862, and s. 45, p. 952, where the learned writer says, that it does not appear whether the judges decided the case on that ground; as, at any rate, the indictment was holden good as a cheat. And see Gibbs's case, 1 East, R. 173. 2 East, P. C. c. 19, s. 7, p. 864.

Jones's case. Instrument defective as a bank note.

Where the false instrument was in the following form, without any signature,

"No. F. 946.
"I promise to pay John Wilson, Esq., or bearer, Ten Pounds.
"London, March 4, 1776.
£ *Ten.* "For Self and Company, of my Bank in England."
"Entered, JOHN JONES,"

and it was laid in one set of counts as a paper writing, purporting to be a *bank note;* and in another as purporting to be a promissory note, for the payment of money; it was holden that the prisoner was entitled to an acquittal, though it was specially found by the jury that the prisoner averred that the instrument was a good bank note, and uttered and published it as a good bank note. The Court said, that the representation of the prisoner could not alter the purport of the instrument, which was what appeared upon the face of the instrument itself; and that, although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of a felony. (*j*)

Reading's case.

In a case where a bill of exchange was directed to "John *Ring*," and the acceptance was by "John *King*;" and the indictment stated that the bill purported to be directed to John *King* by the name of John *Ring*, and that the prisoner forged the acceptance in the name of John *King;* judgment was arrested, because *Ring* could not purport to be *King*. (*k*)

Pateman's case. Note incomplete for want of a signature.

Forging or uttering a note which for want of a signature is incomplete, was holden not to be an offence within the statute, by which forgery of notes was subjected to capital punishment. The prisoner was convicted of the offence of uttering and publishing as true a forged promissory note for the payment of 40*l.*, with intent, &c. It appeared in evidence that the note in question had been originally issued by the Bedford bank as a one pound note, and was then as follows,

"No. 16209. Bedford Bank, £1.
"I promise to pay the bearer One Pound on demand here or at Sir Charles Price, Bart., & Co., Bankers, London.
"Value received.
"Bedford, the 17th day of October, 1817.
"For Barnard, Barnard, and Green.
"THOMAS BARNARD,"

that the note was afterwards altered by cutting out or obliterating the word one and pasting in or inserting in the place of it the word forty, and by cutting off the last line which contained the signature,

(*j*) Jones's case, *cor.* Lord Mansfield, Chelmsford Sum. Ass. 1779, and B. R. Mich. T., 30 Geo., Doug. 300. 1 Leach, 204. 2 East, P. C. c. 19, s. 11, p. 883, and s. 45, p. 952. Upon this case, Mansfield, C. J., in the case of Rex *v.* Collicott, 4 Taunt. 303, observed, "Jones's crime was that of telling a falsehood."

(*k*) Reading's case, O. B. 1793, and 1794. 2 Leach, 590. 2 East, P. C. c. 19, s. 45, p 952, and s. 56, p. 981.

and by some other smaller alterations. The note then was as follows,

"No. 16209. Bedford Bank.

"I promise to pay the bearer Forty Pounds on demand here or at Sir Charles Price, Bart., and Co., Bankers, London.

"Value received.

Bedford, the 17th day of October, 1817.

For BARNARD, BARNARD, and GREEN."

And in this form it was uttered by the prisoner, as a note for forty pounds, and the prosecutor gave him forty pounds in change for it. Objection was taken on behalf of the prisoner, that this note as uttered by him was incomplete, and was not, nor did it purport to be, a promissory note, for want of the signature; and that, therefore, it was not the subject of forgery within the statute: and the point being reserved for the consideration of the Judges, they were unanimously of opinion that the objection was fatal, and the conviction wrong. (*l*)

Burke's case. Instrument averred to be a promissory note, but defective, and held not to be the subject of indictment for forgery at common law.

In a case in which the prisoner had been convicted of a misdemeanor, as for an offence at common law, for disposing of, &c., an instrument in the form of a promissory note, the count upon which the prisoner was found guilty charged in substance as follows: namely, that the prisoner, on, &c., with force and arms, at, &c., unlawfully and fraudulently did dispose of and put away to one J. H. a certain false, forged, and counterfeited *promissory note*, which said false, forged, and counterfeited promissory note was as follows, that is to say,

No. 6414.	Blackburn Bank.	30 Shillings.

I promise to take this as thirty shillings on demand, in part for a two pound note value received.

Entd. J. C.

Blackburn, Sept. 18, 1821. No. 6414.

For Cunliffe, Brooks, & Co.

30 Shillings.	R. Cunliffe.

With intention to defraud R. C., J. C., &c., the said prisoner at the said time he so disposed of, &c., well knowing the same to be false, forged, and counterfeited, to the great damage of the said R. C., &c. It was objected by the counsel for the prisoner, that this instrument could not in any legal sense be denominated a promissory note, as charged in the indictment; and the learned Judge reserved the point for the consideration of the Judges, it appearing also to him that there was great doubt whether the genuine instrument or writing, supposed to be forged and uttered, had any legal va-

(*l*) Reg v. Pateman, Russ. & Ry. 455.

lidity; and whether it was not a mere nullity, for the forgery of which no indictment could be sustained. The case being submitted to the consideration of the Judges, they decided that judgment should be arrested. (*m*)

Defective bill of exchange.

So where the prisoner was indicted for forging and uttering a bill of exchange in the following form,

Nov. 10, 1840.

"Please to pay to your order the sum of forty-seven pounds for value received.

"To Mr. G. PECKFORD, "J. BISHOP."
"Yeovil."

"Accepted G. Peckford," and indorsed "J. Bishop;" it was objected that this was not a bill of exchange; it was nothing more than a request to a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party; Erskine, J., said, he would reserve the point, and the prisoner was convicted, but the learned Judge afterwards thought the objection so clearly good that he recommended a pardon for the offence. (*n*)

Moffatt's case. A bill of exchange drawn for less than the sum, and not in the form required by the 17 Geo. 3, c. 30, holden not to be the subject of forgery.

Where the indictment was for knowingly uttering, as true, a forged acceptance of a bill of exchange; and it appeared that the bill in question was absolutely void by the provisions of a statute at that time in force, it was holden that a conviction could not be supported. The bill of exchange was of the following tenor,

"SIR, Navy Office, 21st December, 1786.

"Seven days after date, please to pay to Mr. John Moffatt, or his order, the sum of three pounds three shillings, and place the same to the account of

WALTER STERLING."

"To GEORGE PETERS, Esq.,
"Bank of England."
"Accepted, G. PETERS."

And the question was, whether, supposing this bill of exchange, to be void, by the provisions of the 17 Geo. 3, c. 30, s. 1, (*o*) not being drawn according to the form therein prescribed, (as it neither specified *the place of abode of the payee*, nor was *attested by any subscribing witness*, though for less than 5*l.*,) the forging of it could be considered as a capital offence within the 2 Geo. 2, c. 25, and 7 Geo. 2, c. 22, on which the indictment proceeded. All the Judges were of opinion that the conviction was wrong; on the ground that, if the bill in question had been a genuine instrument, it would have been absolutely void, and nothing could have made it good: and that, by the 17 Geo. 3, c. 30, such an instrument was no bill, and had not the appearance or semblance of one. (*p*)

(*m*) Rex *v.* Burke, Russ. & Ry. 496. It may be observed of the instrument stated in the indictment that it was not payable to the bearer on demand; that it was not payable in money; that the maker only promised to take it in payment; and that the requisitions of the statute 17 Geo. 3, c. 30, were not complied with.

(*n*) Reg. *v.* Bartlett, 2 M. & Rob. 362.

(*o*) This statute continued in force till the end of the session of parliament, during which the forgery was committed. It was afterwards made perpetual by the 27 Geo. 3, c. 16, but suspended by the 37 Geo. 3, c. 32, and other statutes, until six months after the ratification of a treaty of peace. See 1 Leach, 434, note (*a*).

(*p*) Moffatt's case, O. B. 1787, and Hil. T. 1787. 1 Leach, 431. 2 East, P. C. c. 19, s. 45, p. 954.

The prisoner, Thomas Wall, was convicted upon an indictment for forging and knowingly uttering a will of land of one John Skidmore, deceased, attested by only two witnesses; and, as it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was, so that it might be presumed to be freehold, and, therefore, the will void and of none effect, by the express enactment of the statute of frauds, (*q*) for want of the attestation of three witnesses, the Judges held the conviction wrong; on the ground that, as it was not shewn to be a chattel interest, it was to be presumed to be freehold. (*r*)

Wall's case. A conviction for forging a will of land, attested by only two witnesses, holden to be wrong.

So it has been held, upon a case reserved, that an order for relief of discharged prisoners from a County gaol under the 5 Geo. 4, c. 85, being in many instances ungrammatical and at variance with the act, will not support an indictment for forgery. (*s*)

SECT. II.

Of the Written Instruments in respect of which Forgery may be Committed.

Of the written instruments in respect of which forgery may be committed.

We may now proceed to consider of the written instruments in respect of which forgery may be committed.

It is clearly agreed that, at common law, the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (*t*) Also, it is agreed to be forgery to counterfeit any authentic matter of a public nature; as a privy seal, (*u*) or a licence from the barons of the exchequer to compound a debt, (*v*) or a certificate of holy orders, (*w*) or a protection from a parliament man. (*x*) It is also unquestionable that a man may be, in like manner, guilty of forgery at common law, by forging a deed; (*y*) and, therefore, it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed. (*z*) There seem to be some strong opinions in the books that the counterfeiting of any writings of an inferior nature to those above-mentioned is not forgery at the common law. (*a*) And it has been holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. (*b*) But Hawkins remarks, that it cannot

(*q*) 29 Car. 2, c. 3, s. 5.
(*r*) Wall's case, *cor.* Thomson, B., Worcester Spr. Ass. 1800; and East. T. 1800. 2 East, P. C. c. 19, s. 45, p. 953, 954.
(*s*) Rex *v.* Donnelly, R. & M. C. C. R. 438.
(*t*) 1 Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178. 8 Mod. 66.
(*u*) 1 Roll. Ab. 68, pl. 33, Cro. Car. 326. 1 Jones, 325.
(*v*) 1 Roll. Ab. 65, pl. 5. 2 Buls. 137.
(*w*) 1 Lev. 138.
(*x*) 1 Sid. 142.
(*y*) 1 Roll. Ab. 66. Raym. 81. Ow. 47. 1 Sid. 278. 3 Leon. 170.
(*z*) Moor, 760. Noy, 101. Dy. 302. 1 Hawk. P. C. c. 70, s. 10.
(*a*) 1 Roll. 431. 1 Sid. 16, 155, 451. 1 Roll. Ab. 66. Winch, 40, 90. 1 Leon, 101. 3 Leon, 231. Cro. Eliz. 296, 853. 3 Buls. 265.
(*b*) Cro. Eliz. 166. Yelv. 146. 3 Buls. 265.

surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a public prosecution; and that the opinion of their being punishable by no law seems not to be maintainable, since many of them are most certainly punishable by force of the 33 Hen. 8, c. 1; and that it cannot be a convincing argument that they are not punishable by the common law, because they are of a private nature, as much as other writings concerning other matters; no one being ready to affirm that the making of a false deed concerning a private matter is not punishable at common law. He further says that, perhaps it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature: that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime, unless some one receive a prejudice from it. (*c*)

It is observed as no matter of surprise to find so able a writer as Hawkins treading with so much caution in a path, now indeed too well beaten; but which, previous to the time of the revolution, when paper securities became much more common, had been but little explored. (*d*) But with respect to the foregoing distinction which he takes, between the counterfeiting of such writings the forgery whereof is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, it is said that, however plausible this may be, it is by no means a solution of the difficulty but a mere conjecture, which leaves the crime of forgery as indistinct in principle as before, and tends to confound it with the general class of cheats: (*e*) and that it does not appear upon full consideration of the books to which he refers, that it is any where adjudged, or is even generally laid down, that the counterfeiting of writings of any sort, whereby any person may receive a prejudice, if done *lucri causâ* or *malo animo*, is not punishable as forgery. (*f*) It is also observed, that those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, amount to no more than this, that the imputation of counterfeiting letters or writings *frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification*, is not actionable; and that such letters or writings are incapable from their substance, not from their form, of supporting a charge of forgery, the chief ingredients of which offence are fraud and intention to deceive. (*g*)

Rule now settled that the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced is forgery at common law.

The points to which this discussion relates were fully considered in the following important case, in which it was holden that the counterfeiting of a release, or acquittance for a sum of money, though without seal, was forgery; and that it would be a most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature. (*h*) And this case is considered as having now settled the rule, that *the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law.* (*i*)

(*c*) 1 Hawk. P. C. c. 70, s. 11.
(*d*) 2 East, P. C. c. 19, s. 7, p. 859.
(*e*) 2 East, P. C. c. 19, s. 7, p. 859. And as to the distinction between forgery and cheats, see *ante*, 280, note (*r*).
(*f*) 2 East, P. C. c. 19, s. 7, p. 860.
(*g*) Id. ibid.
(*h*) Bac. Ab. *Forgery* (B).
(*i*) East, P. C. c. 19, s. 7, p. 861.

Ward's case. Forgery of an order to charge certain goods to account, and to appropriate part of the proceeds to the defendant's own use, with intent to defraud, &c. No fraud was effected; but it was holden that this was forgery.

The Attorney General, by order of the House of Lords, filed an information against the defendant John Ward, which charged that he being bound to deliver 315 tons and a quarter of alum, of the value of 1000*l.* to the duke of Buckingham, at a certain day then past, wickedly contriving and intending the said Duke of the said alum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the said alum on &c. at &c., with force and arms, upon the back of a certain certificate in writing, signed by one A. N., falsely forged and counterfeited, and caused to be forged and counterfeited, a certain writing in the words and figures following,

"Schedule

Tons	C.
660	5
315	5
975	10

"Mr. John Ward. I do hereby order you to charge the quantity of 660 tons and 1 quarter of alum, to my account, part of the quantity here mentioned in this certificate; and out of the money arising by the sale of the alum in your hands pay to Mr. W. Ward and yourself 10*l.* for every ton according to agreement; and for your so doing this shall be your discharge.—Buckingham.—April 30th, 1706;" to the evil example, &c., to the great damage of the said duke, and against the peace, &c. And it charged in a second count, that he published the same forged writing, knowing it to be forged, &c. The defendant having been convicted, it was moved in arrest of judgment, that the instrument set forth was not the subject of forgery at common law, and the offence was not, therefore, punishable in this form, but at most punishable only as a cheat; being merely a thing of a private nature, and in effect nothing more than a letter. And it was argued that if the counterfeiting of a letter had been punishable as a forgery at common law, then the making of the 33 Hen. 8, c. 1, to punish those who got the money or goods of others under colour of false tokens, or counterfeit letters was nugatory. It was also urged, that it no where appeared that the Duke of Buckingham had been prejudiced by this; which might have been indictable as a cheat, if he had been so prejudiced; though not as for forgery at common law. But all the court held that this was indictable as a forgery at common law. That none of the books confine the offence to the particular kinds mentioned in 3 Inst. 169; and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex.* That this was recognised in the preamble of the 5 Eliz. c. 14, which recites that the forging of *writings*, as well as of *deeds*, was punishable by law before that statute; but that offenders had been encouraged by the too great mildness of the punishments; and that the 33 Hen. 8, c. 1, did not create new offences, but only enhanced the penalty where the fraud was executed. (*j*)

In the argument upon this case, the following instances of indictments at common law, for forging instruments not under seal, were referred to by the counsel for the crown, and relied upon by the court; an indictment for forging letters of credit to raise money, (*k*) for forging a bill of exchange or a promissory note, (*l*) a bill of

(*j*) Ward's case, Hil. 13 Geo. 1. 2 Str. 747. 2 Lord Raym. 1461. 2 East, P. C. c. 19, s. 7, p 861.

(*k*) Savage's case, Styles, 12.

(*l*) Sheldon's case, Hil. 34 Car. 2, Rot. 35. Rex *v.* Ward, (a brother of the present defendant) Mich. 6 Geo. 1.

lading, (*m*) an acquittance, (*n*) a warrant of attorney, (*o*) a marriage register, (*p*) a protection from a member of parliament, (*q*) with several other cases. (*r*) And the offence of forgery was distinguished from cheats at common law and upon the 33 Hen. 8, c. 1, where the party received an actual prejudice, which was considered not to be necessary to constitute forgery, in which it was sufficient if the party might be thereby prejudiced. (*s*)

Fawcett's case. The defendant having been committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol; and it was holden to be a misdemeanor at common law; although as the attachment was not for the non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. A majority of the judges also thought that it was a forgery at common law.

In a subsequent case Leander Fawcett, who had been committed to the gaol at York, under an attachment, sued out of the court of King's Bench, for a contempt in a civil suit, was indicted for forging a certain writing, purporting to be signed in the name of A. Dawson, (the party who had prosecuted the writ of attachment against him) and to contain the authority of Dawson to the sheriff for his discharge in the following form.—"To the high sheriff of the county of York, his deputy, &c., and gaoler.—As to any writ, attachment, or any other process or cause whatsoever, at the suit, instance, or promotion of me A. Dawson, by reason whereof Leander Fawcett is now detained a prisoner in your custody, you may forthwith discharge and set at liberty him, the said Leander Fawcett, unless detained at the suit of some other person; and for so doing this shall be your warrant and indemnity. (Dated) 26th Feb. 1793. (Signed) A. Dawson, and witnessed by one R. W." The defendant having been convicted, several questions were submitted to the consideration of the Judges; and, amongst others, whether the order were a matter of such a public nature, that the counterfeiting of it would be a forgery at common law; and also, whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorized to discharge the prisoner under it. Lord Kenyon, C. J., and Eyre, C. J., said, that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when Eyre, C. J., was still not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the Judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law. (*t*)

So forging an order from a magistrate to a gaoler to discharge a prisoner, as upon bail having been given, is forgery at common law.

(*m*) Stocker's case, 5 Mod. 137. 1 Salk. 342. The court held the indictment ill for uncertainty; but not because the offence was not forgery at common law.

(*n*) Rex *v.* Ferrers, 1 Sid. 278, and the record is in Trem. Entr, 129.

(*o*) Farr's case, T. Raym. 81.

(*p*) Dudley's case, 2 Sid. 71. 3 Leon, 170.

(*q*) Deakins's case, 1 Sid. 142, *ante*, 338.

(*r*) See 2 East, P. C. c. 19, s. 7, p. 862, note (*g*), where Rex *v.* Hales and Kinnersly, 9 St. Tr. 77, ibid. 93. Rex *v.* Gibson, 1 Sess. Cas. 428, and ibid. 432, are referred to, as relating to promissory notes and indorsements; and a reference is made upon the subject in general to 13 Vin. Ab. 460. Trem. P. C. 100. 2 Show. 20. O'Brian's case, 7 Mod. 378. 2 Sess. Cas. 366. 2 Str. 1144.

(*s*) 2 East, P. C. c. 19, s. 7, p. 862: And see Wilcox's case, Russ. & Ry. 50, where a doubt was entertained whether the offence came under the denomination of a forgery at common law.

(*t*) Fawcett's case, York Spr. Ass. 1793, and East. T. 1793. 2 East, P. C. c. 19, s. 7, p. 862. And see the note (*a*), in which the learned writer says, that Mr. Justice Buller's MS. only made a *quære* as to the opinion of Eyre, C. J.; but that it appeared from other MSS. as well as Mr. Justice Buller's, that the Judges all concurred to sustain the conviction on the general ground only before mentioned.

The prisoner was indicted for a misdemeanor for forging the following instrument,

Forging an order from a magistrate to a gaoler to discharge a prisoner.

"SIR,

"I do hereby authorize you to discharge R. Harris from your county gaol, Oxford, as J. Mace and J. Anker are become sureties, and bound in a bond of 40*l.* each for his appearance at the next General Quarter Sessions, Oxford, before me J. W. Jones, one of his Majesty's justices of the peace for the said county of Oxford.

"I am, your's respectfully,

"J. W. JONES."

"To the Governor of the county gaol, Oxford."

It appeared that Harris, being a prisoner in the county gaol for want of sureties for his appearance at the said sessions, caused the said letter to be written and conveyed to the governor of the gaol. The governor stated the usual course to be that where a man was in custody merely for want of sureties, and the governor received a letter from a magistrate of the county, certifying that sureties had been entered into before him, the governor discharged such prisoner upon entering into his own recognizances before a magistrate in the neighbourhood: but he stated that he certainly should not have discharged the prisoner, as he did not believe the letter was in the handwriting of Mr. Jones. Tindal, C. J., felt some doubt whether the counterfeiting the letter amounted to forgery at common law, and reserved the point for the consideration of the Judges, who held the conviction right. (*u*)

Forging a county court summons.

Where the defendant was indicted for forging a county court summons, and the paper in question was a printed form of a distringas, which had had the words respecting the distraining struck out with a pen, and the word "summon" inserted instead, and it appeared that when the county court clerk was absent, the clerks in the office, if they were busy, sometimes gave out blank summonses to the attornies, who filled them up themselves; Patteson, J., said, "It is highly irregular; but I know that these summonses are sometimes given out in blank. I am not prepared to say, that, after the notice that this trial will give parties, as to the impropriety of the practice, I should not hold that this mode of filling up a summons, or altering a distringas into a summons, was not forgery." (*v*)

SECTION III.

Of the Fraud and Deceit to the Prejudice of another's Right.

Of the fraud and deceit to the prejudice of another's right.

With respect to the *fraud and deceit*, to the prejudice of another's right, it should always be kept in mind, that though in cases of forgery, properly so called, it is, as we have seen, (*w*) immaterial whether any person be actually injured or not, provided he *may be*

(*u*) R. *v.* Harris, R. & M. C. C. R. 393. 6 C. & P. 129.

(*v*) Rex *v.* Collier, 5 C. & P. 160.

(*w*) Ward's case, *ante*, p. 359.

thereby prejudiced, yet the fraud and intention to deceive constitute the chief ingredients of this offence. Thus Buller, J., speaks of it as the making a false instrument "with intent to deceive;" (*w*) and Eyre, B., as a false signature made, "with intent to deceive." (*x*) And it is observed, that in the word "deceive" must doubtless be intended to be included an intent to defraud; (*y*) and that the offence was accordingly defined by Grose, J., as the false making a note or other instrument "with intent to defraud." (*z*) Eyre, B., also in another case defined the offence to be the false making an instrument which purports on the face of it to be good and valid, for the purposes for which it was created "with a design to defraud." (*a*) And it has been argued, that it is no answer to a charge of forgery to say that there was no special intent to defraud any particular person, because *a general intent to defraud* is sufficient to constitute the crime; for if a person do an act the *probable* consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent. (*b*) And it has been holden, that in an indictment for forgery, it is sufficient to aver a general intent to defraud a certain person, which intention may be made out by the facts in evidence at the trial. (*c*)

Intent to deceive.

.545. 731. infra

Forging a bill of exchange payable to the prisoner's own order, and uttering it without indorsement as a security for a debt was holden to be a complete offence. (*d*)

The offence of disposing of and putting away forged bank notes was holden to be complete, though the person to whom they were disposed of was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes for the purpose of disposing of them. The Judges held that if the prisoner put the notes off with intent to defraud, the intent existing in the mind was the essence of the crime, although, from circumstances of which he was not apprised, he could not in fact defraud the prosecutor. (*e*)

Uttering a forged stock receipt to a person who employed the prisoner to buy stock to the amount therein specified, and had advanced the money, was held to be sufficient evidence of an intent to defraud that person; and it was also holden that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, did not repel the presumption of an intent to defraud. (*f*)

Giving an employer a forged receipt

If a person gives his employer a forged receipt for money, with intent to make the employer believe that money already obtained

(*w*) Coogan's case, 1787. 2 East, P. C. c. 19, s. 1, p. 853, and s. 43, p. 948. *Ante*, p. 346.

(*x*) Taylor's case, 1779. 2 East, P. C. c. 19, s. 1, p. 853, and s. 47, p. 960.

(*y*) 2 East, P. C. c. 19, s. 1, p. 853.

(*z*) Rex *v.* Parkes and Brown. 1797. 2 East, P. C. c. 19, s. 1, p. 853, and s. 49, p. 963. 2 Leach, 775.

(*a*) Rex *v.* Jones and Palmer, 1785. 1 Leach, 366.

(*b*) By Shepherd *arguendo* in Tatlock *v.* Harris, 3 T. R. 176, and it is observed in 1 Leach, 216, note (*a*), that this doctrine was seemingly adopted by the court.

(*c*) Powell's case, 1 Leach, 77. It is observed, however, that in Rex *v.* Bigg, 3 P. Wms. 419, it was holden not to be an objection to a special verdict that the forgery was not found to have been committed for the sake of lucre, or to defraud the party. 2 East, P. C. c. 19, s. 3, p. 854.

(*d*) Rex *v.* Birkett, Russ. & Ry. 86, *post*.

(*e*) Rex *v.* Holden, Russ. & Ry. 154, and it was holden that the indictment need not state to whom the note was disposed of, it being sufficient to state that the prisoner disposed of the note with intent to defraud the bank, he knowing it at the time to be forged.

(*f*) Rex *v.* Sheppard, Russ. & Ry. 169.

has been applied in a certain way, he is guilty of uttering with intent to defraud his employer. Upon an indictment for forging and uttering the following receipt,

with intent to make him believe that money before received has been expended is sufficient.

"May 4. Mr. Martin Bought of Laing and Son.
"Wholesale Druggists, Bristol.
"Six quarts of Settledated Striking Acid.
"Settled, £4. SAM. HUGHES."

It appeared that the prisoner was entrusted by Miss Welsh to carry on a tanning business, and that on the 3rd of May, he told her, that if she would let him have 4*l.*, he could procure a liquid which would save a great deal of money in bark; that there was a person going to Bristol, and it could only be procured there or in London. She let him have the 4*l.* On the 5th of May, the prisoner gave her the document in question, and said it was the receipt for the essence he had purchased in Bristol. No such firm as Laing and Son existed, nor any such person as Hughes, connected with any druggist at Bristol, nor any such article as settledated striking acid; and the document was proved to have been printed at Gloucester, the manuscript having been taken to the printer by the prisoner's daughter. The counsel for the prisoner objected that there was no evidence of an intent to defraud Miss Welsh; she had already parted with her money under a false representation, and the offence, if any, was that of obtaining money under false pretences. They distinguished *Rex* v. *Sheppard*, (*g*) because there the money was given at the same time that the receipt was produced; here, nothing was ever said about a receipt at the time of obtaining the money; and the giving it afterwards was the mere voluntary act of the prisoner, and could not in any way defraud Miss Welsh. It was answered, that the prisoner was accountable to Miss Welsh for the application of the 4*l.* to the purpose for which he had obtained it, and, therefore, that the forged receipt was part of the fraud. Patteson, J., was of this opinion, and told the jury that if they believed the prisoner to have uttered the forged receipt for the purpose of deceiving Miss Welsh into a belief that he had applied the 4*l.* to the purpose for which he had obtained it, such purpose being a mere pretence and fraud, they might find him guilty of uttering it with intent to defraud her. The jury found the prisoner guilty, and upon a case reserved, upon the question whether the learned judge was right in directing the jury as above stated, the judges were unanimously of opinion that the direction was right. (*h*)

So where on an indictment for forging the following receipt,

Overseer uttering a forged receipt for county rate, with intent to defraud the high constable.

"£16. 15*s.* 6*d.* 6th January, 1830.
"For the High Constable,
"JAMES HUGHES,"

with intent to defraud E. Grundy, it appeared that the prisoner in 1830, and for many successive years down to 1837, had been assistant overseer of Rivington, and that he was in the habit of receiving warrants from Mr. Grundy, the high constable of the

(*g*) *Supra*, p. 362.
(*h*) Rex *v.* Martin, R. & M. C. C. R. 483. S. C. 7 C. & P. 549.

hundred, ordering him to levy on the inhabitants of Rivington their quota of the county rate. In 1830, having levied to the amount of 11*l.* 5*s.* 6*d.*, he paid that sum into a bank at Manchester, to the credit of the high constable, and the clerk of the bank gave him a receipt for 11*l.* 5*s.* 6*d.* In 1838, the prisoner was removed from his office, and handed over to his successor a great bundle of papers, amongst which the receipt in question was found, but the figures had been altered from 11*l.* 5*s.* 6*d.* to 16*l.* 15*s.* 6*d.* The prisoner's accounts had been passed and allowed from time to time. It was contended that there was no felonious uttering of the receipt; it was not delivered over by him with any intention that it should be used as a voucher. His own accounts had been settled, and the time for auditing them had passed. There was no evidence of any intent to defraud the high constable, or that the utterance of the instrument in its altered form would have that effect. Alderson, B., "I am of opinion, that if the prisoner handed the receipt over to his successor as one of his vouchers, knowing that the figures had been fraudulently altered, he was thereby guilty of a felonious uttering, and that the intention is correctly described to be that of defrauding Grundy, the high constable: for what is the necessary effect of so handing over the altered receipt? The parish would discover from that receipt that the high constable had been paid 16*l.* 15*s.* 6*d.* instead of 11*l.* 5*s.* 6*d.* (to which latter sum only he was entitled); and the effect would be, that the high constable becomes liable to refund to the parish the sum which the receipt shewed that he received in excess. That being the necessary consequence of the prisoner's act, it must be presumed that he intended it, and no proof of such actual intention is necessary. That has been ruled by all the judges, in a case reserved, (*h*) in consequence of a supposed opinion of Lord Abinger to a different effect. The lapse of time can make no substantial difference. Supposing a party forges a receipt for the payment of a debt of more than six years' standing, it is true the debtor might be already protected by the Statute of Limitations, but still the forged receipt would alter the position in which the creditor would stand, and it would clearly be a felonious forgery." (*i*)

Guarantees given to the bank at which a forged bill is uttered do not negative an intent to defraud.

The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not completely negative the intent to defraud the bankers. Upon an indictment for forging and uttering a forged promissory note for 50*l.* with intent to defraud the Gloucestershire Banking Company, it appeared that the prisoner had deposited with them three guarantees for 100*l.* each, signed by his brothers, by which they undertook to be answerable, if he overdrew his account, and it was admitted that at the time of the trial he did not owe the bankers anything. It was submitted that there could be no intent to defraud the bankers, as they held guarantees to a much larger amount than the note. Patteson, J., "It is impossible for me to say that at the time this note was given to the bankers, the prisoner, because he had given guarantees, had no intent to defraud; that is a question for the jury." (*j*)

(*h*) Reg. *v.* Hill, *post*, p. 365.
(*i*) Reg. *v.* Boardman, 2 M. & Rob. 147. 2 Lew. 187.
(*j*) Rex *v.* James, 7 C. & P. 553.

Knowingly uttering a bill of exchange, all the names of which are fictitious, is within the Forgery Statutes, though the party uttering intended to provide for the payment of the bill, the fact of the parties not being real not being known to the person taking the bill. The prisoner was tried for uttering a forged bill of exchange with intent to defraud S. Minor, and it appeared that the parties to the bill were all fictitious persons, and that circumstance was fully known to the prisoner at the time he uttered it to S. Minor, and no doubt existed, therefore, that the names were forged, and the bill was uttered by the prisoner with the full knowledge of that fact. There was, however, reason to contend that the prisoner, who had filled a respectable station in life as a farmer, and who had endorsed the bill to Minor, intended at the time he so uttered it to take up and pay the bill when it arrived at maturity. No such intention, however, if it existed, was ever communicated to Minor. For the prisoner it was urged to the jury, that the existence of such an intention, if they believed it, was ground upon which they might properly negative the intention to defraud Minor as charged in the indictment; and a case was cited in which Lord Abinger, at the previous assizes for Shrewsbury, had so decided. In summing up the case, Alderson, B., told the jury, (after consulting Gurney, B.,) that if they were satisfied that the prisoner uttered the bill in payment of a debt due to Minor, knowing at the time he so uttered it that it was a forgery, and meaning that Minor should believe it to be genuine, they were bound to infer that he intended to defraud Minor. The prisoner was found guilty; but Alderson, B., thought it proper, from respect to the opinion of Lord Abinger, to state a case for the opinion of the Judges, in order to know if the rule laid down by him in his summing up to the jury was correct, and the judges having considered the case, were unanimously of opinion that the conviction was right. (*k*)

Knowingly uttering a forged bill to a person, meaning that he should believe it to be genuine is sufficient, although the utterer intend to provide for the payment of the bill.

So where the prisoner was indicted for forging and uttering a bill of exchange, which he had given to the National Provincial Bank at Hereford, as a security for the debt he owed them; Patteson, J., told the jury, "If the prisoner at the time he uttered this bill, knew that the acceptance was forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is that he meant to defraud. That was the opinion of the Judges in a late case reserved for their consideration. (*l*) There was an earlier case of *Rex* v. *James*, (*ll*) tried before me at Gloucester, in which I did not lay down this proposition strongly enough; but the law on the point is as I have now stated." (*m*) And upon a similar indictment against the same prisoner the same very learned Judge said, "If a person knowingly pays a forgery away as a good bill, it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used; as everything which is the natural consequence of the act must be taken to be the intention of the prisoner." (*n*)

(*k*) Reg. *v.* Hill, 2 Moo. C. C. R. 30. S. C. 8 C. & P. 274.

(*l*) Reg. *v.* Hill, *supra*.

(*ll*) *Ante*, p. 364.

(*m*) Reg. *v.* Cooke, 8 C. & P. 582.

(*n*) Reg. *v.* Cooke, 8 C. & P. 586. See also Reg. *v.* Beard, 8 C. & P. 143, where Coleridge, J., said, "As to the intent, I must tell you that every man is taken to intend the natural consequences of his own

Intent to take up a forged bill immaterial, so also payment.

So in a still later case where the prisoner was also tried for forging and uttering a forged acceptance of a bill of exchange, which had been paid by the prisoner before any proceedings were instituted against him, Parke, B., in addressing the jury, said, "With respect to the intent to defraud, I have no doubt that you will take the law from me, which is this, that a person is guilty of forgery, notwithstanding he may himself intend ultimately to take up the bill, and may suppose that the party whose name is forged will be no loser. If in the present case you are satisfied that the prisoner knew this acceptance to be forged, and uttered it as true, and believed that the bankers would advance money on it, which they would not otherwise do, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act. It appears that this bill has since been paid by the prisoner, but that will make no difference if the offence has been once completed at the time of the uttering." (*o*)

It has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery or from that person's ordinary caution it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (*p*)

Uttering a request directed to a married woman in her maiden name.

Where a forged request for the delivery of goods was addressed in her maiden name to a female, who prior to the date of it had married, it was held that the intent might be laid to be to defraud the husband. Upon an indictment for uttering the following forged request for the delivery of goods,

"Miss Inwood
"Please to let my carpenter have 28lbs. of white lead, and a mop, "for the ship Hunter.
"11th November, 1834." "WILLIAM PESCOD, Master."

It appeared that the prisoner presented the order on the day of the date at a shop which had been kept by Miss Inwood for several years, and at which Captain Pescod had been in the habit of purchasing goods for his ship; but in the month of January previous Miss Inwood had married J. Barrow, and the goods were delivered to the prisoner by him. The Recorder doubted if the indictment was sustained there not being any averment of an intent to defraud Miss Inwood; but the prisoner being found guilty, he consulted Lord Denman, C. J., Park, J., A. J., and Bolland B., and they were of opinion that the conviction was right. (*q*)

Offering a forged bill at a bank where it is sure not to be paid.

Upon an indictment for forging and uttering an order for the payment of money, signed John Phillips, with intent to defraud F. Rufford and others, it appeared that the order was presented at Messrs. Rufford's bank; but they would not pay the amount; and no person named John Phillips kept cash with them; it was objected that there could be no intent to defraud Messrs. Rufford, as there was

act. If I present to you a bill with the name of one of my friends upon it, knowing it to be forged, it would be idle to say that I had no intent to injure him."

(*o*) Reg. *v.* Geach, 9 C. & P. 499.

(*p*) Rex *v.* Mazagora, Russ. & Ry. 291.

(*q*) Rex *v.* Carter, 7 C. & P. 134.

not the most remote chance of their paying the money; but it was held that the prisoner's going to Messrs. Rufford's and presenting the paper for payment, was quite sufficient evidence of an intent to defraud them. (*r*)

Where on an indictment against an attorney for forging a county court summons, it appeared that a distringas had been altered by striking out the words respecting the distraining and inserting the word "summon" instead, and this paper had been served on the prosecutor, who paid the costs, as if it had been a genuine summons, and the debt claimed of him; Patteson, J., held that there was no evidence of any intent to defraud the prosecutor, as he would have had just the same costs to pay if the summons had been sued out in the most regular manner. (*s*)

Forgery consists in the endeavouring to give an appearance of truth to a mere deceit and falsity.

It is said by Hawkins that the notion of forgery does not seem so much to consist in the counterfeiting of a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. (*t*)

But as the fraud and intention to deceive, by imposing upon the world that as the act of another, which he never consented to, are the chief ingredients which constitute this offence, so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command. (*u*)

So, if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name, without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. (*x*) Also he cannot be punished as guilty of forgery who raises the word *libris* out of a bond made to himself, and substitutes *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet this it seems would be forgery if by the circumstances of the case it should in any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person: and it is holden, that such an alteration, even without these circumstances, is a misdemeanor; though it do not amount to forgery. (*y*) So that it is well observed, that at any rate it is very dangerous to tamper in these matters. (*z*)

(*r*) Rex *v.* Crowther, 5 C. & P. 316, Bosanquet, J.

(*s*) Rex *v.* Collier, 5 C. & P. 160.

(*t*) 1 Hawk. P. C. c. 70, s. 2.

(*u*) 1 Hawk. P. C. c. 70, s. 2, and Bac. Ab. *Forgery* (A).

(*x*) Moor, 760. 1 Hawk. P. C. c. 70, s. 5. Bac. Ab. *Forgery* (A).

(*y*) 1 Hawk. P. C. c. 70, s. 4. Bac. Ab. *Forgery* (A). As to the rasure of deeds see Shep. Touch. 68, 69.

(*z*) 2 East, P. C. c. 19, s. 3, p. 854.

SECTION IV.

Of Principals and Accessories.

Of principals and accessories.

It has been stated in a former part of this work, that it is laid down generally in the books, that all are *principals* in forgery; and that whatever would make a man accessory before the fact in felony, would make him a principal in forgery: but that it is conceived, this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (*a*) And with respect to a case (*b*) upon the 5 Eliz. c. 14, which would seem to lead to a contrary conclusion, it is elsewhere observed that, from its circumstances there seems no reason for taking that case out of the general rule, that when a statute makes a new felony, it incidentally and necessarily draws after it all the concomitants of felony, namely, accessories before and after. (*c*) And this doctrine is confirmed by several cases.

Soares, Atkinson, and Brighton's case. Where it appeared that two of the prisoners were privy to the uttering of a forged note by previous concert with the other prisoner who actually uttered it; but that they were not present at the fact of the uttering, it was holden that they were accessories before the fact, and were therefore entitled to an acquittal on an indictment charging them as principals.

Three prisoners, Soares, Atkinson, and Brighton, were charged by the indictment with feloniously uttering and publishing as true a certain false, forged, and counterfeit bank note for 5*l.* knowing it to be forged, &c. with intent to defraud the governor and company of the Bank of England. And the indictment also contained the other usual counts, for forging, and for disposing of and putting away the note, with the like intent; together with counts stating the intent to be, to defraud the person to whom it was offered in payment. It was proved that the prisoner, Brighton, offered the note in question in payment for a pair of gaiters at a shop in Gosport, and that the other two prisoners, Soares and Atkinson, were not with Brighton at the time he so offered the note, but were waiting at Portsmouth till he should return to them, it having been previously concerted *between the three prisoners* that Brighton should go over the water from Portsmouth to Gosport, for the purpose of passing the note, and when he had passed it, should return to join the other two prisoners at Portsmouth; they all three *knowing* that it was a forged note, and having been concerned together in putting off another note of the same sort, and in sharing the produce among them. Upon this evidence, the counsel for the prisoners Soares and Atkinson objected, on their behalf, that they were not guilty of the charge made against them in this indictment, not having been present at the time the other prisoner uttered the note, nor so near as to be able to aid and assist him; and that they could be charged only as accessories before the fact. The jury found that the forged note was uttered by the prisoner Brighton, in concert with the other two prisoners, and found them all three guilty The prisoner Brighton was left for execution: but judgment was respited as to the other two, whose case was referred to the consideration of the Judges, who had no doubt that they were entitled to an acquittal on this indictment charging them

(*a*) *Ante*, vol. 1, p. 33.
(*b*) Bothe's case, Moor, 666. *Ante*, vol. 1, p. 33, note (*v*).
(*c*) 2 East, P. C. c. 19, s. 52, p. 973, 974. And see *ante*, vol. 1, p. 34, *et seq.*

as principals, they not being present at the time of the uttering, or so near as to be able to afford any assistance to the accomplice who actually uttered the note. The prosecutor was, therefore, required to state on what grounds the contrary was meant to be argued; and no suggestion of the kind being made, the two prisoners were recommended for a pardon. (*d*)

Constructive presence.

So in a late case at the Old Bailey, Graham, B., is reported to have said, "It has frequently been held that what would amount to a constructive presence at common law will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at *some little distance in the street;* it was objected that the latter was not liable as a principal. I saved the point; and the Judges were of opinion that the utterer only was liable." (*e*)

The case referred to by the learned Judge was probably that of *Rex* v. *Davis* and *Hall*, tried not at Derby but at the Lent Assizes for Nottingham, in the year 1806, and in which it was holden not to be sufficient, to make a person a principal in uttering a forged note, to prove that such person came with the utterer to the town in which it was uttered, went out with him from the inn at which they had put up a little before the time when it was uttered, joined him again in the street a little after the uttering, and at some little distance from the place of the uttering, and ran away when the utterer was apprehended. (*f*)

Constructive presence in the actual forgery.

But it has been holden that where several persons were in combination, and jointly co-operated in making forged bank of England notes, they were all guilty as principals, though each of them executed by himself a distinct part of the forgery, and though one of them was not present when the notes were completed by the signature. (*g*)

So also if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone, in the absence of the others. (*h*) So also the makers of the paper and plate respectively for the purpose of forging a note, afterwards filled up by a third person, are principals in the forgery with that person, though each executed his part in the absence of the others, and without knowing by whom the other parts were executed. (*i*)

But where three persons were jointly indicted under the 1 Wm. 4, c. 66, s. 19, for feloniously using plates containing impressions of forged foreign notes, it was held that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all

(*d*) Rex *v.* Soares, Atkinson, and Brighton, East. T. 1802, 2 East, P. C. c. 19, s. 52, p. 974. Russ. & Ry. 25. And see Rex *v.* Badcock and others, Trin. T. 1813, Russ. & Ry. 249, and Rex *v.* Stewart and Dickens, East. T. 1818, Russ. & Ry. 363.

(*e*) By Graham, B., in the case of Brady and others, for forging and uttering a check, O. B. June, 1813, 1 Stark. Crim. Plead. 84, in the note. But see upon this subject, *ante*, vol. 1, p. 26, *et seq.*

(*f*) Rex *v.* Davis and Hall, *cor.* Graham, B., Nottingham Lent Ass. 1806, and East. T. 1806. Russ. & Ry. 113.

(*g*) Rex *v.* Bingley and others, Russ. & Ry. 446.

(*h*) Rex *v.* Kirkwood, R. & M. C. C. R. 304, *ante*, vol. 1, p. 33, 34.

(*i*) Rex *v.* Dade, R. & M. C. C. R. 307, *ante*, vol. 1, p. 33, 34.

either present together at one act of using, or assisted in one such act, as by two using, and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. (*j*)

And where three prisoners were indicted under the same section, for feloniously engraving a promissory note of the Emperor of Russia, and it appeared that the plates were engraved by an Englishman, who was an innocent agent, and two of the prisoners only were present at the time when the order was given for engraving the plates, but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction; it was held, that in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. (*k*)

Morris's case. Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize-money, it was holden that they might be indicted together; the wife as a principal on the 49 Geo. 3, c. 123, and the husband as an accessory before the fact at common law.

In the following case a wife was indicted as a principal in a forgery on the 49 Geo. 3, c. 123, s. 13, and her husband as an accessory before the fact at common law. The indictment charged Sarah Morris, with forging an order and certificate for receiving prize-money, which had become due to one Henry Taylor, a petty officer in the naval service, with intent to defraud the commissioners of Greenwich Hospital; and John Morris, with inciting, counselling, aiding, procuring, &c., the said Sarah Morris to commit the said felony. The second count charged Sarah Morris with having knowingly uttered the order and the certificate by the incitement of John Morris. And there were many other counts in which the offence was charged with some variations. It appeared that H. Taylor, whose name purported to be subscribed to the order, was, in the year 1811, a petty officer on board his Majesty's frigate the Frederickstein; and in such capacity became entitled to a share of certain prize-money arising from the capture of a rich vessel. In November, 1813, the prisoner, Sarah Morris, who was the wife of the other prisoner, John Morris, and real or pretended daughter of H. Taylor, applied to a clerk in the cheque office, in Greenwich Hospital, for the payment of the prize-money due to H. Taylor; and produced at the same time the order stated in the indictment. She was desired to call again in about ten days, and went away, leaving the order with the clerk. But in about four or five days she came again, and expressed great anxiety to be immediately paid the money, when she was told that the money had not yet come in; and the order was given back to her with a request that she would not apply again until she was duly informed that the money had been remitted to the office. Almost immediately after this second visit, the other prisoner, John Morris, wrote a letter to the clerk of the cheque on the subject. On the 8th December, notice was given

(*j*) Rex *v.* Harris, 7 C. & P. 416, Littledale and Gaselee, Js.

(*k*) Reg. *v.* Mazeau, 9 C. & P. 676. Patteson, J.

to Sarah Morris that the prize-money was come in, and that she might receive the share of it, to which H. Taylor was entitled; upon which she went to the office with the same order and certificate, which she produced; and had nearly obtained the warrant for the payment of the money, when circumstances occurred which caused suspicion, and she and her husband were shortly afterwards apprehended. It was also proved that H. Taylor, whose name purported to be signed to the order, could not write, and was obliged always to make a mark whenever his signature was required; and that the name of the officer, by whom the certificate purported to be subscribed, was not in his handwriting. The landlord of the house in which the prisoners lodged, stated that the prisoner, John Morris, had, in two or three instances, ordered his wife, Sarah Morris, to go to Greenwich Hospital respecting about 30*l.* of prize-money due to H. Taylor, his wife's father; that he was constantly talking of having been H. Taylor's shipmate; that, at one time, Sarah Morris told her husband that she had been to Greenwich; that the prize-money was not then ready; that the office had not yet received it; and that he, the witness, had lent the prisoner, John Morris, money, upon a belief that he had prize-money to receive. He also swore that he really believed that Sarah Morris went to receive it in obedience to her husband's orders. And, as to this fact, it was proved that the prisoner, John Morris, had signed a paper, stating that his wife had acted in this business entirely under his orders and directions. It was also proved by a witness who had formerly been a captain's clerk in the navy, that in November, 1813, the prisoner, John Morris, represented to him that there was about 30*l.* prize-money due to his father-in-law, H. Taylor, as a caulker in the Frederickstein frigate; that he did not like to go to a Jew upon the subject: and that he would be obliged to him if he would fill up the blanks in certain papers which he produced; that the witness accordingly filled up the blanks, excepting the signatures; and that, on observing there was a spare half sheet to the papers he so filled up, he advised the prisoner, John Morris, to send it by the post to his father-in-law; but that he replied that his wife was going to Portsmouth, on board the Gladiator, and that she would get it done. This witness further stated, that he afterwards met the prisoner, John Morris, who then told him that he had got the papers regularly signed by H. Taylor and the captain; and that he was going to send his wife to Greenwich Hospital for the money. Upon this evidence it was submitted by the counsel for the prisoners, that as Sarah Morris, in the part she took in this transaction, had clearly acted under the directions and coercion of her husband, she could not be found guilty; (*l*) and that if she was innocent as a principal, the other prisoner could not be guilty as an accessory. And the jury having found both the prisoners guilty, the case was reserved for the consideration of the twelve Judges; who were unanimously of opinion that the prisoner, Sarah Morris, was guilty of uttering the forged instrument, knowing it to be forged; and that the prisoner, John Morris, her husband, was guilty of the offence with which he was charged in the indictment, namely, that of an accessory before the fact at common law. (*m*)

(*l*) *Ante*, vol. 1, p. 17, 21. Leach, 1096. Russ. & Ry. 270. And see
(*m*) Rex *v.* Morris, East. T. 1814. 2 Rex *v.* Martha Hughes, *ante*, vol. 1, p. 22.

Of causing, assenting, and consenting.

It is said by Lord Coke, that to *cause* is to procure or counsel one to forge; to *assent* is to give his assent or agreement afterwards to the procurement or counsel of another; to *consent* is to agree at the time of the procurement or counsel, and he in law is a procurer. (*n*) But it is observed, that the *assent* here mentioned must be understood of an assent to the design of forging, before the fact of the forgery committed; (*o*) since, according to Lord Hale, an assent after the fact committed makes not the party assenting guilty or principal in the forging; but it must be a precedent or concomitant assent. (*p*)

Trial of accessories.

By the general provisions of the 7 Geo. 4, c. 64, s. 9, 10, accessories before the fact may be tried as such, or for a substantive felony; and all accessories may be tried by any Court which has jurisdiction to try the principal felon, although the offence may have been committed on the seas or abroad; and if the offences have been committed in different counties, the accessories may be tried in either. (*q*)

SECTION V.

Of the Indictment, Trial, Evidence, and Punishment.

Of the indictment, trial, &c.

It now remains, in conclusion of this Chapter, to mention some of the points of general application concerning the indictment, trial, evidence, and punishment in cases of forgery.

Of the indictment. Word "falsely."

It is usual to charge in the indictment that the party *falsely* forged and counterfeited, &c.: but it is said to be enough to allege only that he *forged and counterfeited* without adding *falsely*, which is sufficiently implied in either of those terms, particularly in the word to *forge*, which is always taken in an evil sense in our law. (*r*) It has been holden that an indictment is good, and not repugnant, although it state that the party *falsely* forged a *false* writing. (*s*)

Statement of the forged instrument.

It was essentially necessary formerly to an indictment for forgery, that the instrument alleged to be forged, should be set forth in words and figures; (*t*) though, in general, figures must not be used in an indictment. (*u*)

2 & 3 Wm. 4, c. 123, s. 3. Sufficient to describe the instrument as in larceny.

But, "in order to prevent justice from being defeated by clerical or verbal inaccuracies," it is enacted by the 2 & 3 Wm. 4, c. 123, s. 3, "that in all informations or indictments for forging or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient

(*n*) 3 Inst. 169. And in a strict sense he that causes a forgery to be done is a forger himself: but then it ought to be so laid in the indictment. *Per Cur.* in Rex v. Stocker, 5 Mod. 138.

(*o*) 2 East, P. C. c. 19, s. 52, p. 973.

(*p*) 1 Hale, 684.

(*q*) See the 1 Wm. 4, c. 66, s. 24, *post*, p. 410.

(*r*) 2 East, P. C. c. 19, s. 57, p. 985. Savage's case, Styles, 12. The Latin words were *fabricavit et contrafecit*. Mariot's case, 2 Lev. 221. Dawson's case, 1 Str. 19.

(*s*) Rex v. Goate, 1 Lord Raym. 737.

(*t*) 2 East, P. C. c. 19, s. 53, p. 975. Mason's case, Northumberland Sum. Ass. 1792. Mich. T. 1792. East. T. 1793. Trin. T. 1793. 2 East, P. C. ibid.

(*u*) 1 Chit. Crim. L. 176.

to describe the same in such manner as would sustain an indictment for stealing the same."

Description of forged instruments under the 2 & 3 Wm. 4, c. 123, s. 3.

This section applies to all forged documents, whether the subject of larceny or not; and in the latter case, the Judges thought that the words of the statute must be read in this way, that, "it shall be sufficient to describe the instrument in such manner as would sustain an indictment for stealing the same, supposing it to be the subject of larceny." (*x*)

It is sufficient therefore to aver that the prisoner uttered, "a certain false and forged writing, as and for a copy of an entry, in a certain register of marriages, kept by the vicar of the parish of Seighford, in the county of Stafford, of a matter relating to a marriage between T. Vaul, and A. Poultney." (*y*) So it is sufficient to describe a receipt as, "a certain receipt for money, that is to say, a receipt for the sum of 3*l.* 15*s.* 9*d.*" (*z*) So a request for the delivery of goods, is well described as, "a certain request for the delivery of goods to one J. Robinson." (*a*) So it is sufficient to describe a deed, as "a certain deed, purporting to be made on the 1st day of March, 1837, between R. Williams of the one part, and D. Griffiths of the other part, and purporting to be an underlease by the said R. Williams, to the said D. Griffiths, of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of 8*l.*, payable on the 1st day of March, in every year, and purporting to contain a covenant by the said D. Griffiths, with the said R. Williams, for the payment by the said D. Griffiths, to the said R. Williams, of the yearly rent of eight pounds." (*b*) So an order for the payment of money is sufficiently described as, "a certain order for the payment of money, to wit, for the payment of 60*l.*" (*c*) So a warrant for the payment of money may be stated to be, "a certain warrant for the payment of money, to wit, for the payment of the sum of 4*l.* 10*s.*" (*d*) So, after verdict, a count has been held good, which stated that the prisoner had in his possession two plates, upon which was engraved in the Polish language, "a certain promissory note for payment of five *florins*, purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of Nicolas, then being king of a certain foreign country called Poland." (*e*) So it is enough to describe a promissory note as, "a certain promissory note for the

(*x*) Per Patteson, J., in Reg. *v.* Sharpe, 8 C. & P. 436, stating what the opinion of the judges was in Reg. *v.* Martin, R. & M. C. C. R. 483.

(*y*) Reg. *v.* Sharpe, *supra*, Park, J. A. J., and Patteson, J.

(*z*) Reg. *v.* Vaughan, 8 C. & P. 276. According to the report of Rex *v.* Martin, R. & M. C. C. R. 483, this point was decided in that case in the same way; but that is inaccurate, and the report in 7 C. & P. 549, is correct. "There were two questions in that case, one on the second and one on the fourth count; and the second count being held good, it became unnecessary to decide the question on the fourth count. The judges, therefore, did not decide it, but they did consider it, and the strong inclination of their opinion was that the count was good, though it did not set out the instrument," per Patteson, J., in Reg. *v.* Sharpe, *supra*. C. S. G.

(*a*) Reg. *v.* Robson, 9 C. & P. 423, decided by all the judges upon a case reserved.

(*b*) Reg. *v.* Davies, 9 C. & P. 427, decided by all the judges upon a case reserved.

(*c*) Reg. *v.* Raake, 2 Moo. C. C. R. 66. S. C. 8 C. & P. 626, and see 9 C. & P. 429, note (*a*). See Reg. *v.* Atkinson, 1 Carr. & M. 325, *post*.

(*d*) Reg. *v.* Rogers, 9 C. & P. 41, Parke, B., and Bosanquet, J.

(*e*) Rex *v.* Warshauer, R. & M. C. C. R. 466. There was at first a difference of opinion among the learned judges, whether the count ought not to have shown what money florins were and their value; but at a subsequent meeting the defect was considered to be cured by the 7 Geo. 4, c. 64, s. 21, the offence being described in the words of the statute.

payment of 29*l.*," without adding the date, or giving any further description. (*f*) So a count charging the uttering of "a certain promissory note, purporting to be a promissory note of A. B., for the payment of money, to wit, for the payment of 5*l.*," has been holden good. (*g*)

Cases where the instrument is set out.

As, however, indictments frequently contain counts, in which the instruments are set out, the following decisions will still be useful in such cases.

In a case, where, upon an indictment for forging a receipt for money, it was objected that in the receipt, as set forth, some of the sums were in figures, it was holden that the receipt must be pursued exactly, or it would be a variance. (*h*) The reason for setting out the instrument is, that the Court may see that it is one of those instruments the falsely making or knowingly uttering of which the law has said shall be considered forgery. (*i*) And in a case of forgery at common law, the indictment was holden to be bad in form, as it did not state what the instrument was in respect of which the forgery was committed, nor how the party signing it had authority to sign it. (*j*)

If it be in a foreign language there must be an English translation.

As the object of setting out the instrument is, that the Court may see, and be able to form an opinion whether it be that which it is alleged to be, and whether it falls within the act or law on which the prosecution is founded, judgment was arrested upon an indictment for forging a Prussian treasury note, on the ground that the indictment did not contain any English translation of the note, which was in a foreign language. (*k*)

The whole instrument must be correctly translated.

Where an indictment charged the prisoner with having in his possession plates upon which there was engraved a promissory note in the Polish language, which was set out, and which said note being translated into the English language, is as follows,

"Cash note of the Kingdom of Poland.

"To the bearer of which the Exchange Office will, in compliance with the royal decree of the 15th of April, 1823, pay the sum of five gilders (*l*) in the established currency.

"This note will be received in all the government establishments.

"Royal Commissary, "Royal Commissary,
"Teofil Szymanowski. "L. Plater."

In the rim and margin of the plate of the note, in the Polish language, were certain words, which in English denoted "year," "1824," and "five florins," and none of these words were stated in the translation. The decree of 1823, mentioned in the note, ordered that the notes were to be marked of the year 1824, and directed that the year 1824 should be put upon them; and that "five florins" should be put upon them; and the words "year"

(*f*) Rex *v.* Burgiss, 7 C. & P. 490, Littledale, J. S. P. Rex *v.* James, 7 C. & P. 553, Patteson, J. And in Sanderson's case, 2 Lew. 187, where a count charged the uttering a promissory note for 5*l.*, setting it out, Taunton, J., intimated an opinion that the count was good.

(*g*) Sanderson's case, 2 Lew. 187, Taunton, J.

(*h*) Powell's case, 2 East, P. C. c. 19, s. 53, p. 976.

(*i*) Lyon's case, 2 Leach, 597, 608.

(*j*) Rex *v.* Wilcox, Russ. & Ry. 50.

(*k*) Rex *v.* Goldstein, Russ. & Ry. 473.

(*l*) It is "guldens" in the report in 7 C. & P. 424, and see 7 C. & P. 418, 419, which seem to show that the word was "guldens," as it was objected that that was not an English word. C. S. G.

"1824" and "five florins" were part of a genuine Polish note, and a note, without these words, would not be received at the government offices. It was objected, that this translation was inaccurate and insufficient, and the point was reserved for the consideration of the Judges, who expressed no opinion upon it, as they held the conviction right upon another count, but it is said that they were unanimously of opinion that the translation was imperfect. (*k*) It is said to have been the opinion of the majority of the Judges in the same case, that describing a foreign note wholly in the English language is not sufficient in an indictment for forgery, notwithstanding the 2 & 3 Wm. 4, c. 123, s. 3; (*l*) but this objection, provided the description is in the words of the statute creating the offence, can only be taken advantage of by demurrer, and is cured, after verdict, by the 7 Geo. 4, c. 64, s. 21. (*m*)

Where an indictment charged the uttering of a bill of exchange, which was as follows,

"No. 6811. ℞ Due 7th December.
"St. Petersburgh, le 4 Août, 1834. B. P. £500 stg. A quatre mois de date par cette lettre de change à l'ordre de nous-mêmes la somme de cinq cent livres sterling, value en moi-même, que passerez suivant l'avi de
"No. 7800. STREIGHT & Co."
497.
"Messrs. Brown, Dan, Hamming, Dublin.
"Payable, Londrès."

And which in English is as follows,

"No. 6811. ℞ Due 7th December.
"St. Petersburgh, the 4th August, 1834. Good for £500 sterling. At four months date by this bill of exchange, to the order of ourselves, the sum of five hundred pounds sterling, value in myself, which you will pass according to the advice of
"No. 7800. STIEGLITZ & Co."
497.
"Messrs. Brown, Dan, Hamming, Dublin.
"Payable, London."

It was objected that this was not a bill of exchange, for that it contained no order to pay, and that the word "livres" did not mean pounds; but, upon a case reserved after a verdict of guilty, the conviction was held right. (*n*)

The recital of the instrument is usually prefaced by the words, "to the tenor following, that is to say," &c., or "in the words

(*k*) Rex *v.* Harris; Rex *v.* Moses; Rex *v.* Balls, 7 C. & P. 429, note (*a*). Rex *v.* Warshaner, *alias* Moses, R. & M. C. C. R. 466.

(*l*) Rex *v.* Harris, 7 C. & P. 429, and note (*a*).

(*m*) Ibid., and R. & M. C. C. R. 466, and see Rex *v.* Warshaner, *ante*, p. 373, where the description of the note is given; the objections taken were, that the note ought to be stated to be a note in the foreign language, and then the meaning of it in English; that it ought to be stated to be for the payment of foreign money, and that the value in English money should be stated, and that the 2 & 3 Wm. 4, c. 123, s. 3, does not extend to such notes. See note (*a*), 7 C. & P. 431. C. S. G.

(*n*) Rex *v.* Szudurskie, R. & M. C. C. R. 429.

and figures following," which imports an exact copy. But where the indictment was for forging a certain receipt for money, "as follows," and then set forth the receipt in words and figures, all the Judges held that the words, "as follows," were to be taken as the same as, "according to the tenor following," or "in the words and figures following;" and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance. (*o*) Therefore, though there be no technical form of words for expressing that the instrument is set forth in words and figures, it is clear that the prosecutor cannot, by varying the terms in which he introduces the instrument, relieve himself from any accuracy which is otherwise requisite. (*p*)

A literal variance will not vitiate.

But in setting forth the tenor of the instrument, a mere literal variance will not vitiate the indictment. Thus where, upon an indictment which charged the prisoner with forging a bill of exchange, and contained, in the bill set forth, the words "value *received*," and the bill produced in evidence, though otherwise corresponding with that set forth, was written, "value *reiceved*," it was holden that the variance was not material as it did not change the word. (*q*) So where the prisoner was indicted for uttering a bill of exchange, directed to Messrs. Masterman, Peters, and Co., with a forged indorsement thereon; and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch as the letter *r* in Messrs. was omitted, and the abbreviation Mess^s^. might stand for words which Messrs. could not; the objection was overruled; and the Judges, upon the point being referred to them, held that the indictment was sufficient. (*r*) But, if by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal. (*s*)

In a case where the note charged to be forged set forth the *attestation* of the witness, and the words "Mary Wallace, her mark;" and it appeared that when the prisoner subscribed the note those parts of it were not written, it was doubted whether the prisoner had not in fact forged a note differing in the tenor of it from that set forth in the indictment. But it was holden upon consultation that the indictment was in this respect well proved. (*t*)

Of laying it to

It is sufficient (except in the cases which will be presently men-

(*o*) Powell's case, 2 Black. R. 787. 1 Leach, 77. 2 East, P. C. c. 19, s. 53, p. 976, in which last book the learned writer says, that he cannot but question Smith's case, Salk. 342, where it is said in the report that where a deed with the mark of I. S. was forged, the indictment need not set out the mark.

(*p*) 3 Chit. Crim. L. 1040.

(*q*) Hart's case, Worcester Lent Ass. 1776; and before the judges, June 7th, 1776, 1 Leach, 145. 2 East, P. C. c 19, s. 54, p. 977.

(*r*) Oldfield's case, *cor.* Bayley, J., Durham Sum. Ass. 1811, MS.

(*s*) Rex *v.* Bear, Carth. 407. Reg. *v.* Drake, Salk. 661. 1 Stark. Crim. Plead. p. 255. 1 Chit. Crim. L. p. 294. And in Rex *v.* Beach, Cowp. 229, where it was holden that in an indictment for forgery, a variance in writing the word undertood instead of understood, was not material, Lord Mansfield said, "The true distinction seems to be taken in Reg. *v.* Drake, which is this, that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material." In Reg. *v.* Robson, 9 C. & P. 423, the first count had the words "guard curbs," but the instrument "guards curbs," and the question whether this was a variance was reserved, but not decided by the judges, the conviction being held right on another count.

(*t*) Dunn's case, O. B. 1765. 2 East, P. C. c. 19, s. 53, p. 976. It appears that the Recorder at first entertained the doubt, which was removed on consultation with Perrott, B., and Aston, J.

tioned) to charge that the defendant forged such an instrument, naming it, and setting forth the tenor; but the laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment is framed describes) is good; and it is said that in strictness of language there may be more propriety in so laying it, considering that the purpose of the indictment is to disaffirm the reality of the instrument. (*u*) In a case where the prisoners had been convicted upon an indictment, charging them with publishing "as a true will, a certain false, forged, and counterfeited paper writing, *purporting to be the last will* of Sir A. C., &c.;" and setting out the tenor of the will, it was objected that it ought to have been laid that they forged *a certain will*, and not a paper writing, *purporting to be the last will, &c.*, as the words of the statute are "shall forge a will." But, after a variety of precedents being produced, all the Judges held it to be good either way. And it was also holden, that as the will was set forth in *hæc verba*, and three names appeared as witnesses, it was sufficient, without stating that it purported to be attested by three witnesses. (*v*)

be a paper writing, purporting to be such an instrument, &c.

In a case where the prisoner was indicted for forging, and knowingly uttering a bill of exchange, which was described in the indictment to be "a certain bill of exchange requiring certain persons by the name and description of Messrs. Down, &c., twenty days after date to pay to the order of R. Thomson, the sum of 315*l.* value received, *and signed by Henry Hutchinson*, for T. G., T. and H. Hutchinson, which bill of exchange so falsely made and counterfeited, is as follows (setting out the bill), &c., with intent to defraud G. Hutchinson, &c.;" and it appeared on the evidence that the signature to the bill, "Henry Hutchinson," was a forgery; it was objected that the indictment averring it to have been *signed by him*, (and not merely that it *purported* to have been signed by him) which was a substantial allegation, was disproved. And the Judges were of that opinion, upon the case being referred to their consideration after the conviction of the prisoner. (*w*)

Carter's case. Where the signature to a bill of exchange was a forgery, it was holden that an indictment averring it to be signed by H. H. instead of stating that it purported to have been signed by him, was bad.

But the setting out the very subject matter which has been forged, will not, in all cases, be sufficient. For if the instrument do not purport, on the face of it, and without reference to some other subject matter, to be the thing prohibited to be forged, the purport and meaning of the forgery, with relation to such other subject matter, must be expressly averred to be the thing so prohibited. So that where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill, and the tenor of the receipt as set forth merely consisted of the signature of the party, it was holden to be defective; on the ground that the mere signing of such name, unless connected with the previous matter, did not purport on the face of it to be a receipt, and that it ought to have been averred that such navy bill, &c., together with such signature, did purport to be, and was a receipt, &c., and that the prisoner feloniously forged the same. (*x*)

If the instrument do not purport on the face of it to be the thing prohibited to be forged, the purport must be expressly averred.

(*u*) 2 East, P. C. c. 19, s. 56, p. 980.

(*v*) Rex *v.* Birch and Martin, 1771. 2 Black. R. 790. 1 Leach, 79. 2 East, P. C. c. 19, s. 56, p. 980. There was a third objection also that the indictment only averred, "they knowing it to be forged, &c." whereas it should have been that "they and each of them, knowing," but it was overruled. The prisoners were executed.

(*w*) Carter's case, 1800, 2 East, P. C. c. 19, s. 56, p. 985.

(*x*) Hunter's case, O. B. 1794, East. T. 1796. 2 Leach, 624. 2 East, P. C.

But where a forged receipt, as set forth in the indictment, was in this form "18th March, 1773, received the contents above by me Stephen Withers," and it appeared in evidence that such receipt was forged at the bottom of a certain account; upon objection taken that the account itself should have been set forth in order to make it appear that the receipt, as stated, was a receipt for money, all the Judges held that the indictment was sufficient, and that the account was only evidence to make out the charge as stated in the indictment. (*y*) It is observed upon this case that by the very terms of the writing itself, it purported to be a receipt for something, though not specifically for money, as it was averred to be, in order to bring it within the 2 Geo. 2, c. 25. (*z*)

Where the instrument is described under the 2 & 3 Wm. 4, c. 123, s. 3, averments to show what the instrument is are not necessary.

But since the 2 & 3 Wm. 4, c. 123, s. 3, if the instrument is described in the indictment, instead of being set out, averments to shew what the instrument is, are not necessary, but it is matter of evidence whether the instrument comes within the description given of it by the indictment. The prisoner was indicted for forging and uttering "a certain warrant for the payment of money, to wit, for the payment of the sum of 4*l.* 10*s.*," and there were no prefatory allegations or inuendoes. The prisoner was a chimney sweeper, and had on several occasions been employed to sweep the funnels of the steam vessel, Princess Victoria, and the course of business was for the prisoner, when he had swept the funnels, to bring in his bill to J. Nicholson, the engineer of the vessel, who, upon that, gave him a certificate that the work had been done, and, on his presenting that certificate at the counting-house of Messrs. Lightly and Simons, he was paid the amount. The prisoner presented the following forged document at their counting-house,

"Oct. 11, 1839.

"This is to satisfy that R. Rogers has swept the flues and cleaned the bilges, and repaired four bridges of the Princess Victoria."

"J. Nicholson."

"4*l.* 10*s.*"

Parke, B., "I think that the written evidence and the parol testimony taken together, shew that the paper, if genuine, would have authorized the payment of the sum mentioned in it. Under the old law, averments would have been necessary, to shew that this was a warrant for the payment of money; but, as the law is at present, no such averments are necessary, if the indictment is framed on the 3rd section of the statute, 2nd and 3rd Wm. 4, c. 123. In the present case it appears by the evidence which has been given, that this

c. 19, s. 36, p. 928, 929, and s. 53, p. 977. See Rex *v.* Barton, R. & M. C. C. R. 141, *post.* Rex *v.* Martin, R. & M. C. C. R. 483, *post.*

(*y*) Testick's case, 1774, 2 East, P. C. c. 19, s. 36, p. 925. 1 East. R. 181, note (*a*).

(*z*) 2 East, P. C. c. 19, s. 53, p. 977. And the learned writer refers to Taylor's case, 1 Leach, 215. 2 East, P. C. c. 19, s. 47, p. 960, *ante*, p. 330, where the prisoner was indicted for forging a receipt for 20*l.* due upon a bill of exchange in these words, "Received, W. Wilson;" and the indictment set forth the bill for 20*l.*, and averred the forging of a receipt for the said sum of 20*l.*, but contained no averment that the writing forged, together with the bill, purported to be, or was a receipt; and he observes that here also the forged writing in itself purported to be a receipt for something.

(if genuine) was a voucher for the payment of this money. If you describe the instrument in the indictment instead of setting it out, averments are, since the 2 & 3 Wm. 4, c. 123, not necessary, as they were before that act; and if the instrument be described under that statute, it is matter of evidence whether the instrument comes within the description given of it by the indictment." (*a*)

A *bank post bill* cannot, in an indictment for forging or uttering, be described as a bill of exchange generally, but it may be described as "a bank bill of exchange." (*b*)

Instrument improperly described as a promissory note.

Where the prisoner had been convicted of uttering and publishing as true, a forged promissory note, with intent to defraud one B. H., knowing, &c., against the statute, the indictment stated the instrument as follows, without any inuendo, explanation, or allegation respecting it or its contents, further than denominating and describing it as "a promissory note for the payment of money, which is as follows,"

Newport, Nov. 20, 1821.

£28. 15*s.* 0*d.*

Two months after date pay Mr. B^n^. Hobday, or order, the sum of twenty-eight pounds fifteen shillings,

Value rec^d^.

JOHN JONES.

At Messrs. Spoon & Co.,
Bankers, London.

And an objection having been taken that the instrument so described was not in law a promissory note, the case was submitted to the Judges, who held that the instrument was a bill of exchange, and not a promissory note. (*c*)

But the word "purport" imports what appears on the face of the instrument.

But with respect to the word "purport," it should be well observed that it imports what appears *on the face of the instrument*, as a want of attention to this meaning of the word has been fatal to many indictments.

Jones's case.

In a case where the instrument was laid in some counts of the indictment to be *a paper writing purporting to be a bank note*, it was holden that as it did not purport on the face of it to be a bank note, the counts could not be supported. (*d*)

Reading's case. Where the indictment charged that the defendant being possessed of a bill of exchange purporting to be directed to one John

In another case the bill of exchange upon which the indictment proceeded was in the following form,

Bristol, Feb. 21st, 1792.

Forty days after date pay to Mr. Jeremiah Reading, or order, the sum of 80*l.*, for value received, and place it to the account of

JOHN WHITE.

To JOHN RING, Esq.
Berkley-street, Portman-square, London.

(*a*) Reg. *v.* Rogers, 9 C. & P. 41, *cor.* Parke, B., and Bosanquet, J. See Rex *v.* Rice, 6 C. & P. 634, *post.*

(*b*) Rex *v.* Birkett and Brady, Russ. & Ry. 251. The form of the instrument was, "At seven days sight I promise to pay this my *sola* bill of exchange," which is properly only a promissory note; but the 15 Geo. 2, c. 13, mentioning "bank notes, bank bills of exchange," &c., seems to give these bank post bills that denomination of bank bills of exchange as there are no other bank bills answering that description. In Moor's case, 1 Lewin, 90, Hullock, B., held that a bank post bill could not be described in an indictment for embezzlement as a bill of exchange.

(*c*) Rex *v.* Hunter, Russ. & Ry. 511.

(*d*) Jones's case, *ante*, p. 354.

King, by the name and description of one John *Ring*, forged the acceptance of the said John *King*, it was holden to be bad, on the ground that *Ring* cannot purport to be *King*.

And the indictment charged that the prisoner, having such bill in his possession, *purporting to be signed by one John White, and to be directed to one John King, by the name and description of one John Ring, Berkley-street, &c.*, forged an acceptance in writing *purporting to be the acceptance of the said John King*. The bill, when produced, appeared to be accepted on the back of it by John *King*; and it was proved that when the prisoner negociated the bill he stated that Mr. King was a gentleman living in Berkley-street, Portman-square, and a man of opulence; but in fact there was no person of that name living there. The prisoner having been found guilty, the case was submitted to the consideration of the twelve Judges, who determined that judgment ought to be arrested on the ground that the bill did not in fact *purport* to be directed to one John King, as stated in the indictment. Buller, J., in delivering the opinion of the Judges, said, "It is clear that where an instrument is to be set forth, the description that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself. On the face of the bill of exchange in the present case (and the face of the bill is the only thing to be considered) nothing more appears, when we examine the averment, than that it is a bill of exchange drawn by *John White on John Ring*; therefore, when the indictment says that it was drawn on *John King*, by the name and description of *John Ring*, it is absurd and repugnant to itself, for the name and description of one thing cannot purport to be another thing. The drawer of the indictment was led into this blunder by not considering what was the original state of the bill, and what was the appearance of it after the acceptance was put on it; it seems as if he did not recollect under what terms, or by whom, a bill of exchange may be accepted. Though the bill was drawn on *John Ring*, it might have been accepted by *John King*, for a bill may be accepted by other persons than those to whom it is directed, as when it is accepted for the honour of the drawer, or of any of the indorsers." (*e*)

Gilchrist's case. An indictment for forging a bill of exchange directed to Ransom, Moreland, and Hammersley, which stated that such bill purported to be directed to George Lord Kinnaird, William Moreland, and Thomas Hammersley, by the name

In a case which occurred shortly afterwards, the prisoner was indicted for forging "*a paper writing, purporting to be an order for payment of money*, dated 11th September, 1794, with the name Thomas Exon thereunto subscribed, *purporting* to have been signed by Thos. Exon, clerk, and to be *directed to George Lord Kinnaird*, Wm. Moreland, and Thos. Hammersley, of, &c., bankers and partners, *by the name and description of Messrs. Ransom, Moreland, and Hammersley*, for the payment of the sum of 10*l.*, &c.;" the tenor of which said false writing, &c., is as follows, viz.,

"Messrs. Ransom, Moreland, and Hammersley, please to pay to Mr. Brooks, or bearer, the sum of Ten Pounds, for

THOS. EXON."

"Sept. 11th, 1794."

(*e*) Reading's case, O. B. 1793, Hil. T. 1794. 2 Leach, 590. 2 East, P. C. c. 19, s. 56, p. 981. Buller, J, also said, that as the opinion of the Judges proceeded merely on the informality of the record, the prisoner might be again indicted for this offence. But no other indictment was preferred; and after remaining in custody till March, 1794, he received a free pardon, and was discharged, 2 Leach, 593.

with intent to defraud the said Geo. Ld. K., &c. There was a second count, for uttering it; and other counts, charging an intent to defraud other persons. An objection was made in arrest of judgment, that the direction of the bill was improperly described in the indictment; and ten of the Judges, who met to consider the case, were unanimously of opinion that the judgment should be arrested, on the ground that the word *purport* imports what appears on the face of the instrument, the apparent and not the legal import; and that the bill in question could not purport to be directed to Lord Kinnaird, because his name did not appear upon the face of it. Buller, J., in delivering their opinion, said, "Old cases have given rise to much learning and argument on the words '*purport*' and '*tenor*,' and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where written instruments are to be stated; but among the many cases upon this subject, I can find no judicial determination that *the purport* and *the tenor* should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it: tenor means an exact copy of it; and, therefore, where an instrument is stated according to its *tenor*, the *purport* of it must necessarily appear. The forms of indictments for forgery have varied, and been different from each other at different periods of time; and of late years they have been much more complicated than they were formerly; and, in my opinion, they have been, for that reason, much worse. I have seen the precedent of an indictment of forgery stating, 'the prisoner to have forged a certain false paper-writing, in the name of J. S. and others, bearing the form of a warrant of attorney, which said writing follows in these words; that is to say, &c.' setting it out *verbatim;* and if indictments for forgery were now merely to state that the prisoner 'forged a paper-writing to the tenor and effect following, &c.;' and the instrument set out appeared on the face of it to be a bond or bill of exchange, or any other of the instruments described in the statute, I should, as at present advised, see no objection to such a form. If, in the present case, the indictment had stated that the prisoner had forged a certain paper-writing, in the name of T. Exon, (*f*) purporting to be a bill of exchange, and then set out the bill to the tenor and effect following, it would, I think, have been quite enough; for the words 'purporting to be a bill of exchange,' are only necessary to shew that the instrument supposed to be forged is one of the instruments mentioned in the statute; and, in order to shew that it is one of those instruments, it cannot be necessary under the word 'purporting,' to recite all the contents of the instrument; for an exact copy of the instrument itself being set forth, all its contents thereby appear; and the law requires an exact copy of the instrument to be inserted in the indictment, in order that the Court may see that the instrument is the subject of forgery within the meaning of the statute. The blunder in the present indictment seems to have arisen from the circumstance

and description of Ransom, Moreland, and Hammersley, was holden to be bad on the principle that the word "purport," signifies that which appears on the face of the instrument.

Meaning of the words "purport," and "tenor."

(*f*) But it would not have been good to have averred that the paper-writing *was signed* by T. Exon, such signature being a forgery, and the paper, therefore, not in fact so signed. See Carter's case, *ante*, 377.

of *Lord Kinnaird*, and *Messrs. Moreland* and *Hammersley* carrying on the banking business under the firm of *Messrs. Ransom, Moreland*, and *Hammersley*. The pleader who drew it, forgetting that it was wholly immaterial whether such a firm as *Ransom, Moreland*, and *Hammersley*, ever existed, or who were the persons who constituted that firm, and, conceiving it to be material that the names of the real partners interested in the business should be mentioned, has taken great pains to shew that a bill, drawn on '*Ransom, Moreland*, and *Hammersley*,' was drawn on '*Lord Kinnaird, Moreland*, and *Hammersley*;' and, in order to do that, he has averred in the indictment that the bill purports to be drawn on '*Lord Kinnaird, Moreland*, and *Hammersley*.' But the *purport* of an instrument, as I have already observed, is that alone which appears on the face of it; and on the face of this bill, Lord Kinnaird's name does not appear, and, therefore, the averment is not true." (*g*)

Edsall's case. The same doctrine was again acted upon in this case.

This doctrine was again acted upon in a case where the indictment charged the prisoner with forging a certain paper writing, *purporting* to be an inland bill of exchange, and to be drawn by one C. W. Wright, bearing date, *Winchester*, 14*th Nov.* 1796, and to be *directed to Richard Down, Henry Thornton, John Freer, and John Cornwall the younger*, bankers, London, by the name and description of Messrs. Down, Thornton, and Co., bankers, London, requiring them, ten days after date, to pay to Mr. Wm. Simmons, or order, 8*l.* 10*s.*, &c., and then setting out the tenor, by which the bill appeared, as the fact really was, to be directed, "*Messrs. Down, Thornton, and Co.*," bankers, London. (*h*)

Reeves's case. An indictment for forging a scrip receipt, signed "C. Olier;" stated that the prisoner forged the receipt "with the name C. Olier, thereunto subscribed, purporting to have been signed by one Christopher Olier." Qu. if this differs from the foregoing cases?

In a case which occurred about the same time, the indictment, which was for forging a scrip receipt, charged that the prisoner forged it "with the name C. Olier thereunto subscribed, *purporting* to have been signed by one Christopher Olier;" and it was objected that this must necessarily be bad, as C. Olier "did not, on the face of it, purport to be Christopher Olier, but might be Charles, &c.;" but the Court thought that this case differed in some degree from the two cases cited in support of the objection, namely, *Jones's case*, (*i*) and *Gilchrist's case*; (*k*) inasmuch as the note in *Jones's case* did not purport to be a bank note, and, therefore, the indictment, charging that it did so purport, was bad; and in *Gilchrist's case*, as the name of Lord Kinnaird did not appear on the face of the bill, it could not purport to be directed to him: but that, in the present case, this scrip receipt being subscribed with the name C. Olier, and the indictment charging that it purported to be signed in the name of Christopher Olier, a cashier of the Bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself. (*l*)

(*g*) Gilchrist's case, O. B. 1795, East. T. 1795, 2 Leach, 657. 2 East, P. C. c. 19, s. 56, p. 982.

(*h*) Edsall's case, 1798, 2 East, P. C. c. 19, s. 56, p. 984. 2 Leach, 662, note (*a*). In East. P. C. ibid., it is said that the judges held the indictment bad, upon the authority of Gilchrist's case, though Buller, J., disapproved much of that determination, which, however, he admitted could not be distinguished from the present case.

(*i*) *Ante*, p. 354.

(*k*) *Ante*, note (*g*).

(*l*) Reeves's case, *cor.* Heath and Lawrence, J., and Thomson, B., O. B. 1798, 2 Leach, 808, 814. 2 East, P. C. c. 19, s. 56, p. 984. The point was saved for the consideration of the twelve Judges; but it does not appear what their opinion was, there being other objections to the convic-

We have already considered the purpose of fraud and deceit, to the prejudice of another's right, which makes a part of the definition of forgery. (*m*) Such purpose or intent to defraud must be stated in the indictment, and pointed at the particular person or persons against whom it is meditated. (*n*)

Of the statement of the intent to defraud.

In stating this intent to defraud, it will be sufficient to describe the party intended to be defrauded with reasonable certainty.

Lovell's case. An indictment which stated that a forged order was directed to Messrs. Drummond and Company, by the name of Mr. D. &c., was holden to be good; and that it was not necessary to state the names of the respective partners.

Accordingly, where after conviction a motion was made in arrest of judgment that the indictment charged the forged order as being drawn on *Messrs. Drummond and Company, Charing Cross*, by the name of *Mr. Drummond, Charing Cross*, (*o*) instead of mentioning the names of the respective partners, which ought to have been inserted in the place of the short description *Drummond and Company*, all the Judges held, upon a conference, that the indictment was good. They were of opinion that, if the words, "*Messrs. Drummond and Company, Charing Cross*," when taken together, had been so senseless and unintelligible as not to import a certain description of persons, the indictment would have been bad; but they said that, understanding those words as every body else did, namely, as meaning the partners in the partnership of the banking-house, they considered them as a sensible and certain pointing out of the persons intended by the draft, and as conveying with legal certainty a notification of the party intended to be defrauded. That it was not necessary in this part of the indictment to describe the party meant with more particularity; for, if any person could be intended from the words, who that person was, and whether he was the meditated object of the fraud, were matters for the consideration of the jury. (*p*)

It has been holden not to be necessary to state in the indictment the manner in which the party was to have been defrauded.

It is not necessary to state in the indictment the

Thus, where it was objected, on a motion in arrest of judgment,

tion of the prisoner, who was afterwards tried and capitally convicted on another indictment pending for the same offence.

(*m*) *Ante*, p. 318, 361, *et seq.*

(*n*) 2 East, P. C. c. 19, s. 58, p. 938.

(*o*) The order was in the following form:—

Mr. Drummond, Charing Cross,
25 *August*, 1782.

Please to pay the bearer, or order, on demand, £10. 10*s*., and place it to account, per me,

H. H. Aston.

(*p*) Lovell's case, O. B. 1782, and 6th November, 1782, 1 Leach, 248. 2 East, P. C. c. 19, s. 60. p. 990. It should be observed that those counts of the indictment which stated the intent to defraud Messrs. Drummond and Co., laid such intent in the concluding parts of the counts to be to defraud Robert Drummond, and the other partners in the house, by name. But that which Gould, J., is reported to have said, (2 East, P. C. ibid), would seem to lead to the conclusion that it is not necessary to specify the names of the partners in any part of the count: *viz.*, "That to require the particularising of all the partners would be of dangerous consequence to such prosecutions; some of them might not be known." A learned writer, (after stating that there are always several counts in the indictment, charging an intent to defraud all such persons, or bodies corporate, as could be affected by the success of the forgery,) suggests that, as the intention to commit a fraud at the time of the forgery is usually general, and intended to impose rather upon the person to whom the forged instrument may be accidentally offered, (particularly in the case of bank notes, and negociable instruments,) it would be desirable to pass an act rendering it unnecessary to state the name of any person or corporation, intended to be defrauded; 6 Ev. Col. Stat. Pt. V. Cl. xii., p. 581, 582. With respect to the statement in that part of the indictment which came in question in Lovell's case, it appears to have been the opinion of Buller, J, and the other Judges, that if the words "*Messrs. Drummond and Company, Charing Cross*," *ante*, note (*o*), it would have been sufficient. 2 East, P. C. c. 19, s. 60, p. 991. And see now 7 Geo. 4, c. 64, s. 14, and the 1 Wm. 4, c. 66, s. 28, *post*, p. 210, as to the description of partners.

manner in which the party was to have been defrauded.

that it was not averred that T. Barrow, whose name appeared to be signed to the forged receipt, meant Taylor Barrow, (with intent to defraud whom the forgery was laid in one of the counts,) that the manner in which the forged receipt of stock was to operate in prejudice of Mr. Barrow ought to have been averred in the indictment, by a statement of Taylor Barrow being a proprietor of so much stock, and being personated by the prisoner, who transferred it, &c.; and that it was not sufficient merely to state that the forgery was committed with intent to defraud T. B. generally; the Judges held that it was sufficient if the offence was described in the words of the act; and that, whether it were or were not meant to defraud Taylor Barrow, was matter of evidence, which the jury had found. (*q*)

It need not be averred that a forged bill of exchange was tendered to the party intended to be defrauded; nor in what other manner the party could be defrauded.

And in another case, where Buller, J., upon a conference with the rest of the Judges, stated, as an objection to an indictment, that it was not alleged that the bill was uttered or tendered to the persons, whom it was laid the prisoner meant to defraud; and, therefore, that it did not appear to the Court, on the face of the indictment, that those persons could be defrauded by the transaction, which *always appeared where the name of a drawer, acceptor, or indorser, was forged;* all the other Judges held that the indictment was good in this respect, as it was sufficient to pursue the words of the act, which constitute the offence; and it was matter of evidence, whether the prisoner intended to defraud the persons named by tendering the bill in payment to them, or how otherwise. (*r*)

As to the property of the party intended to be defrauded in the monies, &c., sought to be obtained.

The following case relates to the property of the party against whom the intent to defraud is aimed, in the monies, &c., sought to be obtained by the forgery.

Jones and Palmer's case.

Two prisoners, Mary Jones and Henry Palmer, were indicted for the forgery of an indenture of apprenticeship, and also of a receipt for money, with intent to defraud A. B., C. D., &c., *the stewards of the feast of the sons of the clergy.* It appeared that the charitable fund of the sons of the clergy was raised by voluntary contributions, and allotted by the secretary equally among all the stewards, to be disposed of by them to the widows and children of deceased clergymen, according to their discretion; that the prisoner Jones was a clergyman's widow, and that, pretending, by means of the indentures in question, and the receipt indorsed thereon, that she had placed her son as an apprentice, she obtained, in concert with the other prisoner, an order from one of the stewards, on the treasurer of the society, for 20*l.*, as an apprentice-fee. The prisoners, having been found guilty, it was submitted that the offence amounted only to a misdemeanor at common law, and that this was not such a species of property as fell within any of the acts relating to forgery. But Eyre, B., said, that the several stewards were the absolute owners of their respective shares

(*q*) Powell's case, 1771, 2 East, P. C. c. 19, s. 59, p. 989. 1 Leach, 77. In East, a further ground for the opinion of the judges is thus stated: "Besides, there was a second count, wherein the offence was laid with intent to defraud one Sykes. If, therefore, there were no such person as Taylor Barrow, or if he had no stock; yet, as the receipt had in form the constituent parts of a receipt for the transfer of East India stock, that was sufficient."

(*r*) Elsworth's case, 1780, 2 East, P. C. c. 19, s. 59, p. 989, and s. 58, p. 986.

of the fund; that it was their money, put into their hands upon a trust; and if they had sunk it improperly, or paid it wrongfully, they would perhaps be answerable; and that unquestionably it was their money, as against all the world, except the subscribers. (*s*)

Where the persons defrauded are a corporation.

Where there is an incorporation, the money becomes the property of the whole body, and not of the individual members who compose it. And the 31 Geo. 2, c. 22, s. 78, and 18 Geo. 3, c. 18, (now repealed,) were passed to obviate the objection that the word "person" in the 2 Geo. 2, c. 55, and 7 Geo. 2, c. 22, (relating to the forgery of deeds, wills, bonds, bills, &c.) did not extend to the aggregate members of a corporation. (*t*)

Statement of partners, trustees, &c.

The 7 Geo. 4, c. 64, s. 14, in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, enacts, "that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees." (*u*)

Where the prisoner was indicted for forging a receipt for county rate; which had been paid out of the poor rate of a parish, it was held that a count laying the intent to be to defraud one of the parishioners, by name, "and others," was good. (*v*)

Joint stock banks.

We have seen that certain provisions are made as to the mode of framing indictments in cases of certain stock banks by the 7 Geo. 4, c. 46, (*w*) and that it is not imperative upon the banking companies formed under that act to prosecute in the name of one of their public officers. (*x*)

Where one count of an indictment alleged the intent to be to defraud "Robert Bell and others," who were shareholders in a joint stock bank, in which the prisoner was also a shareholder; Patteson, J., was inclined to think that it would not be safe to convict upon that count. (*a*) The 1 & 2 Vict. c. 96, seems, however, to do away with any doubt in such a case during its continuance in force. (*y*)

Where the indictment is upon a statute, the offence must be described as

If the indictment proceeds upon a statute, the charge must, in general, be set forth (according to the established rule applicable as well to other cases as to forgery) in the very words of the statute describing the offence. (*z*)

But an indictment for forging a stamp on foreign muslins, which

(*s*) Rex *v.* Jones and Palmer, *cor.* Eyre, B., O. B. 1785. 1 Leach, 366. 2 East, P. C. c. 19, s. 60, p. 991.

(*t*) Harrison's case, 1777, 1 Leach, 180. 2 East, P. C. c. 19, s. 59, p. 988. The statutes referred to are repealed by the 1 Wm 4, c. 66, s. 31.

(*u*) See the 1 Wm. 4, c. 66, s. 28, *post*, p. 410.

(*v*) Reg. *v.* Vaughan, 8 C. & P. 276, Gurney, B.

(*w*) *Ante*, p. 103.

(*x*) *Ante*, p. 104.

(*a*) Reg. *v.* Cooke, 8 C. & P. 586.

(*y*) *Ante*, p. 105.

(*z*) 2 East, P. C. c. 19, s. 58, p. 985.

in the words of the statute.

stated the duty to be chargeable *for, on, and in respect of,* foreign muslin, was holden good; though the words of the statute in the clause imposing the duty were, *for and upon;* in other clauses, *for;* in others, *on;* and in others, *upon.* (*a*)

As to a superfluous description.

It is said that a superfluous description does not appear to be objectionable. (*b*) And a case is cited where, upon an indictment on the 2 Geo. 2, c. 25, (now repealed) for forging "a bond *and* writing obligatory," it was objected that, as the statute uses the term *bond* as well as the term *writing obligatory,* the indictment ought to have described the offence more particularly, either as a forgery of the one or the other; that it should have described the instrument in this case as a *writing obligatory,* as it had neither a defeasance nor penalty annexed to it; and that, although a bond were a writing obligatory, yet the converse did not hold; but by the opinion of the Judges the indictment was holden good. (*c*) With respect to the inference from this case, that a superfluous description does not appear to be objectionable, a learned writer says that he is by no means satisfied that the term bond is not properly applicable to an obligation without a condition, although for the sake of distinction, it is more usually called a single bill. (*d*)

Warrant and order for the payment of money.

Where an indictment charged the prisoner with having forged "a certain warrant and order for the payment of money," which was as follows:

"Worcester Old Bank,
"Hanbury Hall, Nov. 28, 1828.

"Messrs. Berwick, Wall, Isaac, and Lechmere, pay to Mr. John Perkins or bearer, twenty-five pounds ten shillings.

"£25 10*s.* 0*d.*

"JOHN PHILLIPS."

It was held that the indictment was good, for the instrument was both a warrant and order; a warrant authorizing the banker to pay, and an order upon him to do so. (*e*)

The insertion of superfluous words does not vitiate the indictment.

The insertion of superfluous words, which are not contained in the 1 Wm. 4, c. 66, does not vitiate the indictment. The first count charged that the prisoner did "falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting," a certain bill of exchange, &c. The second count charged that the prisoner did "utter and publish as true," &c. The third that he did "offer dispose of and put away," &c. It was objected, that the indictment ought not to contain the words "counterfeit and act and assist in the false making," &c., as those words were not in the 1 Wm. 4, c. 66, though they were in the former forgery acts: and the same objection applied to the second and

(*a*) Rex *v.* Hall and Crutchfield, 1795. 2 East, P. C. c. 19, s. 19, p. 895, and s. 58, p. 988, *post,* Chap. *Of Forging, &c., Stamps;* and an indictment at common law was holden bad for uncertainty, which stated that the defendant forged, or caused to be forged, a bill of lading, Rex *v.* Stocker, 5 Mod. 137. 1 Salk. 342, 371; and see Walcot's case, Holt's R. 345.

(*b*) 2 East, P. C. c. 19, s. 58, p. 985.

(*c*) Dunnett's case, O. B. 1792, East. T. 1793. 2 East, P. C. c. 19, s. 58, p. 985.

(*d*) 6 Ev. Col. Stat. Pt. V., Cl. xii., p. 581. And he refers to 2 Black. Com. 340.

(*e*) Rex *v.* Crowther, 5 C. & P. 316, MS. C. S. G. Bosanquet, J. And see Reg. *v.* Gilchrist, 1 Carr. & Marsh. 224, *post.*

third counts, as that statute does not contain either of the phrases "publish as true," or "put away." Park, J. A. J., "I am of opinion that this indictment is good. The first count charges the prisoner with forging, the second with uttering, and the third with offering and disposing of, which is correct; and that is not rendered bad by a great deal more being stated, which is not applicable to the enactments now in force." (*f*)

Sewing *fac similes* of notes on an indictment.

Sewing to the parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a sufficient setting out of the notes in the indictment. Some counts of an indictment for having in possession plates, on which were engraved foreign promissory notes, had not the *fac similes* of the notes engrossed on the parchment, but *fac similes* of the forged notes on blue paper such as either were, or resembled copies of the forged notes, were sewed with thread to the parchment, on which the indictment was engrossed; (*g*) and upon a case reserved all the counts, in which the *fac similes* of the notes were not engrossed, were held bad. (*h*)

A foreign note need not be alleged to be payable abroad.

An indictment for uttering a foreign promissory note need not allege it to be payable out of England. An indictment under the 1 Wm. 4, c. 66, s. 30, charged the prisoner with uttering the following note:—

20 20

"No. 10101.

"The North River Bank will pay to C. Trinder, or bearer the sum of twenty dollars on demand.

"A. B. Kays, Cash^r. "L. Kip, Prest."

The note had been originally a genuine two dollar note issued by the North River bank of New York, and the forgery consisted in "twenty" being substituted for "two," and the figures 20 for 2. It was contended that as the note was a foreign note, the indictment ought to have stated that the note was payable out of England; it was answered that the offence of uttering forged foreign notes in England being put by the statute exactly on the same footing as the utterance of forged English notes, there was no distinction between them, and therefore no averment was necessary as to the place where the note was payable; and Coleridge, J., overruled the objection. (*i*)

(*f*) Rex *v.* Brewer, 6 C. & P. 363.

(*g*) The statement in 7 C. & P. 423, is that "the note was set out in the Polish language, by sewing an impression of the plate to the parchment on which the indictment was written."

(*h*) Rex *v.* Warshaner, R. & M. C. C. R. 466. S. C. 7 C. & P. 423, and 429. In note (*b*), ibid., p. 430, it is said that "a considerable majority of the judges were of opinion that the sewing the papers to the indictment was of itself sufficient to vitiate those counts, but some did not seem so clearly of that opinion; and as the special counts were bad upon the other grounds, (see *ante*, p. 374) it was not necessary to come to a decision as to the papers being sewed to the indictment." As every indictment, being a record, must be upon parchment, Co. Litt. 260 *a*, it is difficult to see how an indictment, part of which is on paper, can be good. C. S. G.

(*i*) Reg. *v.* Lee, 2 Moo. & Rob. 281.

Where a prisoner is tried in the county where he is in custody, that fact need not be alleged.

Where a prisoner is tried under the 1 Wm. 4, c. 66, s. 24, (*k*) for forgery in the county where he is in custody, the forgery may be alleged to have been committed in that county, and there need not be an averment that the prisoner is in custody there. The indictment contained several counts in the usual form for forging and uttering a promissory note, but there was no evidence of anything done by the prisoner in the county of the city of Gloucester, in which the indictment was preferred; but the prisoner was in custody in the city of Gloucester at the time the bill was found, and at the time of the trial: it was contended that there ought to have been an averment in the indictment that the prisoner was in custody in the city. Patteson, J., in *Rex* v. *Fraser*, (*l*) the averment was held necessary, "However in that case the indictment stated the bigamy to be out of the jurisdiction, and there it was necessary to have the averment; but by the 1 Wm. 4, c. 66, s. 24, the offence may be laid in the county where it did not arise. I think, therefore, that proving the party in custody here is sufficient." (*m*)

The word "alter" used in the indictment, though not in the statute.

An indictment on the 2 Geo. 2, c. 25, (now repealed) which charged that the prisoner "did feloniously *alter* and cause to be altered a certain bill of exchange, *by falsely making, forging, and adding*, a cypher 0 to the letter and figure £8, &c.," was holden good, though the words of the statute are "if any person shall *falsely make, forge, or counterfeit*," and the word *alter* is not used in the statute. (*n*)

If any part of a true instrument be altered, a forgery of the whole instrument may be laid in the indictment.

In this case the Judges held that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously making and forging by falsely altering, &c. (*o*) We have already seen that if any part of a true instrument be altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment. (*p*) But it appears to have been more usual to lay forgeries of this kind by stating the particular alteration, at least in one count. (*q*)

An indictment for uttering a forged acceptance must aver the uttering of the acceptance.

An indictment for uttering a forged acceptance must expressly state that the prisoner uttered the acceptance. The fourth count of an indictment alleged that the prisoner having in his possession a certain bill of exchange, which was set out, with a certain forged acceptance on the said bill, which was also set out, afterwards did utter, &c., (then and there knowing the said acceptance to be forged) the said bill of exchange, with intent, &c. It was objected, that the count was bad for not averring that the prisoner uttered the forged acceptance; and, upon a case reserved, the Judges upon full and mature consideration, held that the count was bad, as it was possible the acceptance might have been taken off the bill before the prisoner uttered it. (*qq*)

Plea of *autrefois acquit.*

In a case where the prisoner was indicted for uttering a forged will, on his arraignment he pleaded *autrefois acquit;* upon which

(*k*) *Post*, p. 410.

(*l*) R. & M. C. C. R. 407, *ante*, vol. 1, p. 189.

(*m*) Rex *v.* James, 7 C. & P. 553. See the section, *post*, p. 410.

(*n*) Elsworth's case, York Lent Ass. 1780, and before all the judges, 12th April, 1780, 2 East, P. C. c. 19, s. 58, p. 986, 988.

(*o*) Id. ibid.

(*p*) *Ante*, p. 319, *et seq.*

(*q*) 2 East, P. C. c. 19, s. 55. p. 980.

(*qq*) Rex *v.* Horwell, R. & M. C. C. R. 405. S. C. 6 C. & P. 148, and MSS. C. S. G. The ground of the decision was stated as in the text, by Patteson, J., in delivering the opinion of the judges at Stafford Lent Assizes, 1834, MSS. C. S. G.

the plea was taken *ore tenus*, and recorded by the clerk of the arraigns, who replied to it on the part of the crown, *nul tiel record*. In order to prove the plea, the record of a former acquittal of the prisoner was produced; but, on comparing it with the present indictment, it appeared that the prisoner had been acquitted of uttering a forged will, beginning "*I, James Gibson*, do hereby," &c., but that he was now indicted for uttering a forged will, beginning "*James Gibson* do hereby," &c. The question, therefore, was, whether this record was legal evidence of the prisoner having been acquitted of the *same offence?* And, after argument by the prisoner's counsel, the court rejected the proof as insufficient; the prisoner pleaded the general issue to the felony, and the jury found him guilty of the offence. (*r*)

Trial of forgery. The quarter sessions have no jurisdiction.

The offence of forgery at common law cannot be tried at the quarter sessions, that court having no jurisdiction over it; nor can they take cognizance of it as a cheat. (*s*) And it has been holden in several cases that the quarter sessions have no jurisdiction in cases of forgery upon the 5 Eliz. c. 14. (*t*) Lord Kenyon, C. J., in speaking of the general jurisdiction of the quarter sessions, after deciding that the offence of soliciting a servant to steal his master's goods is cognizable by that jurisdiction, as falling within that class of offences, which being violations of the law of the land, have a tendency, as it is said, to a breach of the peace; proceeded thus,—"To this general rule there are indeed two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law." (*u*)

Trial where the offence is committed, or a prisoner apprehended or in custody.

The trial of forgery must formerly have been in the county where the offence was committed, as the indictment could only be preferred in that county. And as it seldom happened that direct proof could be given of the very act of forgery, difficulties sometimes occurred in cases where there had been no offence of uttering by the prisoner, as to what was sufficient evidence of the fact of forging within the county laid.

But these difficulties seem now to be obviated by the 1 Wm. 4, c. 66, s. 24, which makes the offender triable "in any county or place in which he shall be apprehended or be in custody." (*x*)

Parkes and Brown's case. The bare fact of a forged note being uttered in a particular

Two prisoners were indicted, the one, Parkes, for forging, the other, Brown, for uttering a forged promissory note for five guineas. It appeared clearly that Parkes had forged the note; but the only evidence offered to shew that the forgery was committed in Middlesex, where the venue was laid, was that Brown, between whom

(*r*) Coogan's case, O. B. 1787, 1 Leach, 448. So in Reading's case, *ante*, p. 380, note (*e*), Buller, J., said that the judgment being arrested for the informality of the record, the prisoner might be again indicted for the offence. And in Gilchrist's case, *ante*, p. 380, as the objection taken went only to the form of the indictment, and not to the merits of the case, the prisoner was remanded to prison till the end of the sessions, that the prosecutor might be at liberty to prefer a better indictment against him if he thought fit. In the above case of Coogan, the prisoner's counsel chiefly relied upon Lord Hale's construction of Vaux's case, (2 Hale, 246), as reported by Lord Coke, 4 Co. 44. 3 Inst. 214.

(*s*) Yarrington's case, 1 Salk. 406. Rex *v.* Gibbs, 1 East. R. 173. 2 East, P. C. c. 19, s. 7, p. 864. 2 Hawk. P. C. c. 8, s. 64.

(*t*) Smith's case, Cro. Eliz. 87. Wilson's case, Id. 601. Hunt's case, Id. 697.

(*u*) Rex *v.* Higgins, 2 East. R. 18. If therefore an indictment for forgery be found at the Sessions, and transmitted to the Assizes, the judge will order it to be quashed. Reg. *v.* Rigby, 8 C. & P. 770. Erskine, J.

(*x*) See the section, *post*, p. 410.

county by one prisoner, is no evidence of the forgery having been committed in that county by another prisoner, though an accomplice of the utterer.

and Parkes there was a great intimacy, had uttered it in Middlesex, in the absence of Parkes, who was not proved to have been cognizant of the fact, and that above forty of the same sort of five guinea notes in blank, without any signature, were found upon Parkes, in the same county, together with a receipt, under cover addressed to Brown, for 21*l.*, for four five guinea bills. All the notes found upon Parkes, as well as that upon which the indictment proceeded, were dated "Ringhton, Salop." Both the prisoners having been convicted, the case was referred to the consideration of the twelve Judges. Some of the Judges were of opinion, that the fact of finding the forged instrument in the county, in which also it appeared that the forger himself was, was evidence, in the absence of other proof, of the fact of the forgery having been there committed. But the majority of them, though they agreed that it was a question of evidence for the jury, were of opinion that there was no proof to warrant the conclusion that the forgery was committed by Parkes in Middlesex, where it was laid: for they thought that the bare fact of the note being uttered in Middlesex by the other prisoner, taking him even to be an accomplice, was no evidence of the forgery itself having been committed in that county. (*y*)

Crocker's case. The finding a forged note in the custody of a person is not evidence that it was forged in the county where it was found; especially in a case where from the circumstances there is a presumption that it was forged in another county.

In a more recent case it is reported, as the opinion of a majority of the Judges, that the finding a forged instrument in the custody of a person is no evidence that it was forged in the county where it was found. The prisoner, was indicted at Salisbury, in the county of Wilts, for the forgery of the note in question. It appeared that the prisoner had formerly lived at Winsham, in the county of Somerset, where he followed the employment of a farmer for many years. About the month of June, 1804, he quitted his farm, and all his concerns at Winsham; at which place one William Tucker, in whose name the forged note purported to be signed, resided, and also carried on the farming business there at the time of the trial. In November, 1804, the prisoner, having changed his name from Crocker to Collins, went with his wife to Salisbury, where he took lodgings, and continued to live until about the middle of the month of May, 1805, when he left his wife at her apartments in Salisbury, and went to London. During his stay in London, he was apprehended there on another charge; in consequence of which, his lodgings at Salisbury were searched, in the presence of his wife; he being still in London; and in a bureau belonging to the prisoner was found a pocket-book, in the inside of which was written his name, B. Crocker, in his own handwriting; and in one of the pockets of this pocket-book was found the note, set forth in the indictment, which was dated on the 7th March, 1803, and on which was an indorsement that a year's interest had been paid. It was objected, upon this evidence, that there was nothing to shew that any offence had been committed in the county of Wilts, the prisoner not having been in that county, but in Somersetshire at the time when the note appeared to bear date; and the point was submitted to the consideration of the Judges. No opinion of the Judges upon this case was ever publicly delivered; but the prisoner received a pardon, and was discharged; and it is said to have been understood,

(*y*) Rex v. Parkes and Brown, 1796. 2 Leach, 775. 2 East, P. C. c. 19, s. 49, p. 963, and s. 61, p. 992. Although these cases may, perhaps, no longer be material, I have thought it safer to let them remain, as they may *possibly* be found useful. C. S. G.

that a majority of the Judges thought there was not sufficient evidence that the offence was committed in the county of Wilts. (z)

It was observed by the counsel who argued the last mentioned case, that in *Elliott's case* (a) the forged instrument was found upon the prisoner in Kent, where the indictment was laid; but that no evidence was given to prove the actual fabrication of the instrument in that county; and, on the contrary, the circumstances of the case afforded some inference that the forgery was not committed there. It appeared, that one Ryland, having struck off a quantity of notes, delivered them, together with the plates, to the prisoner, at a public house in Fleet Ditch. The note in question was found upon the prisoner at Dover, and the plate at a lodging upon Tower-hill; yet the objection that the evidence did not afford proof of the offence being committed in Kent was either overlooked or thought of no weight. (b)

Offences committed in the county of a town.

Where an indictment stated the forgery to have been committed in the county of Nottingham, and it was proved to have been committed in the county of the town of Nottingham, it was holden that, although under the 38 Geo. 3, c. 52, it was triable in the county at large, the offence should have been laid in the county of the town. (c)

In a later case, where the prisoner had been convicted at the assizes for the borough of Leicester, of forging a bill of exchange, a question was raised whether the evidence of forgery in Leicester was sufficient to sustain the verdict. The bill was dated at Leicester, June 1st, 1827, and purported to be drawn and indorsed by E. Addison, to his own order, on W. Rawson, for 40*l.* at two months after date, and to be indorsed by Addison. Addison and Rawson both lived at Leicester, and Addison kept cash with Clark and Co., at that place. The bill was taken on the 5th June by one Porter to the bank of Clark and Co., with a request that they would discount it; but, the forgery being discovered, Porter was detained, and tried, and convicted at the same assizes for uttering the bill. It was proved that the whole of the bill—the date, body, signature, and indorsement were in the handwriting of the prisoner. It was proved by one witness, that the father of the prisoner lived in Leicester, and that he believed the prisoner lived with him, having seen him there. Another witness proved that she saw the prisoner and Porter walking and talking together in a street in Leicester, about a week before the 5th of June.

(z) Crocker's case, 1805. 2 Leach, 987. 2 New Rep. 87. But *qu.* if the only point actually decided by the judges in this case was not "that an incompetent witness had been admitted?"

(a) *Ante*, p. 348.

(b) In 6 Ev. Col. Stat. Pt. V. Cl. xii., the learned writer says, "I remember a case at Lancaster, in the year 1798, where a clerk of a mercantile house at Liverpool had stolen several bills, and was afterwards apprehended on board a sloop in the Downs, with a forged indorsement of the drawee on one of the bills; and Rooke, J., without any evidence to shew a greater probability of the forgery being committed in Lancashire than in any intermediate county, thought there was enough to go to the jury, who, however, acquitted the prisoner." There certainly does not appear in this statement anything which could have warranted the jury in coming to a different conclusion.

(c) Rex *v.* Mellor and another, Russ. & Ry. 144. Where the indictment is preferred in the next adjoining county, under this statute of the 38 Geo. 3, for an offence in an inferior county, though the indictment must state the offence to have been committed in the inferior county, it need not aver that the county in which the indictment is preferred is the next adjoining county. But it may be stated in the caption, when the record is regularly drawn up. Rex *v.* Goff, Russ. & Ry. 179.

Another witness proved that she saw them pass her house together in another street in Leicester, in the course of a fortnight before the 5th of June. And it was proved by another witness that he saw them walking and talking together in another street in Leicester, a very short time before the same 5th of June. But none of the witnesses could fix the precise days to which they spoke. Lord Tenterden doubted whether there was such evidence of the forgery in Leicester as would justify him in leaving that point to the jury; but he left it to them, and the prisoner being found guilty, his Lordship respited the judgment, in order that the point might be submitted to the consideration of the Judges, who held the conviction right. (*d*)

Of the evidence.

The evidence in forgery must support the material facts stated in the indictment: and it is essentially necessary, that the proof should tally with the averment of the intent to defraud. (*e*) And we have seen, that the manner in which the fraud was carried or intended to be carried into effect is peculiarly matter of evidence. (*f*)

Of the competency of the party by whom the instrument purports to be made to prove it forged.

In respect of the persons who might formerly be witnesses in cases of forgery, it was an established point, that a party by whom the instrument purported to be made was not admitted to prove it forged, if, in case of its being genuine, he would have been liable to be sued upon it, or be deprived by it of a legal claim against another. This exception to the general rules, by which testimony in criminal cases is regulated, and which has often been spoken of as an anomaly in the law of evidence, was at length removed by the 9 Geo. 4, c. 32, s. 1, which enacts, "that on any prosecution by indictment or information, either at common law or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessory before or after the fact, to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have or be supposed to have in respect of such deed, writing, instrument, or other matter."

9 Geo. 4, c. 32, s. 1.

As to whether the party whose handwriting is forged, is the only witness to prove the forgery.

It seems to have been considered in some cases, that the party whose handwriting is forged, being the best, is the only witness, if living, to prove the forgery: but it is observed, that this is not confirmed by the current of authorities to such an extent, though the testimony of such witness, when disinterested, must doubtless be the most satisfactory of any on the question of his own handwriting. (*g*)

Smith's case. The person whose voucher is forged for the purpose of imposing on a third person, with whom he

The prisoner, Captain Smith, was tried for uttering a forged receipt of one George Maughan, a butcher, at the island of Granada, upon a bill for butcher's meat, supplied to the ship of which the prisoner was captain; and the crime was effected by altering the figures in the quantity of meat, and in the sum they amounted to, with intent to charge one Trinder, the owner of the ship, with

(*d*) Rex *v.* Corah, Leicester Sum. Ass. 1827. M. T. 1827. MS.

(*e*) *Ante*, p. 383.

(*f*) *Ante*, p. 383, *et seq.*

(*g*) 2 East, P. C. c. 19, s. 66, p. 999.

larger disbursements than the captain had really laid out. To prove that these alterations were forgeries, and not the handwriting of Maughan, one Greenwood, his partner, was produced, as one who was acquainted with Maughan's hand: but as it did not appear that Maughan was dead, it was holden, that as he could give the best and most satisfactory evidence whether the alterations of the bill were or were not forged, no evidence but his could be admitted of the forgery, he having no degree of interest in the question, and being a competent witness to that fact. (*h*)

had no dealing, is the proper witness to prove the forgery of his own handwriting.

But in a subsequent case of a prosecution for the forgery of a bank note, it was ruled, that the handwriting of the cashier of the bank might be disproved by any other person who was acquainted with his handwriting. (*i*) And in a case which was referred to the consideration of the Judges, a conviction for forging a bank note was holden good, though there had been no testimony of the cashier at the trial to disprove his handwriting, and the forgery of the note had been proved by other evidence, which shewed that the instrument was false in all its parts, in the texture of the paper, the water mark, the engraving, the ink, and the written date of the year, which was 1798, though the printed date under the Britannia was 1799; being altogether proved to be such as the bank never made or issued. (*k*)

Hughes's case. Holden that the handwriting of a cashier of the bank might be disproved by any other person acquainted with it.

Upon this subject an able writer upon the law of evidence observes, that the evidence of persons well acquainted with the character of the supposed writer of an instrument, for the purpose of proving or disproving the handwriting, is not in its nature inferior or secondary. He says, "though it may generally be true that a writer is best acquainted with his own handwriting, yet his knowledge is acquired precisely by the same means as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of an inferior or secondary species; nor does it give any reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true. It is the common practice to receive such testimony in ordinary cases; and in prosecutions for capital offences it must be equally admissible." (*l*)

The evidence of persons acquainted with the handwriting, considered not to be inferior or secondary.

It is stated as an established rule of evidence, that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. (*m*) But in a case where the point was, whether a will had been forged, and a paper purporting to be instructions for the will, in the handwriting of the testatrix, became material, a question was put to a clerk of the post-office, who had been used to inspect franks and detect forgeries, if he could judge whether the instructions were written by the same person who was admitted to have written a certain memorandum at

Handwriting cannot be proved by comparison with a genuine paper. And *qu.* as to the examination of persons of skill as to the handwriting being genuine,

(*h*) Smith's (Captain) case, *cor.* Gould, J., and Yates, J., O. B. 1768. 2 East, P. C. c. 19, s. 67, p. 1000.

(*i*) Hughes's case, *cor.* Le Blanc, J., Exeter Spr. Ass. 1802. 2 East, P. C. c. 19, s. 68, p. 1002. And see Downes's case, *post*, p. 400, where a father was admitted to disprove the handwriting of his son, who was at Jamaica. And as to the Bank of England cases, it was holden more recently, in a case reserved, that it is not necessary that the signing clerk should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not his handwriting, Russ. & Ry. 378.

(*k*) M'Guire's case, 1801. 2 East, P. C. c 19, s. 68, p. 1002.

(*l*) Phil. on Evid. 223, 7th edit.

(*m*) Id. ibid. 697, 8th edit.

or an imitation, from its appearance.

the bottom of the instructions, and who was suspected of having been the contriver of the will; and the question, though objected to, is said to have been allowed by the court. (*n*) It is, however, observed, upon this evidence, that it was a mere comparison of handwriting; and a sort of comparison the least of all to be trusted, as it was an attempt to trace a resemblance between two papers which the writer would endeavour to make as unlike as possible. (*o*) In the foregoing case, the clerk of the post-office was also allowed to speak to the general appearance of the handwriting of the instructions, and to say whether, from his general knowledge of writing, the instructions were a natural, or an imitated hand; this matter being considered as a question of art, which might be answered by a witness of skill and experience. (*p*) The subject underwent very considerable discussion in a subsequent case; (*q*) from which, it is said, this distinction may properly be made, namely, that persons of skill may be called to ascertain, whether handwriting is genuine, or whether it was written at interrupted strokes, like the writing of a person attempting to imitate the hand of another: but that they cannot be asked whether the same hand which wrote another paper wrote also the feigned paper. (*r*) The admissibility, however, of evidence of this kind, was denied by a very learned Judge in a late case, where, upon a feigned issue to try a question of forgery, the evidence of an inspector of franks at the post-office was tendered in support of the alleged forgery. The question put to the witness (who had stated that he was unacquainted with the handwriting of the party, whose handwriting was the subject of inquiry) was, whether from his knowledge of handwriting he believed the handwriting in question to be a genuine signature or an imitation; and an objection being taken to the question, the learned Judge allowed the objection, and stated several strong reasons in his report to the Court of King's Bench against the admissibility of evidence of this kind, which he termed loose general evidence. The Judges of the Court of King's Bench expressed doubts as to the evidence being admissible, and refused to disturb the verdict, on the ground of its having been rejected; for even if it were admissible, it was in their opinions entitled to very little weight. (*s*)

Where a prisoner was indicted for forging a deed, when the case was closed, Bayley, J., called the person whose name was

(*n*) Goodtitle dem. Revett *v.* Braham, (trial at bar in K. B.) 4 T. R. 497.

(*o*) Phil. on Evid. 430. In Cary *v.* Pitt, Peake on Evid. lxxxv., upon a question being put by the counsel to a witness, whether, having been used to detect forgeries, he could say if the handwriting in question was a genuine handwriting or otherwise, Lord Kenyon, C. J., said he could not receive such evidence; and observed that though it was received in Goodtitle *v.* Braham, he had not, in his charge to the jury, laid any stress upon it.

(*p*) Goodtitle *v.* Braham, *supra*, note (*n*). This witness and another clerk of the post-office, who was also examined, admitted on their cross-examination, that they had never detected an imitation of the hand of a very old person who wrote with difficulty, and might be supposed frequently to stop. And they said that their principal means of knowledge was by seeing whether the letters were painted, that is, gone over a second time with the pen; which, however, they admitted might happen to any person from a failure of ink.

(*q*) Rex *v.* Cator, *cor.* Hotham, B., Maidstone Spr. Ass. 1802. 4 Esp. 117.

(*r*) Phil. on Evid. 430. Peake on Evid. 112. In this case of Rex *v.* Cator, Hotham, B., said, "I perfectly agree with the counsel for the prosecution that there is no difference in point of evidence, whether the case be a criminal or a civil case; the same rules must apply to both."

(*s*) Gurney *v.* Longlands, 5 B. & A. 330. See the chapter on Evidence for other cases on this subject. C. S. G.

alleged to have been forged by the prisoner, and desired him to write his name on a sheet of paper, which he did, and Bayley, J. then handed it to the jury, together with the imputed forgery. (*t*)

Where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false. (*u*)

Of the admission of his own handwriting by a party accused.

With respect to the admission of his own handwriting by a party accused, a case is reported, where upon an indictment against Richard Beatty and two others, for a conspiracy to defraud, by means of a fraudulent acceptance of a bill of exchange, the indictment averred that Beatty, in pursuance of the conspiracy, *did fraudulently*, &c., *write his acceptance* to the bill; and no other evidence was given either of the fact of writing the acceptance, or of the handwriting of Beatty, than that of a witness, who proved that the bill, with the acceptance written upon it, was shewn to Beatty, who, being asked whether it was a good bill, answered that *it was very good*. The defendants were convicted, and a question reserved for the consideration of the Judges, whether this evidence supported the allegation that Beatty wrote the acceptance: and all the Judges were of opinion that it was proper evidence to be left to the jury, upon which they might found their verdict that Beatty wrote the acceptance. (*v*)

On an indictment for forging a will, said to be written over pencil marks, which had been rubbed out, the evidence of an engraver who had examined the paper with a mirror is admissible.

The prisoner was indicted for uttering a forged will, and it was stated in the opening, that the supposed will, together with ten different pieces of paper used for the purpose of setting it up, had writing which was apparently written over pencil marks, which had been rubbed out. An engraver, called as a witness, stated, that he was in the habit of looking at minute lines on paper, and had examined the papers, to see if there were marks of pencil, with a mirror, and had traced marks on the paper both of letters and words, and he had no doubt that the pencil had been rubbed. Upon being asked what he had observed, the counsel for the prisoner objected that the rule had been rather to narrow this sort of evidence than to extend it; the rule now acted on was, that witnesses shall not be called to state to the jury that which they, as intelligent persons, are capable of deciding for themselves: it would be dangerous to suffer a witness to be called to prove that he can see what the jury are unable to discover. It was answered, that this was not a question of opinion: it was a matter of fact. The paper required minute inspection, a habit and practice to discover the marks upon it. The witness had examined the paper out of court, and could pledge his oath to the fact that the marks did exist; and if the words were pointed out to the jury, they could see them, and the question was then decided by the jury. This was evidence of a fact, and the question was, whether they were to be assisted in forming a conclusion as to that fact? Parke, B., after consulting Tindal, C. J., said, that they were both of opinion that

(*t*) Williams' case, 1 Lew. 137. This seems to have been a dangerous experiment, and giving far too much facility to the prosecutor to write his name in such a manner as to suit the occasion. C. S. G.

(*u*) By Lord Mansfield, C. J., in Folkes v. Chad, 1783, MS. cited in Phil. on Evid. 227.

(*v*) Rex v. Hevey, Beatty, and M'Carty, O. B. 1782, East. T. 22 Geo. 3. 2 East, P. C. c. 19, s. 5, p. 858, note (*a*). 1 Leach, 232.

the evidence was admissible, but the weight of it would depend upon the way in which it would be confirmed. (*w*)

What sufficient evidence of forging a bill of exchange.

The prisoner was indicted for that he, having in his possession a certain bill of exchange, forged the following acceptance on it,

"Accepted, payable at Sir John Lubbock, Bart. & Co's., bankers, London."

The bill was drawn by the prisoner, indorsed by him, and accepted by him. On being taken into custody, he did not deny or attempt to disguise the fact; neither did he personate, or in any manner shew an intention to personate any other person. The bill was paid away to one of the parties named in the indictment, as intended to be defrauded by it: but it was never presented for payment, and consequently not refused. No person was called to negative the authority of Sir John Lubbock to the prisoner to accept the bill for him or on his behalf; neither was there any other evidence given of an intent to defraud Sir John Lubbock, or any of the persons named in the other counts of the indictment. Littledale, J., thought the counsel for the prosecution had left the case short, in not proving an attempt to defraud Sir John Lubbock, or some one specifically mentioned in the indictment, and was further of opinion, that the acceptance, being proved to be in the handwriting of the prisoner, was not in itself *primâ facie* evidence of a forgery, sufficient to put him on his defence. But after some discussion, he allowed the case to go to the jury, intimating that he should reserve the point in the event of a conviction. He then told the jury, that if they thought the prisoner, when he paid away the bill, intended that the party to whom he paid it should add his name, it was an incomplete acceptance. But that if they considered that he uttered it with a fraudulent intent, meaning that it should pass as the acceptance of the drawee, they would then find him guilty; and he would take the opinion of the Judges, as to whether it was an acceptance within the terms of the act of Parliament. (*x*)

Giving a forged note to an innocent agent or an accomplice, that he may pass it, is a disposing of and putting it away.

Giving a forged note to an innocent agent or an accomplice, in order that he may pass it, is a disposing of and putting it away. The first count charged the prisoner with disposing of and putting away a forged 5*l.* bank note. The second with offering to one Abraham Newton a forged 5*l.* bank note. It appeared from the confession of the prisoner that he had on different occasions prior to the transaction in question, purchased 5*l.* and 10*l.* forged bank notes of a person of the name of Trundell, which he had disposed of by an agent employed by him for that purpose. That on the 27th of January, he met Trundell by appointment at the New Inn in the Old Bailey, and purchased of him six 5*l.* forged bank notes. It appeared further, that shortly after receiving the same, the prisoner delivered one of them to Burr, who at the prisoner's desire, disposed of it in part payment of a horse purchased by the prisoner in Smithfield market. The prisoner and Burr, before they parted, agreed to meet at Harlington on the following day, and to proceed from thence in company to Windsor. They met accordingly, and went together in the prisoner's one horse chaise to Windsor, where

(*w*) Reg. *v.* Williams, 8 C. & P. 434.
(*x*) Musgrave's case, 1 Lew. 138. The prisoner was acquitted.

the prisoner delivered into the hands of Burr one other of the *5l.* forged bank notes, which he had received on the preceding day from Trundell, directing Burr to purchase for him some tea and sugar at a grocer's at Eton. Burr accordingly purchased the tea and sugar, for which he gave the *5l.* note given to him by the prisoner, and received the change in small notes and silver, which, together with the tea and sugar, Burr delivered to the prisoner. The prisoner and Burr then returned from Eton to Windsor, when the prisoner delivered to Burr another *5l.* bank note, which, it appeared from the prisoner's confession, was one of the six *5l.* bank notes purchased by the prisoner from Trundell. The last mentioned *5l.* note was the subject of the present indictment, which Burr, by the prisoner's desire, attempted to dispose of at three several shops in Windsor, but without success, the prisoner waiting at a short distance in the street and communicating with Burr after leaving each shop successively. The prisoner then directed Burr to endeavour to get the note changed at a butcher's, whose name was Newton, telling him that he must get change before he went home. Burr accordingly went into the shop of Newton, leaving the prisoner waiting near the top of the street. Burr purchased some meat, and offered in payment the said *5l.* forged bank note, so delivered to him by the prisoner. Newton took the note, and gave Burr the change, deducting the price of the meat, which he delivered to Burr. When Burr offered the note to Newton, the latter asked him what name he should put upon the note, to which Burr answered, Giles of Heston, not far from Cranford Bridge, near Hatton. After receiving the change and the meat, and before Burr had quitted the shop, one Hewitt came in, and made some communication privately to Newton, upon which he insisted on having the meat and the change returned to him, and which Burr complied with. Burr was then detained by Newton and Hewitt, on suspicion of having paid to the former the forged *5l.* bank note, knowing it to be forged, when Burr stated that Giles, from whom he had received it, was in the street, and desired to be taken to him. Giles had, in the meantime, absented himself, and was afterwards apprehended in New Windsor. The counsel for the prosecution insisted, that the offer of a *5l.* forged note by Burr to Newton, as the agent of the prisoner, was the act and offer of the prisoner. For the prisoner, it was contended, that he, not having been present, ought to have been indicted as an accessory before the fact, and could not legally be convicted as a principal. Vaughan, B., told the jury that if they should be of opinion that Burr knew when he offered the note to Newton that it was a forged note, the prisoner could not be considered as a principal: but that if Burr was employed by the prisoner as an innocent instrument, being ignorant that the note was a forged one, it would then be the act of the prisoner, and he might properly be convicted. The learned Judge added also, that he thought the delivery of the prisoner to Burr of the note in question, if delivered with a knowledge of its being forged, and for the purpose of being uttered by Burr, was in itself a disposing of and putting away of the note in question, within the 15 Geo. 2, c. 13, s. 11. The jury found the prisoner guilty, and added that Burr did not know that the note given to him by the prisoner, and by him offered in payment to Newton, was a forged note. And, upon a case reserved, the Judges

thought that Burr knew it was forged, but were of opinion that the giving the note to Burr that he might pass it, was a disposing thereof to him, and that the conviction was right. (*y*)

What is a sufficient uttering.

The prisoner was indicted for forging and uttering an indorsement on an instrument, which was in the form of a bill of exchange, in which one Aickman was the payee; the indorsement was "received R. Aikman;" it appeared that the prisoner took the instrument to the banking house where it was payable and presented it for payment; but the clerk perceiving that the name of the payee in the instrument was spelt Aickman, with a c, but in the indorsement was spelt without any c, objected to pay it; upon which the prisoner altered the indorsement so as to make it stand, "Received for R. Aickman, G. Arscott"; and it was objected that this did not constitute an uttering of the original indorsement, as the whole that took place, viz., the presentment of the bill, the objection by the clerk, and the alteration by the prisoner, formed but one transaction, but the court seemed to be of opinion that the presenting of the bill to the clerk, previous to his objection, was a sufficient uttering. (*z*)

Conditional uttering sufficient.

A conditional uttering of a forged instrument is a sufficient uttering. Upon an indictment for forging and uttering a forged acceptance of a bill of exchange, it appeared that the prisoner gave the bill to the manager of a bank to which he was indebted, saying he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of his inquiries respecting the acceptors of the bill; and it was submitted that there was no sufficient uttering as it was at most conditional; and was like the delivery of a deed as an escrow, as the bill was to be placed to the prisoner's credit or not according to circumstances; but it was held that the uttering was sufficient, for a conditional uttering of a forged instrument is as much a crime as any other uttering. (*a*)

Giving a party an instrument as a specimen is not an uttering.

Giving a party a forged instrument as a specimen of skill is not an uttering. The prisoner was indicted for uttering a Polish note. One Flaum stated that the prisoner shewed him a Polish note on one occasion, and told him that two thousand and a half of those notes had been lately made, and proposed to him to purchase some of them; that the witness said he could not use them, and wished to have Austrian notes; that the prisoner said nothing more then, but afterwards, when they became more acquainted, he gave him a Polish note (the one mentioned in the indictment), and said that they were good, and that they were well made; that he had a quantity of them, and wished the witness to buy some. It was submitted, that the giving of the note under these circumstances, was not a putting in circulation with intent to defraud Nicolas, king of Poland. Littledale, J., said it was a question for the jury; and, in his summing up said, "If the prisoner meant it as a specimen, or that the witness might see whether the others were made according to the pattern, then, in my opinion, it would not be an uttering

(*y*) Rex. *v.* Giles, R. & M. C. C. R. 166. See Rex *v.* Palmer & Hudson, *post.*

(*z*) Rex *v.* Arscott, 6 C. & P. 408, Littledale, J., Vaughan, B., and Bolland, B. The prisoner was acquitted on the ground that forging an indorsement on a warrant for the payment of money is not within the 1 Wm. 4, c. 66.

(*a*) Reg. *v.* Cooke, 8 C. & P. 582, Patteson, J.

within the meaning of the act. If you are satisfied that it was not uttered with intent to put it into circulation, but was to be kept as a pattern, and afterwards thrown away or put in the fire, then you may acquit the prisoner." (*b*)

Shewing a forged instrument.

In a case upon the 13 Geo. 3, c. 79, s. 2, (now repealed) it was held, that shewing to a person an instrument with an intent to raise a false idea of the party's substance did not amount to an uttering; and also that the leaving it afterwards sealed up with the person to whom it was shewn, under cover, that he might take charge of it, as being too valuable to be carried about, was not an uttering or publishing. (*c*)

Uttering or forging an acceptance does not support a count for uttering or forging a bill.

A count for uttering a bill of exchange is not supported by proof of uttering the forged acceptance of the bill. A count alleged that the prisoner uttered a forged bill of exchange, setting it out with the acceptance upon it; the evidence was that the acceptance alone was forged, and known to be so by the prisoner; and it was objected that by the 1 Wm. 4, c. 66, s. 3, the forging or uttering of an acceptance is made a distinct offence from the forging or uttering a bill of exchange, and, consequently, that the evidence did not support the count for uttering the bill, and it was held, upon a case reserved, that the objection was fatal. (*d*) So where the prisoner was a partner in a firm, and was indicted for forging a bill of exchange, and it appeared that the acceptance only was forged, he having authority to draw bills in the name of the firm; Parke, B., held that the indictment could not be sustained. (*e*)

All facts which are part of a continued transaction are admissible on an indictment for forging and uttering.

On an indictment for forging and uttering a forged bill of exchange, the Judge will admit evidence of all the facts which form parts of one continued transaction, relating to the uttering of the bill, and will not put the prosecutor to elect what particular fact he means to rely upon as the uttering, till the case for the prosecution is closed. Upon an indictment for forging and uttering a forged bill of exchange, it appeared that the prisoner had procured the prosecutor to write his name and the word "accepted" on a blank stamp, and afterwards produced the bill to one Edwards when perfectly blank with the exception of the acceptance; and it was submitted that, as the shewing the paper to Edwards might be considered as an uttering, the prosecutor should elect whether he would press this as the uttering, or state what uttering he intended to go upon, as every uttering was a distinct felony. For the prosecution, it was stated, that there were charges in the indictment for forging and uttering, and it was proposed to prove them by shewing a series of circumstances. Littledale, J., "It is not as if they proposed to give evidence of acts quite distinct from each other. I think we must hear all the facts, which form parts of one continued transaction, and we cannot put the prosecutor to any election till his case is concluded." (*f*)

Questions as to the proof of the identity or non exis-

Questions have frequently arisen as to the necessary proof of the identity or non-existence of the person whose name is charged to be forged.

(*b*) Rex *v.* Harris, 7 C. & P. 428.

(*c*) Rex *v.* Shukard, Russ. & Ry. 200, *post.*

(*d*) Rex *v.* Horwell, R. & M. C. C. R. 405. 6 C. & P. 148. S. C.

(*e*) Butterwick's case, Rosc. Cr. Ev. 465.

(*f*) Rex *v.* Hart, 7 C. & P. 652, *cor.* Littledale, J., and Bolland, B. See this case more fully stated, *ante*, p. 322.

tence of the person whose name is charged to be forged.

Sponsonby's case. As to the proof of the identity of a payee of a bill of exchange.

In a case in which it was holden that the payee of a bill of exchange was a competent witness, under the circumstances, to prove that his name indorsed thereon was a forgery, it further became necessary to shew that such payee, whose name was Wm. Pearce, was the identical Wm. Pearce to whom the bill was made payable. The drawer of the bill, whose testimony was considered as the best evidence of the fact, was not produced; and the question was then raised, whether a letter of advice which Pearce had received from the drawer, with whom he was intimate, signifying that such a bill had been remitted to him, and desiring him, as an act of friendship, to pay the produce to one Coles, in discharge of a debt which the drawer owed to Coles, was sufficient evidence. And Adair, Serjt. Recorder, before whom the prisoner was tried, held that it was not sufficient; and the testimony of Pearce, to shew the handwriting to be forged, was ultimately rejected, on the ground that though he might shew it not to be his own handwriting, yet it might be the handwriting of another Wm. Pearce, to whom the bill might be payable. (*h*) But upon this case a doubt is suggested, whether the fact of Wm. Pearce being an intimate acquaintance and correspondent of the drawer, no evidence being given of the existence of any other Wm. Pearce to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee: and it is observed, that under the circumstances of the case, he had no interest in proving himself to be the real payee. (*i*)

Parr's case. Proprietor of stock examined to prove his identity.

A case has been already mentioned, where, upon an indictment for personating a proprietor of stock, such proprietor was examined as a witness, to shew the amount of the stock he had at the bank; and that the sum for which the prisoner had obtained the dividend warrant, was the exact sum due to him at the time; evidence which would have the effect of proving his identity. (*j*)

Downes's case. Where the name of the drawer and also that of the indorser were forged on a bill it was holden not to be an objection that the drawer was not called to prove upon whom the bill was drawn, there being two of the name at the place; and that it might be shewn by other evidence who the prisoner meant by the person

The prisoner, James Downes, was indicted for forging a bill of exchange purporting to have been drawn by one Andrew Holme, payable to the order of John Sowerby. From some letters, written by the prisoner after his apprehension, it clearly appeared, that the name of the supposed drawer, Andrew Holme, who was the prisoner's uncle, was forged: and it also appeared from the same letters that the John Sowerby, whose indorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name at Liverpool. A witness to whom the prisoner paid away the bill stated that he questioned the prisoner at the time, and that the account he gave was that the drawer of the bill, Andrew Holme, was a gentleman of credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses; and the prisoner further said, that he might depend on it was a good bill. Neither Andrew Holme nor John Sowerby the son were called as witnesses; but John Sowerby the father, was produced, and he swore that the indorsement was not in his handwriting; that he had lived thirty-six years in Liverpool, and knew no other person of the same name there, either a cheesemonger or

(*h*) Sponsonby's case, *cor.* Adair, Serjt. Recorder, O. B. 1784. 1 Leach, 332. 2 East, P. C. c. 19, s. 65, p. 996, 997.

(*i*) 2 East, P. C. c. 19, s. 65, p. 997.

(*j*) Parr's case, 1 Leach, 434.

whose name he forged, as the payee and indorser.

otherwise, except his son, who had left him about four months before, and afterwards carried on the same business of a cheesemonger in Dean-street. That his son had failed, and was lately gone to Jamaica. That the indorsement was not at all like his son's handwriting; and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the indorsement was not like the handwriting of the son, and that he did not believe it to be his. An objection was taken on behalf of the prisoner, that Andrew Holme, the drawer of the bill, ought to have been called to prove what John Sowerby it was, in whose favour it was drawn; but the evidence was left by the learned Judge, who tried the prisoner, to the jury, and the prisoner was found guilty. And the point being afterwards submitted to the consideration of the twelve Judges, they were all of opinion that the conviction was proper. Buller, J., who afterwards passed sentence upon the prisoner, in adverting to the reasons upon which the opinion of the Judges proceeded, said that the objection supposed that there was a genuine drawer of the bill; whereas it was apparent, from the prisoner's own acknowledgments in his letters, that the name of the drawer, as well as that of the indorser, was forged by the prisoner: and if no real drawer existed, and the objection were allowed, it would be to excuse one forgery because another had been committed. He observed, in the second place, that the prisoner himself had ascertained who was intended by the John Sowerby whose indorsement was forged; for, when he negociated the bill, he represented him to be a cheesemonger at Liverpool; and by another letter of the prisoner it was clear that he meant Sowerby the son; for thereby he requested his uncle to go to Sowerby's mother, and desire her to say nothing about it, whether he had any concern or not, or whether he indorsed it or not. And he concluded by saying that, it being proved that the indorsement was not the handwriting of Sowerby the son, the evidence of the forgery was full and complete, and the conviction right. (*k*)

Where a prisoner was indicted for forging and uttering a cheque purporting to be drawn by G. Andrewes on Messrs. Jones, Loyd & Co., proof by a clerk of their house that no person of the initial and name of G. Andrewes kept any account there or had any right to draw cheques on their house was held sufficient *primâ facie* evidence to go to the jury that G. Andrewes was a fictitious person. (*l*) So where a prisoner was indicted for forging a bill purporting to have been accepted by "Samuel Knight, Market-place, Birmingham," and the prosecutor stated that he had been twice there to inquire after Knight, and had, on the second occasion, inquired at the bank there and at a place where the overseers of the poor met, and he had made inquiries at Nottingham, at which place the bill purported to be drawn for T. Webb the drawer, but was not able to hear anything of him; and he admitted that he was a stranger to both these places. It was submitted that the evidence was not sufficient, and that witnesses should have been called, who were acquainted with

(*k*) Downes's case, Lancaster Sum. Ass. 1789, Mich. T. 1789. 2 East, P. C. c. 19, s. 65, p. 997.

(*l*) Rex *v.* Backler, 5 C. & P. 118, Parke, J., and Gaselee, Js.

Birmingham and Nottingham respectively; but it was held that it was evidence to go to the jury. It was not certainly the most satisfactory evidence; nor was it the evidence that was usually given in such cases; but it was evidence, and it was for the jury to say whether it was sufficient, in the absence of any evidence on the part of the prisoner, who best knew the state of the matter. (*l*) So where the prisoner was indicted for forging and uttering a cheque for 10*l.* drawn in the name of John Weston, on Messrs. Cox & Greenwood, and a clerk from their establishment stated that they were bankers and army agents, and that there was not any person of the name of John Weston having any account there, and that the cheque was presented to him and payment refused on that ground, and added that he was a clerk in the army agent department; and he could not swear he knew the names of all the customers in the house, but he did not know any one of the name of J. Weston in his department, and that he had inquired of the other clerks, and was informed by them that there was no such person in the banking department; it was objected that the evidence was not sufficient, as it was partly hearsay: but it was held that it was *primâ facie* evidence, and was sufficient to call upon the prisoner to show that in fact there was a J. Weston having an account at Messrs. Cox & Greenwood. (*m*)

Proof that the prisoner represented the maker of a note as living at a particular place, and in a particular line of business, with evidence that it is not that person's note.

Proof that the prisoner, on uttering a note, represented the maker as living at a particular place and in a particular line of business, with evidence that it is not that person's note, is sufficient to prove it a forgery, if the prisoner be the payee of the note; and proof that there is another person of that name in a different line of business will not make it necessary to prove that it was not that person's note. The prisoner was indicted for forging and uttering a promissory note purporting to be drawn by W. Holland, payable to the prisoner or his order. The prisoner told the person, to whom he uttered the note, that it was drawn by W. Holland, who kept the Bull's Head at Tipton, who was a respectable man. The note was dishonoured; and the prisoner, on being informed by the prosecutor that Holland said he knew nothing of the note, said, "Does not he? I will let him see that." Holland proved that he kept the Bull's Head at Tipton; that the note was not made by him, or by his order, or with his knowledge, and there was no other publican of his name at Tipton; but there was a gentleman of the same name living there on his means, who for distinction was called gentleman Holland. Upon this evidence, it was objected 1st., that there was no evidence of the note being forged; the description of the maker applied as exactly to the second as to the first W. Holland. 2nd. No evidence that at the time of the uttering the prisoner knew Holland of the Bull's Head not to be the maker of the note. 3rd. Supposing him to have had such knowledge, verbal misrepresentation did not amount to forgery. 4th. Supposing such misrepresentation could amount to forgery, that was not the offence of which he was convicted, (*n*) but of uttering the note knowing it to be forged, which implied a previous act of forgery. If, therefore, the forgery was not consummated until

(*l*) Rex *v.* King, 5 C. & P. 123, Park, J. A. J., Parke, J., and Bolland, B. The prisoner was acquitted.

(*m*) Rex *v.* Brannan, 6 C. & P. 326, Park, J. A. J., Patteson, J., and Gurney, B.

(*n*) This seems a mistake, the objection being taken before verdict.

the representation was made, the offence of uttering, which must be subsequent, was never committed. The jury found the prisoner guilty of uttering the note knowing it to be forged, and said they were satisfied that when the prisoner represented it to be the note of Holland of the Bull's Head, he knew it was not his note. And, upon a case reserved, the Judges held that, as the prisoner had stated that W. Holland of the Bull's Head was the maker, and from being payee of the note he must have known the particulars, it was sufficient for the prosecutor to shew it was not the note of that W. Holland; and it lay on the prisoner to prove it the genuine note of another W. Holland, if it were so. (*o*)

Of the guilty knowledge, where the publication with knowledge of the fact is made a substantive offence.

It has been already observed, that the publication of the forged instrument, with knowledge of the fact, is made a substantive offence, by most of the statutes which relate to forgery; (*p*) and in cases of this kind the knowledge of the fact, or as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence. The subject has come under consideration in several modern cases.

Wylie's case. Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his knowledge of the forgery.

Two prisoners were indicted for disposing of and putting away a forged bank note for one pound, *knowing the same to be forged.* It was proved that they put off the forged note stated in the indictment at the shop of one John Hind; and then, in order to shew that they knew the note to be forged, evidence was offered to prove that they had before passed other forged notes to other persons. This evidence was objected to by the counsel for the prisoners, who urged that no evidence could be given of any transaction not stated in the indictment, since the prisoners could not be prepared to defend themselves against a charge of which they had no notice. But the learned Judges, before whom the prisoners were tried, overruled the objection. Lord Ellenborough, C. J., said, "Certainly no different rule of law can prevail with respect to prosecutions by the bank from those commenced by any other person. This point, however, is not new; it was reserved in the case of *The King* v. *Tattersall*, which was tried at Lancaster, in 1801, by Mr. J. Chambre, and received the collective voices of the Judges. The question was, whether in giving evidence to prove an allegation that the party uttered a bank note, knowing it to be forged, the prosecutor might give the conduct of the prisoner in evidence, to shew his knowledge of the forgery? The learned Judge reserved the question, whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another? The opinion of the Judges was, that the jury were at liberty to make such inference. The prisoner does not come unprepared; it is alleged that he uttered a note, knowing it to be forged. Are we then to exclude all evidence, but what is furnished by this particular transaction, since without other evidence it is impossible to ascertain whether the party uttered the note with knowledge, or under circumstances which shewed the uttering to be venial? I remember a case in which a person came to Manchester with a large parcel of forged notes; his whole demeanor afforded pregnant evidence of the mind and purpose for which he came; and

(*o*) Rex *v.* Hampton, R. & M. C. C. R. 255.

(*p*) *Ante*, p. 319.

a question was made, whether that evidence should be received, for it was said that it would be trying the prisoner for other utterings. But if crimes do so intermix, the court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one place, and left it at another, and they were all so connected that the court went through the history of the three different burglaries. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances as to leave no doubt that the prisoners must have known what sort of paper they were passing." (*q*)

Other forgeries on the same bank.

So in a case where the prisoner was indicted for forging and for uttering with guilty knowledge a bill of exchange, purporting to be drawn upon a certain banking house, it was holden that other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, were admissible as evidence of guilty knowledge. (*r*)

Ball's case. Upon a similar indictment, evidence is admissible of the prisoner having some time before uttered another forged note of the same manufacture; and also of a number of others having been in circulation which were of the same manufacture, with the prisoner's handwriting on the back of them.

In a subsequent case, the prisoner was also indicted for disposing of and putting away a forged bank note, which purported to be a promissory note of the governor and company of the Bank of England, *knowing the same to be forged.* Clear proof was adduced, that the note in question was forged, and that it had been uttered by the prisoner at East Bourn, on the 17th of June, 1807, so that the only remaining question was, as to his *guilty knowledge* of the forgery. To establish this, evidence was admitted, that on the 20th of March preceding, he had passed off a 10*l.* Bank of England note likewise forged, and of the same manufacture, and that there had been paid into the Bank of England various forged notes, dated between Dec. 1806, and March 1807, all of the same manufacture, and having different indorsements upon them, in the handwriting of the prisoner. It likewise appeared, that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind with those produced. The prisoner was found guilty, but sentence was respited for the purpose of taking the opinion of the twelve Judges, as to the admissibility of this evidence. They were of opinion that it was admissible, to prove the knowledge of the prisoner that the note was forged, and that every thing which he said or did was proper to be admitted to shew his knowledge of the forgery. (*s*)

Crocker's case. Evidence of another forged promissory

In another case, where the prisoner was indicted for forging a promissory note, (not a note of the Bank of England) and also for uttering it, evidence was given that, in the same pocket-book belong-

(*q*) Rex *v.* Wylie and another, *cor.* Lord Ellenborough, C. J., Heath, J., and Thomson, B., O. B. 1804. 1 New R. 92. S. C. by the name of Whiley and Haines, 2 Leach, 983. And see *ante*, vol. 1, p. 80, 81, as to the guilty knowledge in uttering counterfeit money; and Phil. on Evid. (3d edit.) 142, 143.

(*r*) Rex *v.* Hough, 1806, Russ. & Ry. 120.

(*s*) Rex *v.* Ball, Lewes Sum. Ass. 1808. 1 Campb. 324. Russ. & Ry. 132. In this case the judges were of opinion that although it should appear upon a case reserved, that evidence had been admitted at the trial which ought not to have been received, yet if there were ample evidence to support the indictment, after rejecting such improper evidence, the conviction ought not to be set aside.

ing to the prisoner in which the forged note was found, on which the indictment proceeded, there was also found another promissory note for 100*l.*, payable to the prisoner or order, appearing to be signed by one Wm. Gapper, which Wm. Gapper proved not to be his handwriting, and that he never owed the prisoner 100*l.* This evidence of Gapper's note was objected to by the prisoner's counsel, but the Judge received the evidence. (*t*)

note in the same pocket-book where the note was found on which the indictment proceeded.

Where in order to shew guilty knowledge the prosecutor wished to prove the uttering of another forged note *five weeks after* the uttering, which was the subject of the indictment, and it was objected that only previous acts could shew *quo animo* the thing was done, it was held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or it could be shewn that *the notes were of the same manufacture.* (*u*) And in a recent case of uttering a forged acceptance, where for the purpose of proving guilty knowledge it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, &c., passed *a month after* the uttering in question: Mr. J. Gaselee, after consulting the Lord C. B. Alexander, was disposed to allow the evidence to be received and reserve the point, when the counsel for the prosecution declined to press the evidence. (*v*)

Other utterings after the one charged.

Upon indictments for uttering forged notes, other forged notes of other and different banks, either found upon the prisoner or uttered by him, have been held admissible to prove guilty knowledge. Thus on an indictment for uttering a forged Rochdale bank note, two forged 5*l.* Bank of England notes have been admitted. (*w*) So on an indictment for uttering a forged 5*l.* note of the Bank of Ireland, two forged notes of Messrs. Ball & Co., bankers, Dublin, have been held admissible. (*x*)

Other forged notes, &c., of other banks are admissible.

So on an indictment for engraving and uttering notes of a foreign prince, evidence of a recent engraving or uttering notes of another foreign prince is admissible to prove guilty knowledge. The prisoner was indicted for forging and uttering a Polish note. In support of the *scienter* as to this note, the prosecutor gave in evidence what took place at a meeting on 24th August, 1835, between the prisoner Balls, Harris, and a person called Turner, at which Balls agreed with Flaum to make him one thousand Austrian notes for fifty florins each, at the price of three shillings for each note: 30*l.* was paid by Flaum to Balls in advance, and the 30*l.* was to be reckoned in account. Harris told Flaum that the notes should be ready in six weeks; Flaum was to have security for the money, and a bill of exchange was drawn by Balls upon Turner, which Turner accepted.

Engraving other notes.

(*t*) Rex *v.* Crocker, *cor.* Le Blanc, J., Salisbury Sum. Ass. 1805. 2 New R. 87, 88, *ante*, p. 390. The prisoner was convicted, and the case was submitted to the consideration of the twelve Judges; but their opinion upon this point does not appear. The prisoner was in fact pardoned, and discharged; but there were several objections to the conviction. It is, however, understood that the judges were of opinion that the witness was incompetent. See *ante*, 391, note (*z*), and Russ. & Ry. 97.

(*u*) Rex *v.* Taverner, Carr. Supp. 195. 4 C. & P. 413, note (*a*)

(*v*) Rex *v.* Smith, 4 C. & P. 411. The date of the bill on which the indictment was founded was the 1st March, 1830, and it had been uttered on the 15th of May, 1830; the other bills were passed in June, 1830, but their dates are not mentioned.

(*w*) Sunderland's case, 1 Lew. 102.

(*x*) Kirkwood's case, 1 Lew. 103, Littledale, J. See also Martin's case, 1 Lew. 104, where the same point was ruled by the same learned judge, but it is not stated of what bank the notes were.

and Balls signed and indorsed the bill, and Harris also indorsed it; this evidence was objected to by the counsel for the prisoner, as it was a transaction relative to Austrian notes, which were of quite a different description from Polish notes, and besides which no Austrian notes were in fact made, and the transaction took place a week before the 1st of September. The learned Judge admitted the evidence. The prosecutor had begun his case by proving that in September, 1834, the prisoner had brought to an engraver a front plate already engraved, and a back plate; the back plate was not found to answer, and the engraver got another back plate, which the prisoner directed the engraver to engrave; the prisoner, who as well as the engraver, was ignorant of the Polish language, said it was for a mining ticket; the engraver completed the back plate, and took off 500 impressions from the front plate, and 500 impressions from the back plate, and for which Balls paid him; and the engraver stated that the plates had been a great deal used since the engraver used them. This evidence was objected to, but the learned Judge admitted it, as there were counts for forging the note in the indictment, as well as for uttering; and the learned Judge did not then know whether the note in the indictment might or might not turn out to be taken from those plates; at the close of the case, however, it appeared that those plates were calculated to make impressions of Polish cash notes, and that they could not have produced the note in the indictment. That put an end to the counts for forging the notes, and the learned Judge thought there might be a question, as the note was not taken from those plates, whether the evidence ought to have been retained as admissible, so as to submit it to the jury in support of the *scienter* on the remaining counts. The prisoner was found guilty, and, upon a case reserved, the Judges determined that the evidence was admissible, and the conviction was affirmed. (*y*)

As to the admissibility of forged notes the subjects of other indictments.

In one case (*z*) where the prisoners were indicted for uttering forged notes of the Edinburgh bank, it was doubted whether the uttering forged notes of the Paisley Bank, which formed the subject matter of another indictment, was admissible. In another case it was held, that on an indictment for uttering a forged one pound bank of England note, the uttering another forged one pound note, the subject of another indictment, could not be given in evidence. (*a*) But in a subsequent case where the prisoner was indicted for uttering a forged 5*l.* note of the Bank of Ireland, and two forged notes of the bank of Messrs. Ball & Co., bankers, Dublin, were tendered in evidence, and it was objected that these notes being the subject matter of another indictment, were inadmissible; Littledale, J., without hesitation, overruled the objection. (*b*) And in another case the same learned Judge held that forged notes, the subject of other indictments, were admissible, although the names of the witnesses who were called to prove them forged, and to connect the prisoners with them, were not upon the back of the bill. (*c*) So on an indictment for uttering a forged Bank of England note, Alderson,

(*y*) Rex *v.* Balls, R. & M. C. C. R. 470. S. C. 7 C. & P. 426, 429.

(*z*) Hodgson's case, 1 Lew. 103. Hullock, B., 1827.

(*a*) Rex *v.* Smith, 2 C. & P. 633, Vaughan, B., 1827.

(*b*) Kirkwood's case, 1 Lew. 103, 1830.

(*c*) Martin's case, 1 Lew. 104, Littledale, J.

B., admitted another forged Bank of England note in evidence, although the subject of another indictment. (*d*) And in a late case Lord Denman, C. J., said, that "he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge;" and offered to admit the evidence. (*e*)

Other notes must be proved to be forged.

But if the possession of other forged instruments is offered in evidence to prove a guilty knowledge, there must be regular evidence that such instruments are forged, and proof that the prisoner returned the money on any such instrument, and received the instrument back again, is not sufficient without producing the instrument, or duly accounting for its non-production. (*f*)

A former uttering of a supposed forged note, which has been destroyed, and is not proved to have been forged.

Upon an indictment for uttering a 5*l.* note, it appeared that on a former occasion the prisoner had paid away a 1*l.* note, that the woman to whom he paid it, on finding it to be bad, sent word of it to the barracks, whereupon the prisoner, accompanied by one of the serjeants of the regiment, came to the woman's house to ask for the note, and to give good money in exchange for it. They found, however, that the woman had given the note to the constable, whom they immediately sent for; the constable, however, did not come to them, and the serjeant and the prisoner were obliged to return to the barracks without seeing him. But before they went away, they left two half sovereigns to make good the debt. Soon after they were gone, the constable came in, and finding that the woman was satisfied as to her money, he put the note into the fire. When the facts relating to the uttering the 5*l.* note had been gone through, the counsel for the prosecution was about to prove these facts respecting the 1*l.* note. But Bayley, J., interposed, and expressed a strong doubt whether they were admissible, no evidence having been given of the note being a forged note, and the note itself not being produced; he, however, consented to receive the evidence, stating, that if the prisoner should be convicted, he would reserve the point for the opinion of the Judges. (*g*)

Statements and letters respecting bills which are not produced or proved to be forged.

It has been held on the trial of an indictment for forging a bill of exchange that evidence of what the prisoner said respecting other bills of exchange which are not in evidence, is not admissible. (*h*) And although a letter written by the prisoner to a third person, stating that that person's name is on another bill, and desiring him not to say that that bill is a forgery, is receivable in evidence, yet the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced, and the forgery of it proved in the regular way. Upon an indictment for forging and uttering an

(*d*) Reg. *v.* Josiah Aston, Worcester Spr. Ass. 1838, MS. C. S. G.

(*e*) Reg. *v.* Lewis, Arch. Cr. P. 365, 8th edit.

(*f*) Rex *v.* Millard, Russ. & Ry. 245.

(*g*) Phillips' case, 1 Lew. 105. The result of the case is not stated, but it is said that the learned judge subsequently expressed the following opinion: "That the prosecutor could not give in evidence any thing that was said by the prisoner at a time collateral to a former uttering, in order to shew that what he said at the time of such former uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description. That the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration; that the prosecutor is at liberty to show other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them. But that what he said or did at another time collateral to such other utterings, could not be given in evidence, as it was impossible that the prisoner could be prepared to combat it."

(*h*) Reg. *v.* Cooke, 8 C. & P. 586. Patteson, J.

acceptance of W. Prosser to a bill of exchange, a letter written by the prisoner to one Lawrence, in which he stated that a 20*l.* bill was the last one of Prosser's, with Lawrence's name upon it, and requested Lawrence on no account to say it was a forged bill, and to be careful of speaking to Prosser, was tendered in evidence, and objected to as it related to another bill, and, at all events, that the bill to which it referred ought to be put in; Coleridge, J., held the letter receivable, and in summing up said, "With respect to the letter that has been read, I think that you ought not to take it as proof that the bill mentioned in it is forged. Bills, which are not the subject of indictment, are often given in evidence to shew guilty knowledge, but there is in such cases strict proof that those bills are forged. No such evidence is given here, nor is the bill even produced. It therefore may be, that the bill alluded to in the letter is in some respects irregular, but still it may not be a forgery." (*i*)

Punishment.

The punishment of forgery at common law is, as for a misdemeanor, by fine, imprisonment, and such other corporal punishment as the court, in their discretion, shall award. (*ii*) The punishments ordained for the offence by the statute-law will be mentioned, with the other enactments of the different statutes, in the succeeding chapters.

Incompetency to be a witness after judgment.

A consequence of the judgment for forgery was an incapacity to be a witness until restored to competency by the king's pardon. (*j*)

Attornies convicted of forgery. and afterwards practising.

And the 12 Geo. 1, c. 29, provides that, in case persons convicted of forgery shall afterwards practise as attornies, solicitors, or law agents, the Court where the suit or action is brought shall, on complaint, examine the matter in a summary way, in open court, and cause the offender to be transported for seven years.

The principal statutes relating to the crime of forgery having been consolidated by the 1 Wm. 4, c. 66, which contains general provisions applicable to all the offences affected by that act, it is thought expedient to introduce those provisions in this place, in order that they may be more readily referred to in the subsequent chapters.

1 Wm. 4, c. 66.

The 1 Wm. 4, c. 66, s. 1, reciting that "several offences relating to forged writings, and to other forged and counterfeit matters, and to false personation, false oaths, false entries, and other false matters, are now by virtue of several statutes punishable with death; and that it is expedient that none of those offences shall hereafter be punishable with death, unless the same shall be made punishable with death by this act; and also that the statutes concerning such of those offences, whether punishable with death or otherwise, as may more frequently or seriously affect the interests of his majesty or his subjects, should be amended, and consolidated into this act," enacts, "that where by any acts now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to be falsely made, forged, counterfeited, erased, or altered, or any

No forgeries or other kindred offences, which are now capital, shall con-

(*i*) Rex *v.* Forbes, 7 C. & P. 224. See this case, *ante*, p. 341.

(*ii*) 1 Hawk. P. C. c. 70, s. 1. 4 Blac. Com. 247. Bac. Ab. *Forgery*. 2 East, P. C. c. 19, s. 69, p. 1003. The corporal punishment of the pillory may not now be inflicted for this offence; 56 Geo. 3, c. 138. 1 Vict. c. 23.

(*j*) Co. Lit. 6 *b*. 2 Hawk. P. C. c. 46, s. 101. Com. Dig. Testmoign, A. 3. But see now the 9 Geo. 4, c. 32, s. 3, in the Chapter on Evidence. C. S. G.

person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to be falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force any person falsely personating another, or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking a false oath, or knowingly making a false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act, be convicted of any such felony as is hereinbefore mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, such person shall not suffer death for the same, unless the same shall be made punishable with death by this act, and if the same shall not be made punishable with death by this act, in such case every person who shall, after the commencement of this act, be convicted of any such felony, or of aiding, abetting, counselling, or procuring the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years; provided always, that nothing herein contained shall affect or alter any acts relating to the coin of this realm, or to any coin of any other realm lawfully current within this realm."

tinue so, unless expressly made capital by this act.

All forgeries heretofore capital, and not declared so by this act, shall be punished with transportation. Saving of acts relating to coin.

Sec. 23, reciting the 5 Eliz., c. 14, and that there are certain acts by which persons convicted of certain offences mentioned in those acts are subjected to the same pains and penalties as are imposed by the said act of Queen Elizabeth for the offences first enumerated in that act, and that the said act is thereinafter repealed, and that it is expedient to substitute other punishments in lieu of the punishments of that act, enacts, that "every person who shall, after the commencement of this act, be convicted of any offence which is now subjected, by any act or acts, to the same pains and penalties as are imposed by the said act of Queen Elizabeth for any of the offences first enumerated in that act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the

Punishments of the 5 Eliz. c. 14, adopted by other acts repealed, and others substituted.

court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

All forgers and utterers may be tried in the county where they are apprehended or are in custody.

By sec. 24, "If any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

As to the principals in the second degree and accessories.

By sec. 25, "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

The court may order hard labour or solitary confinement for offences against this act.

By sec. 26, "Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet." (*j*)

As to offences committed at sea.

By sec. 27, "Where any offence punishable under this act shall be committed within the jurisdiction of the admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

Rule of interpretation as to criminal possession, and as to parties intended to be defrauded.

By sec. 28, "Where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, (*k*) or shall knowingly and wilfully have any such matter in any dwelling house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall throughout this act be deemed to include his Majesty or any foreign prince or state, or any body corporate, or any company or society of persons

(*j*) See the 1 Vict. c. 90, s. 5, *post*, p. 413.

(*k*) See vol 1, p. 83, as to the construction of these words in the 2 Wm 4, c. 34, s. 8.

not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons shall reside or carry on business in England or elsewhere, in any place or country, whether under the dominion of his Majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be."

By sec. 29, "this act shall not extend to any offence committed in Scotland or Ireland."

This act not to extend to Scotland or Ireland, but to apply to the forging or uttering in England documents purporting to be made, or actually made, out of England; and to the forging or uttering in England bills of exchange, promissory notes, bonds, &c., purporting to be payable out of England.

By sec. 30, "Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in that part of the United Kingdom called England, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of England, whether under the dominion of his Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England; and if any person shall in England forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money, (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose,) in whatever place or country out of England, whether under the dominion of his Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England."

2 & 3 Wm. 4, c. 123. Persons hereafter convicted of crimes punishable with death under recited act, shall not suffer death,

The 2 & 3 Wm. 4, c. 123, s. 1, reciting that by the 1 Wm. 4, c. 66, "it was provided, that if any person should after the commencement of that act be convicted of any forgery or other offence therein named or described, for which he would at the time of the passing of that act have been liable to the punishment of death, he should not suffer death for the same, unless the same should be made punishable with death by that act: and whereas by the law

but shall be transported for life.

and practice now prevailing in Scotland and in Ireland the penalty of death may be awarded, in certain cases, for forgery, for uttering counterfeit instruments, and for false personation: and whereas it is expedient to abolish the punishment of death for offences of that nature, except so far as relates to wills and certain powers of attorney, as hereinafter mentioned," enacts, "that where any person shall after the passing of this act be convicted of any offence whatsoever for which the said act enjoins or authorizes the infliction of the punishment of death, or where any person shall after the passing of this act be convicted in Scotland or Ireland of any offence now punishable with death, which offence shall consist wholly or in part of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another, then and in each of the cases aforesaid the person so convicted of any such offence as aforesaid, or of procuring or aiding or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of such offender's life." (*a*)

Persons hereafter convicted of crimes punishable with death under recited act shall not suffer death, but shall be transported for life.

This act not to extend to punishments for forging or altering wills and certain powers of attorney.

By sec. 2, "Notwithstanding anything hereinbefore contained this act shall not be construed to affect or alter the said recited act, or any other act or law now in force, so far as the same may authorize the punishment of death to be inflicted upon any person convicted, either in England, Scotland, or Ireland, of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferrable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment for each and every of the said offences, and for procuring, aiding, or assisting in the commission thereof, shall continue to be the same as if this act had not been passed."

1 Vict. c. 84. Forgeries heretofore punishable with death, by the recited acts, how punishable hereafter.

The 1 Vict. c. 84, entitled, "An act to abolish the punishment of death in cases of forgery," in sec. 1, recites so much of the 1 Wm. 4, c. 66, as enacts that every person guilty of certain offences therein mentioned, *viz.*, the offences, which are mentioned in the second section of the 2 & 3 Wm. 4, c. 123, shall suffer death as a felon, and as enacts that "every principal in the second degree, and every accessory before the fact should be punishable with death or otherwise in the same manner as the principal in the first degree was by that act punishable;" and also recites the 2 & 3 Wm. 4, c. 59, s. 19, the 2 & 3 Wm. 4, c. 123, s. 2, the 2 & 3 Wm. 4, c. 125, s. 64, the 5 & 6 Wm. 4,

(*a*) By the 3 & 4 Wm. 4, c. 44, s. 3, all persons punishable under this section were made liable, previously to their being transported, to be imprisoned with or without hard labour in the common gaol or house of correction for any term not exceeding four years nor less than one year.

c. 45, s. 12, and the 5 & 6 Wm. 4, c. 51, s. 5, and that it is expedient that none of the hereinbefore mentioned offences should be punishable with death, and enacts, "that if any person shall after the commencement of this act (1st October, 1837) be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned (*l*) for any term not exceeding four years, nor less than two years."

Persons punishable with transportation for life, &c., by the recited acts, how punishable.

Sec. 2 recites the 2 & 3 Wm. 4, c. 123, s. 1, (*m*) the 3 & 4 Wm. 4, c. 51, s. 27, and the 3 & 4 Wm. 4, c. 44, s. 3, and enacts that "so much of the three lastly hereinbefore in part recited acts as relates to the punishment of persons convicted of offences for which they are liable under the said act of the second and third years, or the said act of the third and fourth years respectively of his late Majesty's reign, to be transported for life, shall from and after the commencement of this act be and the same is hereby repealed; and that from and after the passing of this act, every person convicted of any of such offences shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned (*n*) for any term not exceeding four years nor less than two years."

Hard labour with imprisonment.

Solitary confinement.

By sec. 3, "when any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

The 1 Vict. c. 90, s. 5, reciting that "by the laws now in force it is lawful for the court before whom any person shall be convicted of certain offences for which imprisonment or imprisonment with hard labour may be awarded, to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour," enacts, "that after the commencement of this act (1 Oct. 1837) it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year."

(*l*) With or without hard labour. See sec. 3, *infra*.

(*m*) *Ante*, p. 411.

(*n*) With or without hard labour. See the next section.

CHAPTER THE THIRTY-THIRD.

OF THE FORGING, ALTERING, &c., OF RECORDS AND JUDICIAL PROCESS.

It is clear that, by the common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record: for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. (*a*) If, therefore, a man should insert in an indictment the names of those against whom in truth it was not found, it would be forgery. (*b*)

Even if the offence should not constitute a forgery: yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power. (*c*) The defacing or rasure of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment. (*d*) And it has been holden that any person making or knowingly using a false affidavit, taken abroad, (though a forging could not be assignable on it here,) in order to mislead our own courts, and to prevent public justice, is punishable by indictment for a misdemeanor. (*e*)

Judges are highly punishable at common law for offences of this kind. (*f*) And the statute 8 Rich. 2, c. 4, applies expressly to Judges as well as to clerks.

8 Rich. 2, c. 4. As to any judge, &c., falsely entering pleas, &c.

The 8 Rich. 2, c. 4, enacts, that "if any judge or clerk" offend by the false entering of pleas, rasing of rolls, or changing of verdicts, to the disherison of any one, he shall be punished by paying a fine to the King, and making satisfaction to the party.

(*a*) 1 Hawk. P. C. c. 70, s. 1, 8. Bac. Ab. *Forgery* (B). Roll. Ab. 65, 76. Yelv. 146. Cro. Eliz. 178.

(*b*) Rex *v.* Marsh and others, 3 Mod. 66. 1 Hawk. P. C. c. 70, s. 2.

(*c*) 2 East, P. C. c. 19, s. 9, p. 866.

(*d*) 3 Inst. 71, 72. 1 Hale, 646. 1 Hawk. P. C. c. 47, s. 1.

(*e*) Omealy *v.* Newell, 8 East. 364. And see Fawcett's case, 2 East, P. C. c. 19, s. 7, p. 862. *Ante*, p. 360.

(*f*) 3 Inst. 72. 1 Hale, 646. In 3 Inst. 72, the case of Justice Ingham (or Hengham, or as Hawkins says, Ingram) who was a judge in the reign of Edward I., is mentioned thus: He paid "eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen shillings four-pence, the said justice, moved with pity, caused the roll to be rased, and made it six shillings eight-pence. This case Justice Southcot remembered, when Catlyn, Chiefe Justice of the King's Bench, in the reign of Queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the Judges of that Court, utterly denied to assent unto, and said openly, that he meant not to build a clock-house; for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day."

The 1 Wm. 4, c. 66, s. 11, enacts, "that if any person shall forge or counterfeit, or shall utter knowing the same to be forged or counterfeited, the great seal of the United Kingdom, his Majesty's privy seal, any privy signet of his Majesty, his Majesty's royal sign manual, any of his Majesty's seals appointed by the twenty-fourth article of the union to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, every such offender shall be guilty of high treason, and shall suffer death accordingly: (*g*) provided always, that nothing contained in an act passed in the seventh year of the reign of King William the Third, entitled 'an act for regulating of trials in cases of treason and misprision of treason,' or in an act passed in the seventh year of the reign of Queen Anne, intituled 'an act for improving the union of the two kingdoms,' shall extend to any indictment, or to any proceedings thereupon, for any of the treasons hereinbefore mentioned."

1 Wm. 4, c. 66, s. 11. Forging the great seal, privy seal, privy signet, royal sign manual, &c., treason.

The 52 Geo. 3, c. 143, enacts, "that if any person shall make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, the mark or hand of the receiver of the prefines at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defrauded, or suffer any loss thereby; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy." (*h*)

52 Geo. 3, c. 143, s. 5. Any person forging, &c., the hand of the receiver of the prefines at the alienation office.

By the 1 & 2 Vict. c. 94, s. 1, the records in the Tower of London, Chapter House of Westminster, Roll's Chapel, Petty Bag Office, offices in the custody of the Queen's Remembrancer of the Exchequer, or of any other officer of the Exchequer, Augmentation Office, First Fruits and Tenths' Office, office of the Land Revenue and Enrolments, of the late auditor of the land revenues of England and Wales, and the records lately deposited in the office of the Pells of the Exchequer, and now in the custody of her Majesty's Comptroller of the Exchequer, the records belonging to the Courts of Chancery, Exchequer, and Admiralty, Queen's Bench, Common Pleas, and Marshalsea, the records of the lately abolished Courts of Wales and of Chester, Durham, and of the Isle of Ely, are placed under the charge of the Master of the Rolls. (*i*) And by sec. 8,

1 & 2 Vict. c. 94.

(*g*) The present punishment is transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four nor less than two years, with or without hard labour, in the common gaol or house of correction; and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet. See the 1 Vict. c. 84, ss. 2 and 3, *ante*, p. 413. The 2 & 3 Wm. 4, c. 123, *ante*, p. 411, took away the punishment of death in all cases of forgery, except the forging of wills and powers of attorney, and substituted transportation for life in its place. In treason there are no accessories, but all are principals. Fost. 341. C. S. G.

(*h*) The 52 Geo. 3, c. 143, not being expressly repealed by the 1 Wm. 4, c. 66, and the forgeries mentioned in the 52 Geo. 3, c. 143, not being made capital by the 1 Wm. 4, c. 66, they are now punishable (under the 1 Wm. 4, c. 66, s. 1 and 26, *ante*, p. 408 and 410, and the 1 Vict. c. 90, s. 5, *ante*, p. 413) with transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four nor less than two years, with or without hard labour, in the common gaol or house of correction, and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet. As to the punishment of principals in the second degree and accessories, see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410, and 1 Vict. c. 90, s. 5, *ante*, p. 413. C. S. G.

(*i*) By sec. 2, the Queen in Council may order records in other offices to be included in the act.

a public record office is to be established, and by sec. 12, the Master of the Rolls may allow a copy to be made of any of the said records, which is to be "certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers," and to "be sealed or stamped with the seal of the record office;" and by sec. 13, such copies are made evidence.

Certifying as true any false copy of records a felony.

By sec. 19, "every person belonging to or employed in the said public record office, who shall certify any writing as a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, and every person who shall counterfeit the signature of an assistant record keeper for the purpose of counterfeiting a certified copy of a record, or shall forge or counterfeit the seal of the public record office, shall be guilty of felony, and being duly convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

By sec. 20, the word "records" means "all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature belonging to her Majesty, or now deposited in any of the offices or places of custody before mentioned." (*j*)

(*j*) The act contains no provision as to principals in the second degree or accessories. But the principals in the second degree are punishable as principals in the first degree, according to the general rule 4 Bl. Com. 39, and the accessories, as for a felony not specially provided for, under the 7 & 8 Geo. 4, c. 28, s. 8 and 9, and 1 Vict. c. 90, s. 5. See note (*b*), *ante*, p. 135.

CHAPTER THE THIRTY-FOURTH.

OF FORGERIES RELATING TO THE PUBLIC FUNDS, AND THE STOCKS OF PUBLIC COMPANIES.

1 Wm. 4, c. 66, s. 5. Making false entries in the books in which the accounts of public stock are kept; or transfer of public stock in any other name than the true owner's.

THE 1 Wm. 4, c. 66, s. 5, enacts "That if any person shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England, or by the governor and company of Merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the South Sea House, shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent in any of the cases aforesaid to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." (*a*)

Sec. 6. Forging a transfer of any public stock or of certain other stock; power of attorney to transfer the same, or receive dividends thereon; transfer of stock or re-

By sec. 6, "if any person shall forge or alter, or shall utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the South Sea House, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any power of attorney (*b*) or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is

(*a*) The 2 & 3 Wm. 4, c. 123, *ante*, p. 411, took away the punishment of death from these offences, and the present punishment under the 1 Vict. c. 84, ss. 2 & 3, is that mentioned in note (*g*), *ante*, p. 415. For the general provisions of the 1 Wm. 4, c. 66, see *ante*, p. 408, *et seq.*; and for the punishment of principals in the second degree and accessories, see *ante*, p. 410. C. S. G.

(*b*) The 2 & 3 Wm. 4, c. 123, abolished the punishment of death for all the offences mentioned in this section, except forging powers of attorney to transfer any share of any stock, annuity, or public fund, transferable at the Bank of England, or South Sea House, or at the Bank of Ireland; but the punishment of death for forging such powers of attorney is done away by the 1 Vict. c. 84, s. 1, *ante*, p. 412, and the present punishment is that mentioned in note (*g*), *ante*, p. 415, under the 1 Vict. c. 84, ss. 1 & 3.

ceipt of dividends by false personation.

hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney, or other authority, knowing the same to be forged or altered, with intent in any of the several cases aforesaid to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest, or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner as if such person were the true and lawful owner; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." (*c*)

Sec. 7. Personating the owner of any public stock or certain other stock, and endeavouring to transfer or to receive the dividends.

By sec. 7, "if any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years." (*d*)

Sec. 8. Forging the attestation to any power of attorney for transfer of stock, &c.

By sec. 8, "if any person shall forge the name or handwriting of any person as or purporting to be a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year." (*f*)

Sec. 9. Clerks of the bank wilfully making out dividend warrants for a greater or less sum than what is really due.

By sec. 9, "if any clerk, officer, or servant of, or other person employed or intrusted by, the governor and company of the Bank of England, or the governor and company of merchants commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted

(*c*) See note (*g*), *ante*, p. 415, as to the present punishment, and see *ante*, p. 410, as to the punishment of principals in the second degree and accessories.

(*d*) See sec. 26, *ante*, p. 410, as to hard labour and solitary confinement, and the 1 Vict. c. 90, s. 5, *ante*, p. 413.

(*f*) See last note.

thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year." (*g*)

9 Geo. 1, c. 12. 35 Geo. 3, c. 66, and other statutes.

Besides the statute above set forth there may be briefly noticed the 9 Geo. 1, c. 12, s. 4, (*h*) which made it a capital felony to forge orders, receipts, &c., relating to the payment of *annuities* payable at the Exchequer, as mentioned in the act; and the 35 Geo. 3, c. 66, with the 37 Geo. 3, c. 46, which contain regulations for transferring the payment of certain *annuities* and dividends from Ireland to the Bank of England, made the forging or altering receipts for subscriptions to loans or debentures, under these acts, a capital offence, re-enacted the provisions of the 8 Geo. 1, c. 22, s. 1, (*i*) and the 33 Geo. 3, c. 30, (*i*) and made the forging or uttering any dividend warrant, or warrant for the payment of any annuity, &c., payable in pursuance thereof, capital offences. The 52 Geo. 3, c. 129, also, which is entitled an act for amending the 48 Geo. 3, c. 142, and the 49 Geo. 3, c. 64, in enabling the commissioners for the reduction of the national debt to grant life-annuities, recites those acts, specifies the terms on which the life-annuities shall be granted, declares before whom the necessary affidavits or affirmations and certificates shall be taken; and enacts that, if any person shall forge, &c., any such affidavit, affirmation or certificate, or produce to any person acting under the authority of the acts, or utter the same, knowing the same to be forged, &c., such person shall be guilty of felony, without benefit of clergy. (*j*) And the 10 Geo. 4, c. 50, which was passed for the further improvement of the land revenue of the crown, makes it a felony (by sec. 124) to forge any power of attorney for the sale or transfer of any stock, or any draft, instrument or writing, for the receiving any money in the Bank of England or Ireland, &c., or any draft, instrument, or writing in the form of a draft of the Commissioners of the Woods and Forests.

In the acts by which the different *loans* have been raised, common clauses have usually been inserted, in substance nearly the same, by which it is made a capital offence to forge certificates, debentures, receipts, &c., mentioned in the acts. (*k*)

Some enactments respecting the forgery of *dividend warrants* have occurred in the statutes already mentioned. But there is a general provision as to the forgery of these instruments contained in the 1 Wm. 4, c. 66, which will be stated at large in the next chapter, as it relates not only to dividend warrants, but to the forgery of bank notes and other securities of the Bank of England.

Forgery of exchequer bills.

The forgery or counterfeiting of any *exchequer bill* is made a felony by the several acts passed, usually every year, authorizing

(*g*) See note (*d*), *supra*.

(*h*) The present punishment is that mentioned in note (*h*), *ante*, p. 415, by virtue of the 1 Wm. 4, c. 66, s. 1 and 26, *ante*, p. 408, 410, and 1 Vict. c. 90, s. 5, *ante*, p. 413.

(*i*) Repealed by the 1 Wm. 4, c. 66, s. 31.

(*j*) The 9 Geo. 4, c. 16, repeals "all such powers and authorities as are by the 48 Geo. 3, c. 142, 49 Geo. 3, c. 64, and the 52 Geo. 3, c. 129, or any or either of them given to the commissioners for the reduction of the national debt, for or in relation to the granting of any life annuities, or the accepting the transfers of any stock for any life annuities."

(*k*) As in the 37 Geo. 3, c. 46, s. 3, 41 Geo. 3, c. 3, s. 4. 42 Geo. 3, c. 8, s. 26. 42 Geo. 3, c. 58, s. 20. 44 Geo. 3, c. 47, s. 25. 44 Geo. 3, c. 48, s. 20. 45 Geo. 3, c. 12, s. 25. 46 Geo. 3, c. 33, s. 25. 58 Geo. 3, c. 23, s. 38. 5 Geo. 4, c. 53, s. 22.

the issue of such securities. Latterly it has been enacted, that the clauses of the 48 Geo. 3, c. 1, entitled, "An act for regulating the issuing and paying off of Exchequer Bills," shall be extended to the acts subsequently passed, (*l*) and one of those clauses, (s. 9) enacts, "that if any person or persons shall forge or counterfeit any exchequer bill or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon, or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited, and with intent to defraud his Majesty, his heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract to circulate or exchange the same or any of them, or any other person or persons, body or bodies politic or corporate; then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer as in cases of felony without benefit of clergy."

41 Geo. 3, c. 1, s. 9. Persons forging exchequer bills, or demanding to have them exchanged, knowing, &c., guilty of felony without clergy.

5 Vict. c. 8.

The 5 Vict. c. 8, entitled "An Act for Funding Exchequer Bills," by sec. 26 enacts, that "if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any receipt or receipts for the whole or any part or parts of the said subscription towards the said sum of five millions, either with or without the name or names of any person or persons being inserted therein as the subscriber or subscribers thereto, or payer or payers thereof, or of any part or parts thereof, or shall alter any number, figure, or word therein, or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, with intent to defraud the governor and company of the Bank of England, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years, under the provisions of the 1 Vict. c. 84. (*m*)

5 Geo. 4, c. 53. Persons coun-

The 5 Geo. 4, c. 53, entitled "An Act to permit the Mutual

(*l*) The last act on this subject, the 5 Vict. c. 8, recites the 48 Geo. 3, c. 1, and by sec. 3 enacts that every the clauses, &c., in that act shall be extended to the Exchequer Bills, to be made in pursuance of the act as fully as if the clauses were repeated in the act. The 48 Geo. 3, c. 1, is repealed by the 1 Wm. 4, c. 66, s. 31, as far "as relates to any forgery or other capital felony therein mentioned." "Nevertheless," says Mr. Lonsdale, Cr. St. 100, "the annual appropriation acts still continue to have inserted in them the beforementioned clause. The forging of Exchequer Bills under these acts would therefore appear to be capital."

(*m*) *Ante*, p. 412.

Transfer of Capital in certain Public Stocks or Funds transferable at the Banks of England and Ireland respectively," by sec. 22, enacts that "if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or duplicate certificate required by this act, or shall alter any number, figure, or word therein, or shall alter or publish as true any such false, forged, counterfeited, or altered certificate, with intent to defraud the governor and company of the Bank of England, or the governor and company of the Bank of Ireland, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or published as aforesaid, being thereof convicted in due form of law shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." (*n*)

terfeiting certificates under the 5 Geo. 4, c. 53.

In conclusion of this chapter a case may be mentioned in which the forgery of a *transfer* of stock and the construction of the 33 Geo. 3, c. 30, s. 2 (now repealed), came under consideration.

Gade's case. The prisoner being found guilty on an indictment charging him with forging a transfer of stock, objections that the stock had never been accepted by the person in whose name it stood, and that the transfer was not witnessed according to the rules and directions of the bank, were overruled.

The indictment charged that one W. Harrison was possessed of and entitled to 50*l.* interest or share in the consolidated three per cent. annuities; and that whilst W. H. was so possessed of and entitled to the said 50*l.*, &c., the prisoner falsely made, forged, and counterfeited a transfer of the said 50*l.* interest or share, with the name of the said W. H. thereto subscribed, purporting to have been signed by the said W. H. and to be a transfer of the said 50*l.*, &c., from the said W. H. unto one W. W. the tenor of which was, &c., (setting it out); with intent to defraud the governor and company of the Bank of England, contrary to the form of the statute, &c. In other counts the intent was laid to be to defraud W. H. and W. W. and in others the prisoner was charged with publishing the transfer, knowing it to be forged, with the same intent. There were also further counts, charging the prisoner generally with forging a certain transfer, to wit, a transfer of an interest and share, *viz.* 50*l.* interest and share of and in certain annuities transferable at the Bank of England, commonly called consolidated three per cent. annuities, without stating to whom the stock belonged, or reciting the statutes relating thereto, in fraud of the same several persons. It appeared in evidence that the prisoner and one H. Harland, were executors of a person named J. Howard, who had by his will given the 50*l.* in the three per cent. consols to his grandson, W. Harrison, and that on the 11th January, 1796, they transferred the same into the name of W. Harrison; *but the transfer never was accepted by W. Harrison.* Afterwards, on the 14th January, the prisoner brought his own son with him to the bank, and represented him to be W. Harrison; and, by the intervention of a broker, it was agreed that the stock should be sold to W. West. The prisoner's son

(*n*) This provision is not expressly repealed by the 1 Wm. 4, c. 66, but the punishment of death is abolished by the first section of that statute, and the present punishment by virtue of the 1 Wm. 4, c. 66, s. 1, and 26, *ante*, p. 408, 410, and the 1 Vict. c. 90, s. 5, *ante*, p. 413, is that mentioned in note (*h*), *ante*, p. 415. As to the punishment of principals in the second degree and accessories, see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410.

in his presence signed the transfer, which was properly filled up; but from the circumstance of his writing the name with a double *ss* (Harrisson), he was required to bring an affidavit that he was the person described in the books of the Bank, by the name of Harrison with a single *s*; and, in consequence, the broker did not pay over the money he had received from West for the stock, and the transfer was not witnessed. It appeared that according to the printed form of transfers used at the Bank they ought to be witnessed; and also, that there were positive orders at the Bank not to transfer any stock till it had been accepted. But this last rule was frequently departed from in transfers made with the stock-jobbers; and it was allowed by the rules that dividends should be received on stock before it was accepted. On behalf of the prisoner the 33 Geo. 3, c. 28, was cited, which required that books should be kept at the Bank for the entering of all transfers, which should be conceived in proper words for that purpose, and signed by the parties making such transfers, and that the several persons to whom such transfers should be made should underwrite their acceptance thereof; and that no other method of transferring or assigning the said annuities should be good or available in law. (*o*) And it was objected that the evidence did not support the indictment; first, for want of Harrison's acceptance of the transfer made to him by the executors of Howard; which it was contended was necessary to make the transfer complete, and give Harrison possession of the 50*l.* stock; secondly, because no transfer at all could be made until the stock was accepted; and, thirdly, that the transfer in the name of W. Harrison was not witnessed, and therefore not available in law, and in fact no transfer; the witnessing being part of the words in which transfers were conceived. (*p*) The jury having found the prisoner guilty, the case was argued before the Judges at some length, the counsel for the prosecution relying in support of the indictment upon the second section of the 33 Geo. 3, c. 30 (now repealed); and ultimately the objections were all overruled, and the offence was holden to be complete. It is stated that Buller, J., in delivering the opinion of the Judges, observed as to the two first objections, that two answers had been given, first, that the stock vested in W. H. by the mere act of transferring it into his name, and that if he had died before he had accepted it, yet it would have gone to his executors as part of his personal estate; and, secondly, that the nature of the offence would not have been altered if W. H. had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred; that neither the forgery nor the fraud would have been less complete if Harrison had really had no stock. And as to the third objection, he said that the Judges were all of opinion that the entry and signatures, as stated in the indictment, were a complete transfer without the attestation of witnesses, which was no part of the instrument, but only required by the Bank for their own protection *ex abundanti cautelâ*. (*q*)

(*o*) A clause similar in substance was enacted by the 35 Geo. 3, c. 14, s. 16, the 36 Geo. 3, c. 12, s. 16, and other statutes.

(*p*) The want of witnessing was compared to the omissions in the bill of exchange in Moffatt's case, *ante*, p. 356.

(*q*) Gade's case, O. B. Feb. 1796. East, T. 1796, and O. B. June, 1796. 2 East, P. C. c. 19, s. 9, p. 874. 2 Leach, 732.

A case also has occurred in which *the endeavouring to receive, &c.*, the money of a proprietor of stock, within the statute 31 Geo. 2, c. 22, s. 37 (now repealed), came under consideration. The prisoner, Francis Parr, applied to the clerk whose business it was to issue the dividend warrants upon the 3 per cent. consols stock, in the name of Isaac Hart, for a warrant for half-a-year's dividend; using the words "Isaac Hart, 3,900*l.*" He also signed the book "Isaac Hart:" and, being asked of what place? he said Windsor; which agreeing with the description in the book, a warrant was made out for 58*l.* 10*s.*, to which he again signed "Isaac Hart." The warrant was then delivered to him. A few minutes afterwards he was apprehended; and it did not appear that in the meantime he had made any application at the pay-office, or had even gone towards it, or taken any other step towards obtaining the actual payment of the money. It was objected by his counsel that some such proceeding was necessary to the completion of the offence: but after his conviction the point being submitted to the consideration of the twelve Judges, they all held the conviction right; and Gould, J., in delivering their opinion, said, that the facts shewed that the prisoner, by personating the proprietor, and by obtaining and indorsing the warrant as such, thereby made an *endeavour*, as far as it went, towards receiving the dividend. (*r*)

Parr's case. The obtaining and indorsing a dividend warrant at the Bank, in the name of a stockholder, holden to be a personating of a proprietor, and thereby endeavouring to receive the dividend; though no attempt was made to receive the money at the pay-office.

It was held that a power of attorney to transfer government stock signed, sealed, and delivered, was a deed within the 2 Geo. 2, c. 25, s. 1 (now repealed). (*s*)

(*r*) Parr's case, O. B. 1787. Hil. T. 1787. 1 Leach, 434. 2 East, P. C. c. 20, s. 2, p. 1005. In this case, J. Hart, the proprietor of the stock, was examined as a witness to prove the identity of the person intended to be defrauded.

(*s*) Rex *v.* Fauntleroy, R. & M. C. C. R. 52 S. C. 2 Bing. R. 413. See this case more fully stated, *post*. As the forging such a power of attorney is made an offence expressly by the 1 Wm. 4, c. 66, s. 6. *ante*, p. 417, it would now be the proper course to proceed upon that section.

CHAPTER THE THIRTY-FIFTH.

OF FORGING THE SECURITIES OF THE BANK OF ENGLAND.

SOON after the establishment of the Bank of England, it was thought necessary to make especial provision against the offence of forging its securities. The former statutes relating to this subject were the 8 & 9 Wm. 3, c. 20, s. 36, the 15 Geo. 2, c. 13, s. 11, the 45 Geo. 3, c. 89, the 13 Geo. 3, c. 79, and the 52 Geo. 3, c. 138, and they are repealed by the 1 Wm. 4, c. 66, s. 31.

1 Wm. 4, c. 66, s. 3. Forging an exchequer bill, exchequer debenture, East India bond, bank note, will, bill of exchange, promissory note, or warrant or order for payment of money, capital.

But that statute, by sec. 3, enacts, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of England trading to the East Indies, commonly called an East India bond, or any indorsement on or assignment of any East India bond, or any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, or any will, testament, codicil, or testamentary writing, or any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." (*a*)

Sec. 12. Knowingly purchasing or receiving, or having in pos-

By sec. 12, "if any person shall, without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession, (*b*) any forged

(*a*) The 2 & 3 Wm. 4, c. 23, *ante*, p. 411, and the 1 Vict. c. 84, s. 1, have done away with the punishment of death for all the offences mentioned in this section, and the present punishment under the 1 Vict. c. 84, s. 1, 2, and 3, *ante*, p. 412, is transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding four, nor less than two years, with or without hard labour, in the common gaol or house of correction, and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in the space of any one year, as to the court in its discretion shall seem meet. See *ante*, p. 409, *et seq.* for the general provisions of the 1 Wm. 4, c. 66, and *ante*, p. 410, for the punishment of principals in the second degree and accessories.

(*b*) See sec. 28, *ante*, p. 410, and Rex *v.* Rowley, Russ. & Ry. 110, *post*, p. 429.

bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years." (*c*)

session, forged bank notes.

By sec. 13, "if any person shall, without the authority of the governor and company of the Bank of England, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, (*b*) any frame, mould, or instrument for the making of paper with the words "Bank of England" visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of the paper; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, (*b*) any paper whatsoever with the words "Bank of England" visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall, by any art or contrivance, cause the words "Bank of England" to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years." (*c*)

Sec. 13. Making or having, without authority, any mould for making paper with the words "Bank of England," visible in the substance, or for making paper with curved bar lines, &c., or selling such paper.

By sec. 14, "nothing herein contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks, visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the governor and company of the Bank of England."

Sec. 14. Proviso as to paper used for bills of exchange, &c.

By sec. 15, "if any person shall engrave or anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or blank bill of exchange, or part of a promissory note or bill of

Sec. 15. Engraving on any plate, &c., any bank note, blank

(*b*) See sec. 28, *ante*, p. 410.
(*c*) As to principals in the second degree and accessories, see sec. 25, *ante*, p. 410.

bank note, &c., or using or having such plate, &c., or uttering or having paper upon which a blank bank note, &c., shall be printed, without authority.

exchange, purporting to be a bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession (*d*) any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, shall be made or printed; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession (*d*) any such paper; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years." (*e*)

Sec. 16. Engraving on any plate, &c., any word, number, or ornament resembling any part of a bank note, &c., or using or having any such plate, &c., or uttering or having any paper on which there shall be an impression of any word, number, &c.

By sec. 16, "if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England, to be proved by the party accused; or if any person shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making upon any paper or other material the impression of any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession (*d*) any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession (*d*) any paper or other material upon which there shall be an impression of any such matter as aforesaid; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years." (*e*)

1 Geo. 4, c. 92, s. 1. Engraving, &c., on

The 1 Geo. 4, c. 92, after reciting the increase of the forgery of the notes of the governor and company of the Bank of England, and the difficulty of detection, and a new plan for printing such notes

(*d*) See sec. 28, *ante*, p. 410.
(*e*) See sec. 25, *ante*, p. 410, as to the principals in the second degree and accessories.

enacts (by s. 1), "that if any person or persons (other than the officers, workmen, servants, and agents for the time being of the said governor and company, to be authorized and appointed for that purpose by the said governor and company, and for the use of the said governor and company only,) shall engrave, cut, etch, scrape, or by any other art, means, or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other art, means, or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other art, means, or device making in or upon any plate of copper, brass, steel, iron, pewter, or of any other metal or mixtures of metal, or upon wood or other materials, or any plate whatsoever, for the purpose of producing a print or impression of all or any part or parts of a bank note, or of a blank bank note, of the said governor and company, of the description aforesaid, without an authority in writing from the said governor and company, or shall use any such plate so engraved, cut, etched, scraped, or by any other art, means, or device made, or shall use any other instrument or contrivance for the making or printing any such bank note or blank bank note, or part of a bank note of the description aforesaid; or if any person or persons shall from and after the passing of this act, without such authority as aforesaid, knowingly and without lawful excuse have in his, her, or their custody, any such plate or instrument, or, without such authority as aforesaid, shall knowingly or wilfully utter, publish, dispose of, or put away any such blank bank note, or part of such bank note, of the description aforesaid, every person so offending in any of the cases aforesaid, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

any plates for producing an impression of all or any part of a bank note of the Bank of England without authority;

or using such plate;

or having such plate in custody; or uttering any impression from it.

The second section, after reciting that divers frauds had been practised by making and publishing papers with certain words and characters so nearly resembling the notes of the governor and company of the Bank of England, as to appear, to ignorant and unwary persons, to be the notes of the said governor and company; and that it was necessary for the security of the public that such practices as applied to the notes of the said governor and company of the aforesaid description should be prevented, enacts, "that if any person or persons from and after the passing of the act, shall engrave, cut, etch, scrape, or by any other art, means, or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other art, means or contrivance made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other art, means, or contrivance making, in or upon any plate of copper, brass, steel, iron, pewter, or of any other metal or mixture of metals, or upon wood or any other materials, or upon any plate whatsoever, any line work, as or for the ground work of a promissory note or bill of exchange, the impression taken from which line work shall be intended to resemble the ground work of a bank note of the said governor and company of the description aforesaid, or any device, the impression taken from which shall contain the words "Bank of England," in white letters, upon a black, sable, or dark ground, either with or without white or other lines therein, or shall contain in any part thereof the numerical sum or amount of any promissory note or bill of exchange in black and red register work, or shall

Sec. 2. Punishment of persons engraving, &c., on any plate any resemblance of ground work intended to resemble the ground work of a Bank of England note, without the authority of the bank;

shew the reversed contents of a promissory note or bill of exchange, or of any part of a promissory note or bill of exchange, or shall contain any word or words, figure or figures, character or characters, pattern or patterns, which shall be intended to resemble the whole or any part of the matter or ornaments of any bank note of the description aforesaid, or shall contain any word, number, figure, or character in white, on a black, sable, or dark ground, either with or without white or other lines therein, which shall be intended to resemble the numerical sum or amount in the margin, or any other part of the bank note of the said governor and company, without an authority in writing for that purpose from the said governor and company, to be produced and proved by the party accused; or if any person or persons shall, from and after the passing of this act, (without such authority as aforesaid,) use any such plate, wood, or other materials, so engraved, cut, etched, scraped, or by any other art, means, or contrivance made, or shall use any other instrument or contrivance for the making or printing upon any paper or other material, any word or words, figure or figures, character or characters, pattern or patterns, which shall be intended to resemble the whole or any part of the matter or ornaments of any such note of the said governor and company, of the description aforesaid, or any word, figure, or character, in white, on a black, sable, or dark ground, either with or without white or other lines therein, which shall be apparently intended to resemble the numerical sum or amount in the margin, or any other part of any bank note of the said governor and company; or if any person or persons shall, from and after the passing of this act, without such authority as aforesaid, knowingly have in his, her, or their custody or possession, any such plate or instrument, or shall knowingly and wilfully utter, publish or dispose of, or put away any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns as aforesaid, or shall knowingly or willingly have in his, her, or their custody or possession any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns as aforesaid, (without lawful excuse, the proof whereof shall lie upon the person accused), every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

or using such plate, &c.,

or having such plate in possession, or uttering any impression from it.

transportation for fourteen years.

Sec. 3 provides that the bank may cause an impression to be made upon the note by machinery in lieu of signature by handwriting.

The third section, after reciting that it was expedient that the name or names of the person or persons intrusted and authorized by the said governor and company to sign bank notes on behalf of the said governor and company, should be impressed by machinery upon bank notes of the description aforesaid, in such form as might from time to time be adopted by the said governor and company, instead of being subscribed in the handwriting of such person or persons respectively, and that doubts might arise respecting the validity of such notes; enacts, "that all bank notes of the said governor and company of the description aforesaid, whereon the name or names of any person or persons intrusted or authorized to sign such notes on behalf of the said governor and company shall or may be impressed by machinery provided for that purpose by the said governor and company, and with the authority of the said governor and company, shall be and be taken to be good and valid to all intents and

purposes, as if such notes had been subscribed in the proper handwriting of the person or persons intrusted or authorized by the said governor and company to sign the same respectively, and shall be deemed and taken to be bank notes within the meaning of all laws and statutes whatsoever, and shall and may be described as bank notes in all indictments and other criminal and civil proceedings whatsoever; any law, statute, or usage to the contrary notwithstanding."

Cases upon the repealed statutes.

A case has been already noticed in which it was holden, upon one of the statutes relating to forgeries upon the Bank of England, namely, the 8 & 9 Wm. 3, c. 20, s. 36, (now repealed) that the expunging by means of lemon-juice an indorsement on a bank note, was a *raising* of the indorsement. (*e*) And in the inquiry in a former chapter as to the resemblance which the forged instrument must bear to one that is genuine, a case upon the 15 Geo. 2, c. 13, s. 11, (now repealed) was mentioned, where it was holden that the resemblance to a bank note must appear on the face of the instrument; and that a signature "for Self and Co." of "my bank in England," did not support an allegation that the paper purported to be a bank note: and further, that the representation of the prisoner could not alter the purport of the instrument. (*f*)

Possession of a forged note.

The 45 Geo. 3, c. 89, s. 6, made it felony if any person should knowingly have "in his, her, or their possession or custody," &c., any forged bank note, &c., and in a case upon this section, in which the circumstances necessary to constitute "the having in possession" of forged notes came under the consideration of the Judges, they seemed to be of opinion, that every uttering included having in custody and possession within the statute: and some of them thought, that without actual possession, if the notes had been put in any place under the prisoner's controul, and by his direction, the result would have been the same. (*g*)

In order to constitute an uttering the instrument should be parted with or offered or tendered, or used in some way to get money or credit upon it.

In a case upon the 13 Geo. 3, c. 79, s. 2, (now repealed) which subjected to imprisonment any person who should "knowingly and wilfully publish or utter any promissory note" of the description therein mentioned, it was holden that shewing to a person an instrument with an intent to raise a false idea of the party's substance, did not come within its provisions: and also that the leaving it afterwards, sealed up, with the person to whom it was shewn, under cover, that he might take charge of it, as being too valuable to be carried about, was not an uttering or publishing. The defendant was indicted for uttering and publishing a certain promissory note answering the description in the 13 Geo. 3, c. 79, s. 2. The defendant had introduced himself to an innkeeper at Brighton upon a fabricated story, and in order to persuade him that he was a man of substance, one day after dinner, he pulled out a pocket book, and showed the innkeeper a 500*l.* and a 50*l.* note of the above description, of which, at the time, he only saw the sums and general form: the defendant said that he did not like to carry so much property about him, and desired the innkeeper to take care of them for him; the innkeeper took charge of them accordingly; they were put into

(*e*) Rex *v.* Bigg, 3 P. Wms. 419, *ante*, p. 323.

(*f*) Jones's case, *ante*, p. 354.

(*g*) Rex *v.* Rowley, Russ. & Ry. 110, and see the 1 Wm. 4, c. 66, s. 28, *ante*, p. 410.

a cover, and sealed up by the defendant himself; and the innkeeper received them from him in an envelope, which, after some time, upon some suspicions created by the defendant's conduct, he broke open, and found them to contain the notes above mentioned. The prisoner was convicted, but upon a case reserved on the question, whether there was a sufficient uttering and publishing, the Judges held the conviction wrong, being of opinion that this did not amount to an uttering. That in order to make it an uttering, they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it. (*h*)

Palmer and Hudson's case. Where one of the prisoners knowingly delivered a forged bank note to the other prisoner for the purpose of its being knowingly uttered by her, and she uttered it accordingly, it was holden that the prisoner, who delivered such note, might be convicted of having "disposed of and put away" the same on the 15 Geo. 2, c. 13, s. 11.

Amongst the few reported decisions upon the particular construction of the repealed statutes, it appears to have been holden that a person knowingly delivering a forged bank note to another, for the purpose of its being knowingly uttered by such person, might, in case the note were uttered accordingly, be convicted of having "disposed of and put away" such note within the statute 15 Geo. 2, c. 13, s. 11 (now repealed). The indictment charged the two prisoners, Palmer and Hudson, in one of several counts, with feloniously disposing of and putting away a forged bank note, knowing it to be forged. It appeared that Palmer had been in the habit of putting off forged bank notes, and had employed Hudson in putting them off; that on a certain day being at a public house, he sent out Hudson with the forged note in question, for the purpose of passing it; that she went to a neighbouring shop, purchased some handkerchiefs for six shillings, and tendered the note in payment, which was suspected and stopped, and, upon examination, appeared to be forged; that on the evening of the same day, Palmer went with her to the shop, and when he got there said, "This woman has been here to-day, and offered a two pound note which you have stopped; it is my note, and I must have either the note or the change." Upon these facts it was objected by the counsel for the prisoners, that the evidence related to two distinct and separate offences, and not to one joint offence; and the learned Judge directed the jury to consider whether the woman was guilty of uttering the note at the shop, or the man of disposing of it to her; but told them that they could not convict both; that the man could not be convicted, unless they were satisfied that he gave the very note stated in the indictment to the woman for a fraudulent purpose, knowing it to be a bad one; nor the woman, unless they were satisfied that she put the note away knowing it to be forged; and that they must consider which they would convict, if either appeared to be guilty. The jury acquitted the woman, and found Palmer guilty; but judgment was respited, in order that the opinion of the Judges might be taken upon the question, whether the evidence given would support the conviction. Their opinion was afterwards delivered by Rooke, J., who first stated with respect to one of the counts in the indictment which charged the prisoners with uttering and publishing the note as true, knowing it to be forged, that it seemed to be the general opinion of the Judges, that if the woman had not known the note to be forged, Palmer might have been rightly convicted on that count; according to the doctrine, that where an innocent person is employed for a criminal purpose, the employer must be answerable: (*i*) but as it appeared that she knew

(*h*) Rex *v.* Shukard, Russ. & Ry. 200. (*i*) Fost. 349. *Ante*, Vol. 1, p. 484.

the note to be forged, the Judges had formed no opinion upon the evidence as applying to that count, thinking it sufficient to consider the case upon the count which charged the prisoners with disposing of and putting away the note in question. He then proceeded to state, that upon the point whether the facts amounted to a disposing of, or putting away, within the meaning of the 15 Geo. 2, c. 13, s. 11, there had been a considerable difference of opinion amongst the Judges. That some of them had holden, that this was not an offence within the statute, because till the woman had uttered the note it ought to be considered as in the possession of the man; and when she did utter it, the man was only an accessory before the fact, and should have been so indicted. But that the majority of the Judges were of opinion that the conviction was right. And as to the constructive possession, he observed, that it is by fiction of law only that when the actual possession is in one person the constructive possession shall be considered in another; and that these fictions are adopted for the sake of promoting justice, but ought not to be adopted when they tend to defeat that purpose." (*j*)

And we have seen that it has since been held that giving a forged note to an innocent agent, or an accomplice, that he may pass it, was a disposing of and putting it away, within the 15 Geo. 2, c. 13. (*k*)

Holden's case. In an indictment for putting away forged bank notes, it is not necessary to aver to whom the notes were put away.

In a case upon the 45 Geo. 3, c. 89, s. 2, (now repealed) an objection was taken to the indictment, that it did not point out the name of the person to whom the forged note was disposed; but, upon argument in the Exchequer Chamber before the twelve Judges, Lord Ellenborough, C. J., observed, that the indictment contained every word which the statute uses for constituting the offence; and that the statute did not contain the words, "to any person or persons;" but to put off with intent to defraud the governor and company of the Bank of England; and the Judges held the indictment to be sufficient. (*l*)

And this offence may be completed, though it appear that the notes were furnished by the prisoners to agents employed by the bank to procure them from the prisoners, and that the notes were delivered

Another point arose in the same case, upon the evidence, from which it appeared that the notes, which the prisoners were charged with having disposed of and put away, were furnished by the prisoners in consequence of an application made to them by agents employed for that purpose by the Bank, and that they were delivered to such agents as forged notes, for the purpose of being disposed of by them. The facts were, that in consequence of a great number of forged notes having been circulated in the neighbourhood, two persons, named Shaw and Whitehead, were employed by the magistrates, with the approbation of the agents for the Bank, to detect those who were suspected to be the utterers. The prisoners did not pay the notes to Shaw and Whitehead as

(*j*) Rex *v.* Palmer and Hudson, 1804. 1 New R. 96. 2 Leach. 978. Russ. & Ry. 72. Thompson, B., Lawrence, J., Le Blanc, J., and Chambre, J., were of opinion that the conviction was wrong.

(*k*) Rex *v.* Giles, R. & M. C. C. R. 166, *ante*, p. 398.

(*l*) Rex *v.* Holden and others, *cor.* Chambre, J., Lancaster Sum. Ass. 1809, and argued before the Judges, Mich. T. 1809. 2 Taunt. 334. 2 Leach, 1019. Russ. & Ry. 154. The count in question in the indictment charged that the prisoner "on, &c., with force and arms at, &c., feloniously did dispose of, and put away a certain false, forged, and counterfeit bank note, the tenor of which was as followeth, (an exact copy set out,) with intent to defraud the governor and company of the Bank of England, he (the prisoner) at the time of his so disposing of and putting away the same forged and counterfeit bank note, then and there well knowing such last mentioned note to be forged and counterfeited: against the form of the statute, &c."

to such agents as forged notes, for the purpose of being disposed of by them.

genuine; but those persons, for the purpose of detection, applied to the prisoners, as supposed dealers in forged bank notes, to purchase them, and the prisoners accordingly procured them, and sold them as forged notes, so that Shaw and Whitehead were not deceived or defrauded in any of the instances, nor were any of the prisoners the first movers in the transaction they had with them; nor did it appear, by any direct evidence, that either of the prisoners, when he was first applied to, had any of the notes in his actual possession; but they respectively produced them at meetings which took place subsequent to such first application. Upon this evidence it was objected, on behalf of the prisoners, that there was no sufficient disposing of the notes, inasmuch as the prisoners were solicited to commit the act proved against them by the Bank themselves, by means of their agents. The objection was overruled by the learned Judge who tried the prisoners; but he thought proper to respite their sentence, in order that the point might be considered by the twelve Judges, who held the conviction right. (*m*)

Evidence of guilty knowledge where the party is charged with uttering, &c., forged notes, &c., knowing the same to be forged.

We have seen that the offering, disposing of, receiving, or having possession of forged bank notes, &c., *knowing the same to be forged*, are made substantive offences by the statutable enactments, which have been cited; (*n*) and the knowledge of the forgery, or, as it is commonly termed *the guilty knowledge*, will of course, in prosecutions for such offences, form a most material part of the inquiry. The principal cases upon this subject are mentioned in a former chapter, treating generally of the crime of forgery. (*o*)

Bank prosecutions. Practice. Election to proceed for minor offence.

In a case where the Bank of England had preferred a bill of indictment for the capital offence of disposing of and putting away forged Bank of England notes; and also another bill against the same prisoners for the transportable offence of having the *same notes* in their possession, knowing them to be forged, and had elected to proceed on the latter indictment, it was holden, that although facts sufficient to support the capital charge were made out in evidence, an acquittal for such minor offence ought not to be directed, because the whole of the minor offence was proved, and it did not merge in the capital offence. And that the Bank might elect to proceed on indictments for the lesser offence, although indictments had been found for the capital charge. (*p*)

Signing clerk not a necessary witness.

It was also holden in the same case, that it is not necessary that the signing clerk at the Bank should be produced, if witnesses acquainted with his handwriting stated that the signature to the note was not his handwriting. (*q*)

(*m*) Rex *v.* Holden and others, *ante*, p. 431, note (*l*). The ground on which this decision proceeded, was that the intent is the essence of the crime, which exists in the mind, although from circumstances of which the prisoner is not apprised the prosecutor cannot be defrauded.

(*n*) *Ante*, 424, *et seq.*

(*o*) *Ante*, Chap. xxxii., p. 403.

(*p*) Case of Bank Prosecutions, Russ. & Ry. 378. Both the offences were felonies.

(*q*) Id. ibid.

CHAPTER THE THIRTY-SIXTH.

OF FORGING THE SECURITIES OF OTHER PUBLIC COMPANIES.

Forging the seal, bond, &c., of the South Sea Company; or demanding payment on a forged bond, &c. 9 Anne, c. 21, s. 57.

THE 9 Anne, c. 21, s. 57, relates to forgeries upon the South Sea Company, and enacts, "That if any person or persons shall forge or counterfeit the common seal of the said company, or shall forge, counterfeit, or alter any bond or obligation under the common seal of the said company; or shall offer to dispose of or pay away any such forged, counterfeited, or altered bond, (knowing the same to be such,) or shall demand the money therein contained or pretended to be due thereon, or any part thereof, of the said company, or any of their officers, (knowing such bond or obligation to be forged, counterfeited, or altered,) with intent to defraud the said company or their successors, or any other person or persons whatsoever," every such offender shall be guilty of felony, without benefit of clergy. And the 6 Geo. 1, c. 4, s. 56, contains similar provisions. (*a*)

Forging receipts or warrants of the South Sea Company. 6 Geo. 1, c. 11, s. 50.

The 6 Geo. 1, c. 11, s. 50, recites that the South Sea Company might issue out receipts under the hand or hands of one or more of their officers, from time to time, upon or for subscriptions to be taken by the said company for increasing their capital, pursuant to the 6 Geo. 1, c. 4, and might also issue out warrants under the hand or hands of one or more of their officers, for the dividend from time to time to be made to the proprietors of the stock of the said company; and then enacts, "that if any person or persons shall forge, counterfeit, or alter any such receipt or receipts, warrant or warrants, or an indorsement or writing, indorsements or writings thereupon or therein, or shall tender any such forged, counterfeited, or altered receipt or receipts, warrant or warrants, or any such receipt or receipts, warrant or warrants, with such counterfeit indorsement or writing thereon or therein, knowing the same to be so forged, counterfeited, or altered, to the said company, or any of their officers, or shall offer to alienate or dispose of the same, knowing the same to be forged, counterfeited, or altered, and with intent to defraud the said company, or any other person or persons, bodies politic or corporate," every such person so offending shall be adjudged a felon, without benefit of clergy. (*b*)

(*a*) The 9 Anne, c. 21, s. 57, and the 6 Geo. 1, c. 4, s. 56, not being expressly repealed by the 1 Wm. 4, c. 66, or the offences contained in them made capital by that statute, the present punishment for such offences is regulated by the 1 Wm. 4, c. 66, ss. 1 and 26, and the 1 Vict. c. 90, s. 5, and is that stated in note (*h*), *ante*, p. 415. As to the punishment of the principals in the second degree and accessories, see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410

(*b*) The 6 Geo. 1, c. 11, s. 50, is not

Forging East India bonds.

The 1 Wm. 4, c. 66, s. 3, enacts, that "if any person shall forge or alter (*inter alia*) any bond under the common seal of the united company of merchants trading to the East Indies, commonly called an East India Bond, or any indorsement on or assignment of any East India bond, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." (*c*)

Forgeries upon insurance companies, &c.

Especial provisions have also been made respecting forgeries affecting some of the insurance companies; (*d*) the English linen company, (*e*) the British society for extending the fisheries, &c., (*f*) and the governor and company of the British cast plate glass manufactory. (*g*) And the statute books probably contain provisions of a similar kind relating to other public companies, not requiring particular notice in this work; and which indeed may be considered as having been rendered of less importance by the general statutes applying to forgeries committed with the intention of defrauding any corporation whatsoever. (*h*)

repealed expressly by the 1 Wm. 4, c. 66, or the offences contained in it made capital by that act; see therefore the last note as to the present punishment.

(*c*) See the section in full, *ante*, p. 424, and note (*a*), *ante*, p. 424, for the present punishment.

(*d*) By 6 Geo. 1, c. 18, s. 13, as to forging the securities of the London and Royal Exchange Assurance Companies; and by 39 Geo. 3, c. 83, s. 22, (public, local, and personal act,) as to forging those of the Globe Insurance Company.

(*e*) 4 Geo. 3, c. 37, s. 15.

(*f*) 26 Geo. 3, c. 106, s. 26.

(*g*) 13 Geo. 3, c. 38, s. 28, revived by 38 Geo. 3, c. 17, s. 23, (public, local, and personal act).

(*h*) *Post*, Chap. *Of the Forgery of Private Papers, &c*

CHAPTER THE THIRTY-SEVENTH.

OF FORGING AND TRANSPOSING STAMPS.

The forging, transposing, &c., of stamps, in general were capital offences, by various statutes.

THE various statutes by which stamps, marks, &c., have been required to be affixed to written instruments, plate, or other articles, in order to denote the payment of the duties imposed thereon by the legislature, have made the forging or counterfeiting such stamps, marks, &c., offences of a very high degree; and, in general, punishable with death. And in some of the statutes are included the offences of transposing stamps, and knowingly uttering and selling articles with the impression of a forged or counterfeited stamp, &c., upon them; and the privately or secretly using any genuine stamps, &c., for the purpose of defrauding the crown. The 52 Geo. 3, c. 143, (*a*) embraces offences of this description; having first enacted, in the following words, "that in all cases where any act to be done or committed *in breach of or in resistance to* any part of the laws for collecting his Majesty's revenue in Great Britain, would by the laws now in force subject the offender to suffer death, as guilty of felony, without benefit of clergy, by virtue of the said laws, or any of them, such act, so to be done or committed, shall be deemed and taken to be felony with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act." (*b*)

52 Geo. 3, c. 143, s. 1, offences in breach of, or in resistance to, the revenue laws, felonies.

52 Geo. 3, c. 143, s. 7. Forging, &c., marks, stamps, &c., used by the commissioners of the duties on vellum, paper, &c., for denoting the duties, or for denoting any device for the Ace of Spades, in any playing cards; or forging, &c., the resemblance of such marks, stamps, &c., upon

This statute then enacts, "that if any person shall forge, or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, die, or plate, which in pursuance of any act or acts of parliament shall have been provided, made or used by or under the direction of the commissioners (*bb*) appointed to manage the duties on stamped vellum, parchment and paper, or by or under the direction of any other person or persons legally authorized in that behalf, for expressing or denoting any duty or duties, or any part thereof, which shall be under the care and management of the said commissioners, or for denoting or testifying the payment of any such duty or duties, or any part thereof, or for denoting any device appointed by the said commissioners for the Ace of Spades, to be used with any playing cards; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, the impression, or any resemblance of the impression, of any such mark, stamp, die, or plate as aforesaid, upon any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, or shall stamp or mark, or

(*a*) So much of this act "as relates to offences committed in breach of any law relating to his Majesty's customs, or for the preventing of smuggling," is repealed by the 6 Geo. 4, c. 105, s. 297.

(*b*) As no punishment is specially appointed for these offences they seem to be punishable under the 7 & 8 Geo. 4, c. 28, ss. 8 and 9, and 1 Vict. c. 90, s. 5. See note (*b*), *ante*, p. 135.

(*bb*) Now "the commissioners of stamps and taxes," by the 4 & 5 Wm. 4, c. 60, s. 8.

vellum, paper, card, ivory, gold or silver plate, &c.; or uttering, &c., with forged marks, &c., or secretly using them, felony.

cause or procure to be stamped or marked, any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, with any such forged or counterfeited mark, stamp, die, or plate as aforesaid, with intent to defraud his Majesty, his heirs, &c., of any of the duties, or any part of the duties under the care and management of the said commissioners; or if any person shall utter or sell, or expose to sale any vellum, parchment, paper, card, ivory, gold or silver plate, or other material, having thereupon the impression of any such forged or counterfeited mark, stamp, die or plate, or any such forged or counterfeited impression as aforesaid, knowing the same respectively to be forged or counterfeited; or if any person shall privately or secretly use any such mark, stamp, die, or plate, which shall have been so provided, made or used, by or under such direction as aforesaid, with intent to defraud his Majesty, his heirs, &c., of any of the duties, or any part of the duties under the care and management of the said commissioners; every person so offending, shall be adjudged guilty of felony, without benefit of clergy." (*c*)

52 Geo. 3, c. 143, s. 8. Transposing from one piece of wrought plate to another, or to base metal, any mark, stamp, &c.; or marking base metal with forged mark, stamp, &c.; or selling or exporting wrought plate or base metal, with forged mark, stamp, &c.; or transposed mark, stamp, &c.; knowing, &c.; or wilfully having possession of any forged mark, stamp, &c., felony.

By sec. 8, "If any person shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate of gold or silver to another, or to any vessel or ware of base metal, any impression made with any mark, stamp or die, provided, made or used by or under the direction of the said commissioners of stamps, or by or under the direction of any other person or persons legally authorized in that behalf, for denoting any duty or duties, or the payment of any duty or duties, granted to his Majesty on gold or silver plate; or shall stamp or mark, or cause or procure to be stamped or marked, any vessel or ware of base metal with any mark, stamp or die, which shall have been forged or counterfeited in imitation of, or to resemble any mark, stamp or die so provided, made or used as aforesaid; or shall sell, exchange or expose to sale, or export out of Great Britain, any wrought plate of gold or silver, or any vessel or ware of base metal, having thereupon the impression of any forged or counterfeited mark, stamp, or die, for denoting any such duty or duties, or the payment of any such duty or duties, or any forged or counterfeited impression of any mark, stamp, or die so provided, made or used as aforesaid, or any impression of any such mark, stamp, or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged or counterfeited, or transposed or removed as aforesaid; or shall wilfully and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp, or die, for denoting any such duty or duties, or the payment thereof; every

(*c*) Mr. Lonsdale, Cr. St. Law, p. 78, observes, "The whole of this enactment is either superseded or repealed by the 55 Geo. 3, c. 184, s. 7, (*post*, p. 437,) c. 185, s. 7, (*post*, p. 439,) and the 9 Geo. 4, c. 18, s. 35, (*post*, p. 441,) except so far as the offences thereby made punishable relate to *other* than the materials specified in such enactment. With respect to which offences (the 1 Wm. 4, c. 66, not having made the same punishable with death, although so punishable at the time of the passing of that act, and not having repealed the 52 Geo. 3, c. 147, s. 7,) persons convicted thereof are liable under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, to the punishment at the head of this class of offences," *i. e.* the punishment mentioned in note (*h*), *ante*, p. 415. In such cases principals in the second degree and accessories are punishable under the 1 Wm. 4, c. 66, s. 25, and the 1 Vict. c. 90, s. 5. See *ante*, p. 410. C. S. G.

person so offending shall be adjudged guilty of felony, without benefit of clergy. (*d*)

By the ninth section it is enacted, "that if any person (not being lawfully appointed or authorized so to do) shall make, or cause, or procure to be made, or shall knowingly aid or assist in the making, or, without being so appointed or authorized as aforesaid, shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused,) any frame, mould, or instrument, for the making of paper, with the words 'Excise Office' visible in the substance of such paper, or shall make or cause, or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the words 'Excise Office' shall be visible; or if any person (except as before excepted) shall by any art, mystery or contrivance, cause or procure the said words 'Excise Office' to appear visible in the substance of any paper whatever; or if any person (not being so appointed or authorized as aforesaid) shall engrave, cast, cut, or make, or shall cause or procure to be engraven, cast, cut, or made, any mark, stamp, or device, in imitation of or to resemble any mark, stamp, or device, made or used by the direction of the commissioners of excise in England or Scotland, or the major part of them respectively, for the purpose of printing, stamping, or marking of any paper to be used as or for a permit or permits to accompany any excisable commodity or commodities removing or removed from one part of Great Britain to any other part thereof, in pursuance of the directions of any of the several statutes requiring such permit," every person so offending shall be adjudged guilty of felony without benefit of clergy. (*e*)

52 Geo. 3, c. 143, s. 9. Making or having in possession any frame, &c., for paper, &c., or making paper, &c., with the words, "Excise Office," visible in the substance; or engraving, making, &c., any marks, stamp, &c., in imitation of the mark, stamp, &c., used by the commissioners of Excise for paper used for permits, felony.

The stamp act, 55 Geo. 3, c. 184, s. 7, includes the cutting or getting off the impression of any stamp from paper, &c., with intent to use the same upon any other paper, &c., chargeable with the duties thereby granted; and makes this also a capital offence. This section (without referring to the former general act of the 55 Geo. 3, c. 143,) enacts, "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made or used, in pursuance of this act, or in pursuance of any former act or acts, relating to any stamp duty or duties, or shall forge, counterfeit or resemble, or cause or procure to be forged, counterfeited or resembled the impression or any part of the impression of any such stamp or die as aforesaid, upon any vellum, parchment or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his Majesty, his heirs, &c., of any of the duties hereby granted, or any part thereof; or if any person shall utter, or sell, or expose to sale any vellum, parchment, or paper,

55 Geo. 3, c. 184, s. 7, includes the cutting or getting off the impression of any stamp from paper, &c., with intent to use the same upon any other paper, &c., chargeable with the duties, and makes such cutting, getting off, &c., felony.

(*d*) See 5 Geo. 4, c. 52, (local and personal) s. 22, as to plate wrought or made within the town of Birmingham, and within thirty miles thereof.

(*e*) As the 52 Geo. 3, c. 143, ss. 8 & 9, is neither expressly repealed, nor the offences in those sections made capital by that act, such offences are punishable as stated in note (*h*), *ante*, p. 415, under the 1 Wm. 4, c. 66, ss. 1 & 26, and 1 Vict. c. 90, s. 5. As to the punishment of principals in the second degree and accessories see the 1 Wm. 4, c. 66, s. 25, and 1 Vict. c. 90, s. 5, *ante*, p. 410.

having thereupon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or [if any person shall privately and secretly use any stamp or die which shall have been so provided, made or used as aforesaid, with intent to defraud his Majesty, his heirs, &c., of any of the said duties, or any part thereof; or if any person shall fraudulently cut, tear, or get off, or cause or procure to be cut, torn or got off, the impression of any stamp or die which shall have been provided, made or used in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, (*f*) or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper, or any instrument or writing, charged or chargeable with any of the duties hereby granted; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid]," shall be adjudged "guilty of felony without benefit of clergy." (*g*) The eighth section enacts, that all the powers, &c., pains and penalties contained in and imposed by the several acts relating to the duties by this act repealed, and the several acts relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties by this act granted, as far as the same shall be applicable, &c.

Sec. 8. Powers of former acts extended.

55 Geo. 3, c. 185, grants

The 55 Geo. 3, c. 185, entitled "an act for repealing the stamp office duties on advertisements, (*h*) almanacks, newspapers, gold and

(*f*) Now "the commissioners of stamps and taxes." See the 4 & 5 Wm. 4, c. 60, s. 8.

(*g*) The 55 Geo. 3, c. 184, s. 7, is neither expressly repealed by the 1 Wm. 4, c. 66, nor are the offences mentioned in it made capital by that act; such of the offences in it, therefore, which fall within the 1 Wm. 4, c. 66, s. 1, (*ante*, p. 408) are now punishable under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, in the manner stated in note (*h*), *ante*, p. 415; and the principals in the second degree and accessories are punishable under the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410, and 1 Vict. c. 90, s. 5, *ante*, p. 413. The 4 & 5 Vict. c. 56, s. 1, recites so much of the 55 Geo. 3, c. 187, s. 7, as is included within the brackets, and enacts, that after the 1st of October, 1841, "if any person shall be convicted of any of the offences hereinbefore specified, such person shall not be subject to any sentence, judgment, or punishment of death," but shall "be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any time not exceeding three years;" and by sec. 4, such imprisonment may be with or without solitary confinement and hard labour: see the section, *ante*, p. 200. Mr. Lonsdale (St. Cr. L. 81,) observes, that "the forging of stamps on newspapers, directed to be used by the 6 & 7 Wm. 4, c. 66, (an act to reduce the duties on newspapers, and to amend the laws relating to the duties on newspapers and advertisements,) appears to be punishable under the 55 Geo. 3, c. 134. See the 6 & 7 Wm. 4, c. 66, s. 1, which enacts, that all the powers, provisions, clauses, regulations, and directions, fines, forfeitures, pains and penalties contained in and imposed by the several acts of parliament relating to the stamp duties, and not repealed by this act, shall be of full force and effect with respect to the duties hereby granted as far as the same are or shall be applicable in all cases not hereby expressly provided for. There is no express provision in that act respecting the forgery of stamps thereby directed to be used.

(*h*) The 3 & 4 Wm. 4, c. 23, enacts that the duties granted by this act "upon or in respect of pamphlets, or books or papers commonly so called, and upon or in respect of any advertisement," shall cease, and grants new duties in respect thereof, and by sec. 4, enacts, that all the powers, provisions, clauses, regulations, and directions, fines, forfeitures, pains, and penalties contained in or imposed by the several acts relating to the duties on advertisements and sea insurances respectively, and the several acts relating to any prior duties of the same kind and description, shall be in full force and effect with respect to the duties by this act granted, and to the vellum, parch-

silver plate, stage-coaches, and licenses for keeping stage-coaches, now payable in Great Britain; and for granting new duties in lieu thereof," declares that the duties thereby granted shall be under the care and management of the commissioners of stamps (*i*) in Great Britain, and requires the commissioners to provide and use proper and sufficient plates, stamps, or dies, for denoting the duties thereby granted: (*j*) and enacts, that the powers, &c., pains and penalties contained in and imposed by the acts relating to the duties by this act repealed, and to any prior duties of the same kind or description, shall be of full force and effect, with respect to the duties by this act granted as far as the same shall be applicable, &c. (*k*) The sixth section then enacts, "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any plate, stamp, or die, or any part of any plate, stamp, or die, which shall have been provided, made or used, in pursuance of this or any former act, for expressing and denoting any of the duties granted by this or any former act on almanacks, newspapers, and licenses to keep stage-coaches; or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression, or any part of the impression of any such plate, stamp, or die, upon any paper whatsoever, or shall stamp or mark, or cause or procure to be stamped or marked any paper whatsoever, with any such forged or counterfeited plate, stamp, or die as aforesaid, with intent to defraud his Majesty, his heirs, &c., of any of the duties hereby granted on almanacks, newspapers, (*l*) and licenses to keep stage-coaches, (*m*) or any part thereof; or if any person shall utter, or sell, or expose to sale any paper, having thereupon the impression of any such forged or counterfeited plate, stamp, or die, or part of any plate, stamp, or die, or any such forged, counterfeited, or resembled impression, or part of impression as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any plate, stamp, or die, which shall have been so provided, made or used as aforesaid, with intent to defraud his Majesty, his heirs, &c., then every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid," shall be adjudged guilty of felony without benefit of clergy. (*n*)

new duties on advertisements, almanacks, newspapers, plate, coaches, &c.

Sec. 6, Persons forging, &c., any plate, stamp, or die, used to denote the duties on almanacks, &c. for forging the impression thereof, or stamping any paper with such forged plate, stamp, or die, or uttering such paper, knowing, &c., or secretly using any plate, stamp, or die, and their aiders, &c., shall be guilty of felony.

By sec. 7, "If any person shall forge or counterfeit, or cause or procure to be forged or counterfeited any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former act relating to any duties on gold or silver plate made or wrought in Great Britain, for the purpose of marking or stamping any such gold or silver plate, in the manner directed by

55 Geo. 3, c. 185, s. 7. Any persons forging, &c., any mark, stamp, or die used for *plate*, or forging, &c.

ment, and paper articles, matters, and things charged or chargeable therewith, and to the persons liable to the payment of the said duties.

(*i*) Now "the commissioners of stamps and taxes," by sec. 8 of the 4 & 5 Wm. 4, c. 60.

(*j*) Sec. 3.

(*k*) Sec. 4.

(*l*) Repealed by the 6 & 7 Wm. 4, c. 76, as "relates to newspapers, or the duties thereon, or to any discount or allowance in respect of the said duties."

(*m*) See the 2 & 3 Wm. 4, c. 120, *post*, p. 440.

(*n*) This section not being repealed by the 1 Wm. 4, c, 66, nor the offences therein contained, which still are subsisting, made capital by that act, such offences are liable under the 1 Wm. 4, c. 66, ss. 1 & 26, and 1 Vict. c. 90, s. 5, to the punishments stated in note (*h*), *ante*, p. 415. See Rex *v.* Hope, R. & M. C. C. R. 396.

the impression of such mark, &c., upon plate, or stamping plate or base metal with a forged mark, stamp, or die, or transposing from one piece of plate to another, or to base metal any impression of a mark, stamp, or die, or selling or exporting plate or base metal, with forged or transposed mark, &c., or having possession of forged mark, &c., or secretly using any mark, &c., to be guilty of felony.

any such act, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression of any such mark, stamp, or die, upon any such gold or silver plate, with intent to defraud his Majesty, his heirs, &c., or if any person shall mark or stamp, or cause or procure to be marked or stamped, any such gold or silver plate, or any vessel or ware of base metal, with any such forged or counterfeited mark, stamp, or die as aforesaid, or [shall transpose or remove, or cause or procure to be transposed or removed, from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former act, for the purpose of marking or stamping of any such gold or silver plate as aforesaid; or if any person shall sell, exchange, or expose to sale, or export out of Great Britain, any such gold or silver plate, or any vessel or ware of base metal, having thereupon] the impression of any such forged or counterfeited mark, stamp, or die as aforesaid, or any forged, counterfeited or resembled impression of any mark, stamp, or die so provided, made, or used as aforesaid, or [any impression of any such mark, stamp, or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be] forged or counterfeited, or [transposed or removed as aforesaid;] or if any person shall wilfully, and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp, or die as aforesaid, or shall privately and secretly use any mark, stamp, or die so provided made or used as aforesaid, with intent to defraud his Majesty, &c.," every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons committing any such offence as aforesaid, (*o*) shall be adjudged guilty of felony without benefit of clergy. (*p*)

2 & 3 Wm. 4, c. 120, s. 32. Forging stage carriage plates a misdemeanor.

The 2 & 3 Wm. 4, c. 120, entitled "an act to repeal the duties under the management of the commissioners of stamps on stage-carriages, and on horses let for hire in Great Britain, and to grant other duties in lieu thereof," repeals so much of the 55 Geo. 3, c. 185, "as relates to the duties on coaches, and on licenses for keeping stage-coaches, and as relates to the offences in the said act mentioned respecting such duties and licenses;" and by sec. 32, enacts, "that if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, or resembled, any numbered plate directed to be provided, or which shall have been provided, made, or used, in pursuance of this act, or of any former act relating to the duties payable in respect of stage-carriages, or shall wilfully fix or place, or shall cause or permit, or suffer to be fixed or placed, upon any stage-carriage or other carriage, any such forged or counterfeited plate, or if any person shall sell or exchange, or expose to

(*o*) The 4 & 5 Vict. c. 56, s. 1, recites so much of this section as is included within the brackets, and enacts as stated in note (*g*), *ante*, p. 438. With regard to the other offences contained in this section, as they are neither expressly repealed nor made capital by the 1 Wm. 4, c. 66, they are liable to the punishments stated in note (*h*), *ante*, p. 415.

(*p*) See 5 Geo. 4, c. 52, (local and personal) s. 22, as to plate wrought or made within the town of Birmingham, and within thirty miles thereof.

sale or utter, any such forged or counterfeited plate, or if any person shall knowingly, and without lawful excuse, the proof whereof shall lie on the person accused, have or be possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited, every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as aforesaid, shall be adjudged guilty of a misdemeanor, and being thereof convicted, shall be liable to be punished by fine or imprisonment, or by both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the court shall think fit; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner."

3 & 4 Wm. 4, c. 97, s. 11. Licensed vendors of stamps having counterfeit stamps in their possession liable to what punishments.

The 3 & 4 Wm. 4, c. 97, entitled "an act to prevent the selling and uttering of forged stamps," &c., enacts, by sec. 11, that "whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to vend or deal in stamps, or who shall have been so licensed at any time within six calendar months then next preceding, such vellum, parchment, or paper having thereon any false, forged, or counterfeit stamp, mark, or impression resembling or representing, or intended or liable to pass or be mistaken for any stamp, mark, or impression of any die, plate, or other instrument which at any time whatever hath been or shall or may be provided, made, or used, by or under the direction of the commissioners of stamps, (*p*) for the purpose of expressing or denoting any stamp duty whatever, then and in every such case the person in whose possession such vellum, parchment, or paper shall be so found, shall be deemed and taken to have so had the same in his possession, with intent to vend, use, or utter the same with such false, forged, or counterfeited stamp, mark, or impression thereon, unless the contrary shall be satisfactorily proved; and such person shall also be deemed and taken to have such vellum, parchment, or paper so in his possession, knowing the stamp, mark, or impression thereon to be false, forged, and counterfeit, and such person shall be liable to all penalties and punishments by law imposed or inflicted upon persons vending, using, uttering, or having in his possession false, forged, or counterfeit stamps, knowing the same to be false, forged, or counterfeit, unless such person shall in every such case satisfactorily prove that such stamp or stamps was or were procured by or for such person from some distributor of stamps appointed by the said commissioners, or from some person licensed to deal in stamps under the authority of this act."

Sec. 12. Persons knowingly having forged dies or stamps in their possession,

By sec. 12, "if any person shall, knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or instrument resembling, or intended to resemble, either wholly or in part, any die, plate, or other instrument, which at any time whatever hath been, or shall or may be provided, made, or used, by or under the direction of the commissioners of stamps, (*q*) for the purpose of expressing or denoting any stamp duty whatever; or if any person shall, know-

(*p*) Now "the commissioners of stamps and taxes," by the 4 & 5 Wm. 4, c. 60, s. 8.

(*q*) See last note.

ingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any vellum, parchment, or paper having thereon the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp, mark, or impression resembling or representing, either wholly or in part, or intended or liable to pass, or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument which hath been, or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or if any person shall fraudulently use, join, fix, or place for, with, or upon any vellum, parchment, or paper any stamp, mark, or impression which shall have been cut, torn, or gotten off, or removed from any other vellum, parchment, or paper; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from any stamped vellum, parchment, or paper, any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such vellum, parchment, or paper, or that the same may be used for any deed, instrument, matter, or thing in respect whereof any stamp duty is, or shall, or may be, or become payable; or if any person shall knowingly use, utter, sell, or expose to sale, or shall knowingly and without lawful excuse, (the proof whereof shall lie on the person accused) have in his possession any stamped vellum, parchment, or paper, from or off, or out of which any such name, sum, date, or other matter or thing as aforesaid, shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

or fraudulently affixing stamps, &c.

Erasing names, &c.

Using stamped vellum from which names, &c., have been erased.

9 Geo. 4, c. 18, s. 35. Forgery of stamps relating to cards and dice, or uttering them with counterfeit stamps.

The 9 Geo. 4, c. 18, entitled "An act to repeal the stamp duties on cards and dice," &c., enacts, by sec. 35, that "if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited any type, die, seal, stamp, mark, plate, or device, or any part of any type, die, seal, stamp, mark, plate, or device, which shall be at any time provided, made, or used by or under the authority of the commissioners of stamps in pursuance of this act, or shall counterfeit, or shall cause or procure to be counterfeited or resembled the impression of any such type, die, seal, stamp, mark, plate, or device, or any part thereof, upon any playing card or dice, or upon any label, thread, or paper; or shall forge or counterfeit the name, handwriting, or signature of any sealing officer or other officer of stamps, to or upon any wrapper, paper, or material in which any dice shall be actually enclosed; or shall forge or counterfeit, or shall cause or procure to be forged or counterfeited any mark or name, or any part of any mark or name, directed to be used by the commissioners of stamps (*r*) in pursuance of this act, in order

(*r*) See note (*p*), *ante*, p. 441.

to distinguish the maker of any such cards or dice respectively, and printed or marked on, or affixed to, or making part of the wrapper, label, or paper in which any playing cards or dice shall be actually enclosed, with intent to defraud his Majesty, his heirs or successors, of any of the duties at any time by law payable upon cards or dice; or shall utter, sell, or expose to sale, or part with for use in play, any card, die, ace of spades, label, wrapper, or jew whatsoever, with such counterfeit seal, stamp, mark, device, impression, name, or signature, knowing the same to be counterfeit, or shall privately or fraudulently use any seal, stamp, mark, plate, device, or label at any time provided, made, or used by or under the authority of the commissioners of stamps in pursuance of this act, with intent to defraud his Majesty, his heirs and successors, of any of the duties at any time by law payable upon cards or dice; every person convicted of any such offence, in due form of law, shall be adjudged a felon, and shall suffer death." (*s*)

56 Geo. 3, c. 56, s. 37, (Irish act.) Forging any type, die, &c., of the stamp-office in Dublin, or having possession of counterfeit types, dies, &c. or marking any paper, &c., with any counterfeit device, mark, &c., or using, uttering, or having in possession with intent to use any paper, &c., with counterfeit device, mark, &c., and also the fraudulent using of any stamps, marks, &c., by any officer of the commissioners of stamps, or the having possession of any paper, &c., fraudulently stamped, felony.

The Irish stamp act, 56 Geo. 3, c. 56, s. 37, (*t*) enacts, "that if any person in any part of the United Kingdom of Great Britain and Ireland, or of any of the dominions thereto belonging, shall counterfeit or forge, or cause or procure to be counterfeited or forged, any type, die, mark, or stamp, to resemble or represent, or be mistaken for any type, die, mark, or stamp at any time heretofore kept or used, or hereafter to be kept or used at the stamp office in Dublin, for denoting the charging or marking on vellum, parchment, or paper, or other matter directed to be stamped, any of the stamp duties payable under or by virtue of any act or acts which has been or shall be at any time in force in Ireland, although such act or acts may not be in force, or such type, die, mark, or stamp may not be kept or used at the said stamp office at the time of such forging or counterfeiting; or if any person or persons (save and except such person or persons as shall be lawfully entitled and authorized to have and to use the same for the purpose of stamping vellum, parchment, or paper, or other matter directed to be stamped by or under the authority of the said commissioners of stamps for the time being,) shall have in his, her, or their possession, any type, die, or mark or stamp made to resemble or represent, or be mistaken for any type, die, mark, or stamp, heretofore kept or used, or hereafter to be kept or used at the said stamp office, for denoting the charging or marking on vellum, parchment, or paper, or other matter directed to be stamped, any of the said stamp duties so payable as aforesaid, although such type, die, mark, or stamp shall not be then kept or used at the said stamp office, or the duty denoted thereby shall not be then payable in Ireland; or if any person or persons shall mark or impress, or cause or procure to be marked or impressed on any vellum, parchment, or paper, or other matter which heretofore was or hereafter shall be directed to be stamped, any device, mark, or impression to resemble or represent, or be mistaken for any

(*s*) This section being neither expressly repealed by the 1 Wm. 4, c. 66, nor the offences contained in it rendered capital by that statute, such offences are now punishable (under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5,) in the manner pointed out in note (*h*), *ante*, p. 415.

(*t*) Repealed by the 6 & 7 Wm. 4, c. 76, s. 32, "as relates to newspapers or the duties thereon, or to any discount or allowance in respect of the said duties." The 5 & 6 Vict. c. 81 & 82, contain new regulations as to the stamp duties in Ireland.

device, mark, or impression which has been or shall be used, kept, or made, marked or impressed at the stamp-office in Dublin, for denoting the charging or marking on vellum, parchment, or paper, or other matter or thing so directed to be stamped, any of the said stamp duties so payable under or by virtue of any act of parliament which shall be or shall have been in force in Ireland at or before the time when such mark, device, or impression shall have been so used, kept or made, marked or impressed, at the said office, although such act or acts may not be in force, or such device, mark, or impression, may not be used or kept, marked or impressed at the said office, at the time of such offence committed: or if any person or persons shall use, utter, vend or sell, or cause to be used, uttered, vended, or sold, or shall have in his or her possession with intent to use, utter, vend or sell the same, any vellum, parchment, or paper, or other matter, with any counterfeit device, mark or impression thereon, to resemble or represent, or be mistaken for any device, mark, or impression which has been or shall be used, kept or made at the stamp-office aforesaid for the purposes aforesaid, or any of them, although not then used or kept for the said purposes, or any of them, or although the duty denoted thereby shall not be then payable in Ireland, knowing such device, mark, or impression to be counterfeited, or if any officer or officers in the employment of the commissioners of stamps, or any other person or persons whatever, shall, with intent to defraud his Majesty, his heirs, &c., mark or impress, or cause or procure to be marked or impressed, or be aiding, abetting, or assisting in marking or impressing, or in causing or procuring to be marked or impressed any stamp, mark, or impression, denoting any of the said stamp duties on any vellum, parchment, or paper, or other matter directed to be stamped, not delivered to him or them by or by the authority of the said commissioners of stamps for the purpose of being stamped with any type, die, mark or stamp, which has been or shall be used, kept, or made at the stamp-office aforesaid, for denoting the charging or marking on vellum, parchment, or paper, any of the said stamp duties so payable under or by virtue of any act of parliament, although such type, die, mark, or stamp shall not be then kept at the said stamp-office, or the duty denoted thereby shall not be then payable in Ireland; or if any person or persons shall, with intent to defraud his Majesty, his heirs, &c., knowingly have in his, her, or their possession any vellum, parchment or paper, or other matter required to be stamped, so fraudulently stamped or marked with any mark or stamp to denote any of the aforesaid duties," then and in every of the said cases, every such person so offending shall be adjudged a felon, and shall be transported for life.

56 Geo. 3, c. 56, s. 38. As to the possession by persons licensed to deal in stamps in Ireland, of vellum, paper, &c., with counterfeit devices, marks, &c.

The thirty-eighth section enacts, that whenever any vellum, parchment, or paper shall be found in the possession of any person licensed to deal in and retail stamps in Ireland, or who shall have been so licensed within six calendar months then next preceding, having impressed thereon any counterfeit device, mark, or impression to resemble or liable to be mistaken for any device, &c., used, kept, or made at the said stamp-office, although such device, &c., shall not then be so used or kept; or although the duty denoted thereby shall not be then payable in Ireland; in every such case the person in whose possession such vellum, &c., shall be

so found, shall be deemed to have had the same in possession with intent to use, utter, or vend the same with such counterfeit device, &c. thereon, unless the contrary shall be satisfactorily proved; and shall also be deemed to have had such vellum, &c., in possession, knowing the stamps, devices, &c., thereon to be forged and counterfeited, and be liable to all punishments, &c., inflicted upon persons using, uttering, or vending false, forged, or counterfeit stamps, or having such false, forged, or counterfeit stamps in their possession, knowing the same to be forged, unless such person shall in all cases satisfactorily prove that such vellum, &c., and the stamps thereon, were procured at the stamp-office in Dublin, or from some distributor of stamps in Ireland.

56 Geo. 3, c. 56, s. 52, (Irish.) Making, &c., or having possession of without excuse any frame, &c., for paper with the words "stamp-office," or so making, &c., or having possession of any paper with those words, or with any device, &c., peculiar to the paper used by the commissioners of stamps.

By sec. 52, "if any person not being an officer, workman, servant, or agent for the time being of the said commissioners of stamps, and authorized and appointed by them for that purpose and for their use only, shall make or use, or cause or procure to be made or used, or knowingly aid or assist in making or using, or, without being authorized and appointed as aforesaid, shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall be on the person accused) any frame, mould, or instrument for the making of paper in the substance whereof the words 'stamp-office,' or the greater part of such words would be visible, or in the substance whereof any device or distinction would be visible, peculiar to and appearing in the substance of the paper which shall from time to time be used by the commissioners of stamps as aforesaid; or shall make, or cause or procure to be made, or knowingly aid or assist in making any paper in the substance whereof there shall be visible the said words 'stamp-office,' or the greater part of such words, or any of such device or distinction peculiar to and appearing in the substance of the paper which shall be so used by the said commissioners of stamps; or if any person, not being authorized or appointed as aforesaid, shall knowingly have in his or her custody or possession, without lawful excuse, (the proof whereof shall be on the person accused) any paper whatsoever in the substance whereof there shall be visible the words 'stamp-office,' or the greater part of such words, or any device or distinction peculiar to and appearing in the substance of paper so from time to time used by the said commissioners; or if any person not being authorized or appointed as aforesaid, shall by any art, device, mystery, or contrivance, cause or procure, or knowingly aid or assist in causing or procuring to appear in the substance of any paper whatsoever the words 'stamp-office,' or the greater part of such words, or any such device or distinction peculiar to and appearing in the substance of the paper which shall be so used by the said commissioners of stamps;" every person so offending in any of the said cases shall be adjudged a felon, and shall be transported for the term of his or her life.

56 Geo. 3, c. 56, s. 58, imposes a penalty of 40*l.* for several frauds in evasion of the stamp duties in Ireland.

By sec. 58, a pecuniary penalty of forty pounds is imposed upon any person who, for the purpose of evading any of the stamp duties payable in Ireland, shall execute any stamped instrument without a date, or bearing date prior to the execution, or shall fraudulently erase, &c., the name of any person or any date, &c., engrossed or written in such instrument, or shall fraudulently cut, tear, or take off any mark or stamp from any piece of vellum, &c., with intent to

use them for any other writing, &c., in respect whereof any stamp duty shall then be payable.

56 Geo. 3, 78, imposes penalties on persons forging stamps, &c., on pasteboard, paper, &c.

The 56 Geo. 3, c. 78, entitled "An act for the better regulating and securing the collection of the duties on paper in Ireland, and to prevent frauds therein," imposes large pecuniary penalties on persons forging stamps, &c., on any pasteboard, paper, &c., or having in possession or using such forged stamps; and, generally, upon persons counterfeiting any stamps, &c., provided in pursuance of that act, having them in possession knowing them to be counterfeited, selling any paper with counterfeited stamps, &c., thereon, or committing other offences of a like nature. (*u*)

6 & 7 Wm. 4, c. 69, s. 19. Forging or imitating dies, or marks, stamping with forged dies, &c., and fraudulently using lawful dies.

The 6 & 7 Wm. 4, c. 69, entitled "An act to fix the standard qualities of gold and silver plate in Scotland, and to provide for the assaying and marking thereof," by sec. 19, enacts, that "if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, any die, punch, or other marking instrument, or any part of any die, punch, or marking instrument, used or provided, or to be used or provided for striking or impressing any mark or impression by this act directed to be used, or which in pursuance of this act hath been, or shall or may be used, by or under the direction of the said incorporation or company respectively, or by any maker or worker of gold or silver plate, or by or under the direction of any other person or persons legally authorized in that behalf, for the purpose of stamping or marking gold or silver plate; or if any person shall forge, counterfeit, or imitate, or shall cause or procure to be forged, counterfeited, or imitated, upon any gold or silver plate, or upon any ware or manufacture of base metal or mixture of metals, the stamp, mark, or impression, or any part of the stamp, mark, or impression, of any such die, punch, or other marking instrument as aforesaid; or if any person shall stamp or mark, or shall cause or procure to be stamped or marked, any gold or silver plate, or any ware or manufacture of base metal, with any such forged or counterfeit die, punch, or marking instrument as aforesaid; or if any person shall transpose or remove, or shall cause or procure to be transposed or removed, from any piece of gold or silver plate to any other piece of plate, either of gold or silver, or to any ware, or manufacture of base metal, any mark or impression directed to be used, or which hath been, or shall or may be used as aforesaid; or if any person shall sell, exchange, or expose for sale, or shall export, or attempt to export, out of any part of Scotland, or shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any gold or silver plate, or any ware or manufacture of base metal, having thereupon the mark or impression of or from any such forged or counterfeit die, punch, or marking instrument as aforesaid, or having thereupon any such forged or counterfeit mark or impression as aforesaid, or any mark or impression which shall have been so transposed or removed as aforesaid, knowing the same respectively to be forged, counterfeit, transposed, or removed, or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any such forged or counterfeit die, punch, or marking instrument, or part of a die, punch, or marking instrument as afore-

(*u*) Secs 43, 64, 65.

said; or if any person shall cut out of or sever from any piece of plate of gold or silver any mark or impression, or any part of any mark or impression, made with any such die, punch, or marking instrument as aforesaid, with intent that such mark or impression, or part of a mark or impression, shall or may be placed upon or joined or affixed to any other piece of plate, either of gold or silver, or to any ware or manufacture of base metal, or if any person shall place upon or join or affix to any piece of plate, either of gold or silver, or any ware or manufacture of base metal, any such mark or impression, or any part of any such mark or impression which hath been or shall have been cut out of or severed from any piece of plate of gold or silver; or if any person shall privately or secretly employ or use, or cause or procure to be employed or used, any genuine or lawful die, punch, or marking instrument so used or provided, or to be used or provided as aforesaid; then and in every such case every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years, as the court shall award."

Forging, &c., the assay marks or stamps on gold and silver manufactures.

Besides the statutes which relate to the forging, &c., the stamps and marks on *plate*, by which the *duty* payable to the crown is denoted, there are others which relate to the offences of forging, &c., the *assay* marks, or stamps required to be affixed to gold and silver manufactures in order to denote their standard value. Offences of this kind were first made punishable by the 12 Geo. 2. c. 26, s. 8, by pecuniary forfeiture, and imprisonment in default of payment. But that provision was repealed by the 31 Geo. 2, c. 32, s. 14, which by sec. 15 made the forging or counterfeiting the stamp, &c., used for making plate in pursuance of the 12 Geo. 2, c. 26, s. 8, by the Goldsmiths' Company, &c., the marking plate, &c., with a forged or counterfeited stamp, the transposing the stamp, &c., impressed from one vessel to another, the selling or exporting plate with a forged, counterfeit, or transposed mark, and the having such stamp, &c., in possession, felony without benefit of clergy. This section of the 31 Geo. 2, c. 32, after having been amended by the 32 Geo. 2, c. 24, was repealed by 13 Geo. 3, c. 59, s. 1.

13 Geo. 3, c. 59, s. 2. Forging, &c, any mark or stamp used for gold or silver plate by the Goldsmiths' Company, or by the assayer or workers of plate, or forging, &c., in imitation of such mark, stamp, &c., or marking, &c., any wrought plate or base metal with a forged mark

The 13 Geo. 3, c. 59, s. 2, enacts, "That if any person whatsoever shall cast, forge, or counterfeit, or cause or procure to be cast, forged, or counterfeited, any mark or stamp used, or to be used, for the marking or stamping gold or silver plate, in pursuance of any act or acts of parliament now in force by the Company of Goldsmiths in London, or by the wardens, or assayer or assayers, at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne, or by any maker or worker of gold or silver plate, or any or either of them, or shall cast, forge, or counterfeit, or cause or procure to be cast, forged, or counterfeited, any mark, stamp, or impression, in imitation of or to resemble any mark, stamp, or impression made, or to be made, with any mark or stamp used, or to be used, as aforesaid, by the said Company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or workers of gold or silver plate, or any or either of them; or shall mark or stamp, or cause or procure to be marked or stamped, any wrought plate of gold or

or stamp, or transposing any marks, &c.: or selling or exporting plate or base metal with forged or transposed marks, &c., or being possessed, knowingly, of forged marks, &c., made punishable by transportation for 14 years.

silver, or any wares of brass or other base metal silvered or gilt over, and resembling plate of gold or silver, with any mark or stamp which hath been or shall be forged or counterfeited at any time, in imitation of, or to resemble any mark or stamp used, or to be used, as aforesaid, by the said company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate to another, or to any vessel of such base metal as aforesaid, any mark, stamp, or impression, made or to be made, by or with any mark or stamp used, or to be used, as aforesaid, by the said company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; or shall sell, exchange, or expose to sale, or export out of this kingdom, any wrought plate of gold or silver, or any vessel of such base metal as aforesaid, with any such forged or counterfeit mark, stamp, or impression thereon, or any mark, stamp, or impression which hath been, or shall be, transposed or removed from any other piece of plate at any time, knowing such mark, stamp, or impression, to be forged or counterfeited, or transposed or removed as aforesaid; or shall wilfully or knowingly have or be possessed of any mark or stamp which hath been, or shall be, forged or counterfeited at any time in imitation of, or to resemble any mark or stamp used, or to be used, as aforesaid, by the said company of Goldsmiths in London, or by the said wardens, or assayer or assayers, or by any maker or worker of gold or silver plate, or any or either of them; every person offending in any, each, or either of the cases aforesaid, and being thereof lawfully convicted, shall, by order of the Court before whom such offender shall be convicted, be transported to some of his Majesty's colonies or plantations in America, for the term of fourteen years." (*u*)

24 Geo. 3, sess. 2, c. 53, and 38 Geo. 3, c. 69, containing provisions nearly in a similar form to the 13 Geo. 3, c. 59.

The 24 Geo. 3, sess. 2, c. 53, which required the mark of the king's head to be added both to gold and silver manufactures to denote the payment of the *duty* thereby imposed, contains similar provisions, not only with respect to such duty mark, but with respect to the assay marks, and applies to such marks when used by the company of Goldsmiths in Edinburgh, and by the Birmingham and Sheffield company, as well as by the company of goldsmiths in London, and by the wardens or assayers at York, Exeter, Bristol, &c.; and it makes the offenders guilty of felony without benefit of clergy. (*v*) After this came the 38 Geo. 3, c. 69, (which allowed

(*u*) This act contains no express provisions for the punishment of principals in the second degree and accessories; the principals in the second degree, therefore, are punishable in the same manner as the principals in the first degree, and the accessories before and after the fact are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5, (*ante*, p. 135, note (*b*),) as for a felony for which no punishment has been expressly provided,) with transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and the offender may be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet; and the offender, if a male, may be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

(*v*) Sec. 16. And it refers to the 1st December, 1784, instead of the 5th July, 1758. This section is neither expressly repealed by the 1 Wm. 4, c. 66, nor are the offences contained in it made capital by that act; consequently they are punishable in the manner pointed out in note (*h*), *ante*, p. 415.

gold wares to be manufactured at a lower standard than before) and contains provisions nearly in a similar form to those of the 13 Geo. 3, c. 59, s. 2, as to the forging, &c., any mark or stamp used, "*in pursuance of this act*," for the making or stamping *gold plate* by the company of goldsmiths in London or Edinburgh, or the Birmingham or Sheffield company, or by the wardens or assayers at York, Exeter, Bristol, &c.: but it does not extend to marks, &c., used by any *maker* or *worker* of gold plate; and the description of articles, the marking or stamping of which with a forged or counterfeited mark or stamp is made one of the offences therein enumerated, is, "any wrought plate of gold, or any wares of silver, brass, or other metal gilt over, and resembling plate of gold." And the offences therein enumerated are not made capital, but felonies punishable by transportation for seven years. (*w*) It was observed as singular that when the subject was under the review of the legislature, and the punishment for the offences under this act limited to transportation, offenders *ejusdem generis* under a former act (24 Geo. 3, sess. 2, c. 53, s. 16,) should be left subjected to capital punishment. (*x*)

A fraudulent intent is not necessary to bring a case within the 13 Geo. 3, c. 59, and 38 Geo. 3, c. 69.

It has been held that a person may be convicted under the 13 Geo. 3, c. 59, s. 14, and the 38 Geo. 3, c. 69, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both be genuine rings, and although the jury find that he did it without any fraudulent intent. The prisoner was indicted under the 13 Geo. 3, c. 59, s. 14, and the 38 Geo. 3, c. 69, s. 7, for unlawfully transposing the lion passant from one gold ring to another; and it was clearly proved that he had transposed the mark, but there was no proof that the ring, to which it was transposed, was not genuine gold; and the jury found the prisoner guilty of transposing the hall mark from one genuine ring to another genuine ring, but without any fraudulent intent; it was held, however, that, as there were no words in the statutes referring to any fraudulent intent, that finding amounted to a verdict of guilty. (*y*) The prisoner was, however, afterwards pardoned.

Cutting, getting off, &c., stamps from paper, with intent to use them.

We have seen that the stamp act, 55 Geo. 3, c. 184, s. 7, makes the fraudulent cutting or getting off any stamp from any paper, &c. with intent to use the same upon any other paper, &c. chargeable with the duties thereby granted, a capital offence. (*z*) A former statute, 12 Geo. 3, c. 48, contains more general provisions; but makes the offences therein mentioned felony, punishable only by transportation. It enacts, "that if any person or persons shall write or engross, or cause to be written or engrossed, either the whole or any part of any writ, mandate, bond, affidavit, or other writing, matter or thing whatsoever, in respect whereof any duty is or shall be payable by any act or acts made, or to be made in that behalf, on the whole or any part of any piece of vellum, parchment, or paper, whereon there shall have been before written any other bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped according to the said acts; or shall fraudulently erase or

12 Geo. 3, c. 48. Any person writing any writ, mandate, &c., on paper, &c., whereon there shall have been before written any other writ, &c., liable to duty, before such paper, &c., shall have been again

(*w*) 38 Geo. 3, c. 69, s. 7. This statute contains no provisions for the punishment of principals in the second degree and accessories; they are, therefore, punishable in the manner stated in note (*u*), *ante*, p. 448.

(*x*) 2 East, P. C. c. 19, s. 18, p. 892.

(*y*) Rex *v.* Ogden, 6 C. & P. 631. See Reg. *v.* Allday, *post*, p. 451.

(*z*) *Ante*, p. 440.

stamped; or fraudulently erasing names, sums, &c., or getting off any stamp from any paper, &c., with intent to use it, is guilty of felony.

scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing written in such writ, mandate, affidavit, bond, or other writing, matter or thing, as aforesaid, or fraudulently cut, tear, or get off any mark or stamp, in respect whereof or whereby any duties are or shall be payable, or denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter or thing, in respect whereof any such duty is or shall be payable, or denoted to be paid or payable as aforesaid;" every person so offending, and every person aiding, abetting, &c. to commit any such offence shall be deemed to be guilty of felony, and be transported to some of his Majesty's plantations beyond the seas for a term not exceeding seven years. And it further enacts that if any such person so convicted or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he shall be apprehended.

And an offender escaping or returning from transportation, is to suffer as a felon.

In order to bring a case within the 12 Geo. 3, c. 48, the act must be done with a fraudulent intent.

It has been held that to constitute a felony within this section by writing some matter liable to stamp duty on paper, on which had before been written some other matter liable to stamp duty, before the paper had been again stamped, it is essential that the party writing should do so with some fraudulent intention. An indictment stated that the defendant did feloniously write the word "six", being a certain part of a license to let horses on hire, in respect whereof a certain duty was then payable, on a certain piece of paper whereon had been before written a license to let horses for hire, which said paper had before been duly stamped, and it appeared that the defendant was the father of the farmer of the post horse duty of a district, and was in the habit of acting for his son in the duties of this situation, and that in 1833 one Hinckley took out a license to let post horses, which was granted by the defendant and bore a 7*s.* 6*d.* stamp. This license was renewed in 1834, and in 1835, on an application for a further renewal, the defendant, instead of granting a new license, as he ought to have done, altered the date of the old license from 1833 to 1835, and the time of its expiration from 1834 to 1836, and received 7*s.* 6*d.* from Hinckley. Lord Abinger, C. B.—"I consider that no fraud is proved. To come within the mere words of the act, it is not necessary that it should have been done fraudulently; still I am of opinion, that if a person innocently, and without any intent to defraud, wrote any thing on this paper, it would not be an offence. Whether fraud was intended is a question for the jury." "Suppose a person had made a perfect deed, which was executed, and afterwards it was found necessary to alter the date and some of the terms, and the parties altered the original deed, intending to send it to the Stamp Office to have new stamps put upon it, would they be liable to be transported? The enactment on which this case is founded is general, and makes it a felony to write upon any stamped document any thing which makes it liable to a new stamp before such new stamp is put upon it." For the crown it was submitted, that by the terms of the act, any person thus writing upon a stamped document was within its

provisions, even if he had no intent to defraud. Lord Abinger, C. B. (in summing up)—"The act of Parliament does not say that an intent to deceive or defraud is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence there must be a guilty mind. It is a maxim, older than the law of England, that a man is not guilty unless his mind be guilty. If a person through mistake thought he could alter this license, and send the 7*s.* 6*d.* to Somerset House, that would be no felony in law, any more than it would be in reason, justice, or common sense. If the defendant meant to defraud the government of 7*s.* 6*d.*, he is guilty; but as it could have been easily proved, if the duty had not been paid on Mr. Hinckley's license, and no such evidence has been given, I think you should presume in favour of innocence. You will say whether you think that the defendant intended to commit any fraud. You may find that he made the alterations in the license, but that he did so without any fraudulent intent, and I can put the matter in a train of investigation; or you may (and you have a right, if you think proper to do so,) find a verdict of not guilty." (*a*)

As to stamps on paper, &c., in respect whereof any duty of excise is imposed.

The statutes 47 Geo. 3, Sess. 2, c. 80, s. 13, and 49 Geo. 3, c. 81, s. 1, by which the counterfeiting stamps, &c. upon paper, &c. upon which any excise duty was imposed, was punished, were repealed by the 1 Geo. 4, c. 58, which was also repealed by the 2 & 3 Vict. c. 23: by sec. 42 of which, the counterfeiting such stamps, &c., having counterfeit stamps, or paper with such counterfeit stamps, &c. in possession, knowing, &c. with other offences of a similar kind, are subjected to severe pecuniary penalties.

10 Ann. c. 19, s. 97. As to the forging of seals or stamps for linens, calicoes, &c.

The 10 Ann. c. 19, s. 97, directs the commissioners of the customs to provide certain seals or stamps for imported linens; and the commissioners for managing the duties on silks, calicoes, linens, and stuffs, to provide proper seals or stamps of another kind for marking such silks, &c.; and it enacted, that if any person should counterfeit or forge any stamp or seal provided or made *in pursuance of that act*, or counterfeit the impression of the same upon any of the commodities *chargeable by that act*, thereby to defraud the crown of the duties thereby granted, the offender should be guilty of felony without benefit of clergy: and further, that if any person should, during the continuance of the act, sell any printed, painted, stained, or dyed silks, calicoes, linens, or other stuffs, with a counterfeit stamp, knowing the same to be counterfeited, with intent to defraud the crown, such offender shall forfeit 100*l.* and stand in the pillory for two hours. (*b*)

(*a*) Reg. *v.* Allday, 8 C. & P. 136. The jury found a general verdict of "not guilty." It was objected in this case that the indictment was bad; first, because the writing the word should have been charged to have been fraudulently done; second, that the instrument ought to have been set out; third, that these alterations were not within the meaning of the statute, which referred to some independent writing of some new instrument, and not to the mere altering of a word or figure in an old one; but no opinion was expressed on any of these objections. Reg. *v.* Page, 8 C. & P. 122, *ante*, vol. 1, p. 79, was cited for the prisoner.

(*b*) The 2 & 3 Vict. c. 23, s. 67, repealed so much of this act "as relates to the duties, allowances, or drawbacks on paper, buttonboard, millboard, pasteboard, or scaleboard, or the collecting or securing the same." The 6 & 7 Wm. 4, c. 76, s. 32, repealed so much of the 10 Anne, c. 19, "as relates in any manner to the stamp

13 Geo. 3, c. 56, s. 5, recites certain doubts upon former statutes.

The 13 Geo. 3, c. 56, s. 5, reciting the 10 Ann. c. 19; 12 Ann. stat. 2, c. 9; 3 Geo. 1, c. 7, s. 1, and 6 Geo. 1, c. 4, s. 1, and also reciting that doubts had arisen whether persons counterfeiting or forging any stamp or seal to resemble any stamp or seal renewed or altered by the commissioners of excise, in pursuance of the authority of the said act of the twelfth year of Queen Anne, or counterfeiting or resembling the impression of such renewed or altered stamp or seal, were subject to the penalties and pains of death in the said acts enacted and declared; and evil-minded persons had thereby been encouraged to counterfeit such renewed and altered stamps and seals; for obviating all such doubts, enacts, "that if any person or persons whatsoever shall, at any time or times hereafter, counterfeit or forge any stamp or seal, already provided by the said commissioners, or which shall hereafter be by them provided, renewed, or altered, or shall counterfeit or resemble the impression of the same, upon any of the said commodities chargeable by the said acts, thereby to defraud his majesty, his heirs, or successors, of any of the said duties thereby granted;" then every such person so offending shall be adjudged a felon, and shall suffer death, as in cases of felony, without benefit of clergy. (*c*)

And enacts that any person forging any stamp, &c., provided by the commissioners, shall be guilty of felony.

Subsequent statutes relating to the duties of the customs and excise have contained similar provisions, either by re-enactment, as in 27 Geo. 3, c. 31, s. 13, 14, or by express reference, as in 43 Geo. 3, c. 69, s. 4.

Construction of the stamp acts.

The books afford but few cases on the construction of the stamp acts.

Field's case. Question upon the words *intent to use* in the 12 Geo. 3, c. 48.

A question was made upon that part of the 12th Geo. 3, c. 48, which relates to the offence of fraudulently getting off a stamp from parchment or paper, *with intent to use* the same for any other writing, &c. (*d*) whether a person taking a stamp from a writ, fixing it to another writ of the same kind, and then selling it to a law stationer to be disposed of in his business, and used by any person who might purchase it of him, was a sufficient using of it within the words of the statute. It was contended on behalf of the prisoner,

duties on newspapers, or the duties on advertisements, or as imposes any penalty with relation to the said duties or either of them." The 3 & 4 Vict. c. 49, s. 69, also repeals the 10 Anne, c. 19, "so far as the same relates to the duties and drawbacks of excise on soap, or contains any regulations for collecting, managing, or securing, or paying the duties and drawbacks on soap, but no further." The pillory is abolished by the 1 Vict. c. 23.

(*c*) Mr. Lonsdale (St. Cr. L. 189,) observes that this enactment is incidentally repealed by the 1 Wm. 4, c. 17, s. 1, as far as relates to calicoes, linens, and stuffs. With respect to the stamps or seals on silks, however, the forging thereof having been made felony without benefit of clergy by the 13 Geo. 3, c. 56, s. 5, but not declared to be so by the 52 Geo. 3, c. 143, persons committing that offence were, until the passing of the 7 & 8 Geo. 4, c. 28, entitled to their clergy, and not having been made punishable with death by any statute passed since are now liable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5,) to the punishment at the head of this class of offences (*i. e.* the punishment stated in note (*u*), *ante*, p. 448), as being guilty of a felony for which no punishment is otherwise specially provided. Offenders against the above enactment were not within the 1 Wm. 4, c. 66, s. 1, as they were not liable to suffer death at the time of the passing of that act, and consequently are not now punishable under the 1st and 26th sections thereof, and the 1 Vict. c. 90, s. 5. The act contains no express provisions for the punishment of principals in the second degree and accessories; they are, however, punishable in the same way as the principals in the first degree in this instance—that is, the principals in the second degree in the same way as the principals in the first degree according to the common law rule; and the accessories under the 7 & 8 Geo. 4, c, 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5, as for a felony for which no punishment has been expressly provided.

(*d*) *Ante*, p. 449.

that as the statute was silent as to uttering, vending, or exposing to sale, it would violate the known rules of construction, to say, in so penal a case, that the sale to the law stationer was made *with an intent to use* the stamp in the manner described by the act. No opinion of the Judges upon this point appears to have been delivered; but the prisoner, after lying a long time in gaol, was ultimately discharged. (*e*)

A party innocently cutting off a stamp and bit of parchment, and afterwards fraudulently getting off the stamp from the bit of parchment with intent to use it, is within the 55 Geo. 3, c. 184.

One who innocently cuts off the stamp and part of the parchment &c. from an instrument, is guilty of an offence under the 55 Geo. 3, c. 184, s. 7, if he afterwards gets off such stamp from such part of the parchment with intent to use it again. And it is equally an offence, whether the impression was made before or after the 55 Geo. 3, c. 184. The fifth count of the indictment charged that the prisoner did feloniously and fraudulently cut, tear, and get off, from a certain piece of parchment, a certain impression of a certain die, which had been theretofore provided, made, and used, in pursuance of the statute in such case made and provided, for denoting a certain duty, being one of the duties under the care and management of the commissioners of stamps, that is to say, a stamp duty of 25*l.*, with intent to use the same for and upon a certain other piece of parchment, against the statute. The sixth count was the same as the fifth, with the exception of alleging the offence to be that he did cut, tear, and get off the impression from a certain piece of vellum. The prisoner was a junior clerk in the Stamp Office, and in consequence of the illness of another clerk, attended on the 9th of April 1831, before one of the commissioners in the office for making allowances upon spoiled stamps, upon which occasion it was his duty to cut off from each of the instruments on which allowances were to be made, a piece upon which the stamp was impressed, and to throw into the fire the piece so cut off. Upon the 9th of April, two stamps only of the amount of 25*l.* were brought before the commissioners for allowance, and it was satisfactorily proved that the prisoner upon that occasion cut off the parts of two instruments upon which those stamps were impressed, but instead of putting them into the fire he retained them, and afterwards contrived to detach the impressions from the blue paper upon which the stamps were impressed, and affixed them to two other skins of parchment, which he procured from a law stationer, with the words "This Indenture" engrossed thereon, and offered the skins with the impressions so annexed for sale. It was proved that stamps impressed on blue paper are used for vellum and parchment only, that stamps of this description of the value of 25*l.* were in use before the passing of 55 Geo. 3, but the officers of the Stamp Office could not undertake to say that the impression in question had not been made and issued before the passing of that act. It was objected on behalf of the prisoner, first, that the allegations in the indictment which stated the impressions to have been made from a die used in pursuance of 55 Geo. 3, were not sustained; secondly, that the act did not apply to the case of impressions lawfully cut off, by order of the commissioners, from the instruments to which they were affixed, and afterwards detached from the pieces of vellum or parchment which had been lawfully cut off; and, thirdly, that the act was only applicable to cases where the impressions were

(*e*) Field's case, O. B. 1785. 1 Leach, 383.

detached, with intent to use them upon some vellum, parchment, or paper chargeable with a duty; and that the parchment to which the impressions were affixed by the prisoner, were not in a state to be chargeable with a duty. The jury found the prisoner guilty; and in answer to questions suggested to them by the Court, stated, first, that they could not say whether the impressions in question were issued before or after the passing of the 55 Geo. 3; secondly, that they acquitted the prisoner of any fraudulent intent at the time when he cut from the spoiled instruments the pieces to which the impressions were affixed; thirdly, that when he detached the blue paper bearing the impression from the pieces so cut off, he did so with a fraudulent intent to use them upon other parchment; fourthly, that he intended to use them upon parchment destined to be employed as an indenture. A verdict of guilty was then entered upon the fifth and sixth counts. And upon a case reserved as to the propriety of the conviction upon the fifth and sixth counts, the judges were unanimously of opinion that upon this finding the conviction was good. (*f*)

Palmer's case. Construction of the words "any paper liable to the said duties" in the 23 Geo. 3, c. 49, s. 20.

The following case arose upon the 23 Geo. 3, c. 49, s. 20, by which it was enacted that if any person should forge, &c., any stamp or mark directed or allowed to be used by the act for the purpose of denoting the duties therein mentioned, or should fraudulently use any of the said stamps or marks, or should "utter, vend, sell, or expose to sale *any paper liable to the said duties*, with any counterfeit mark or impression thereon," knowing the same to be counterfeited, such person should be guilty of felony. The indictment against the prisoner contained two counts. The first, after stating that a certain stamp was provided by the statute for stamping every piece of paper upon which any receipt, &c., upon the payment of money amounting to 2*l.*, &c., was written with a stamp duty of 2*d.*, &c., stated, that the prisoner, intending to defraud the king of the duty on, &c., "unlawfully, fraudulently, and feloniously did utter and expose for sale to one Hannah Gabriel, 1,000 pieces of paper *liable to the said duty of twopence*, with a counterfeit impression upon each and every one of the said pieces of paper resembling the impression of the said stamp then and there used, according to the form of the statute, &c., he the defendant at the said time of uttering, &c., well knowing the said impression on the said pieces of paper so by him uttered, &c., to be counterfeited; against the form of the statute, &c." The second count was the same as the first, except in this respect that the words "liable to the said duty of twopence" were omitted. An objection was taken on behalf of the prisoner, on the ground that the words "papers liable to the said duties" were entirely void of the precise sense and definition to which they were applied; and also that the indictment had not sufficiently stated the offence according to the words of the statute. The prisoner having been found guilty, the question was reserved for the consideration of the Judges; ten of whom (Lord C. B. Skynner and Hotham, B., being absent from indisposition) were unanimous that the conviction was right; and their opinion was afterwards delivered by Gould, J., to the following effect. "The objection arises upon a supposed inaccuracy of the words in the

(*f*) Rex v. Smith, R. & M. C. C. R. 314. 5 C. & P. 107, S. C.

statute, "paper liable to the said duties," in the plural number; which words the present indictment has properly pursued and necessarily applied to the particular duty in question, *viz.* the duty of twopence on receipts; and the Judges are of opinion that the indictment is properly drawn, although a duty of one description only is mentioned. The material question is, what the legislature meant by the words "paper liable to the said duties?" And it was said that as one particular piece of paper cannot be liable to any of the duties more than another, it would follow that all the writing paper in the world might be considered as "paper liable to duties," and every utterer or seller of paper of any description, might be indicted for a capital offence, in having exposed to sale "paper liable to the said duties." But the Judges are of opinion that, upon a due attention to the present statute, and the subsequent statute, 24 Geo. 3, c. 7, upon the same subject, it will appear that the words "paper liable to the said duties" are capable of a clear and unequivocal meaning. The rules by which the expressions of the legislature are to be interpreted are; first, that if any part of a statute is penned obscurely, and other passages in the same statute will elucidate that obscurity, recourse ought to be had to such context for that purpose; and secondly, that if there are several statutes upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. By adopting these rules in the present case, it will appear that the words "paper liable to the said duties," are not to be taken in the large and absurd sense which was attempted to be imposed upon them, namely, as applying to every species of paper, on which receipts might probably be written, but are to be taken as applying distinctly to such pieces of paper only as are destined or prepared for the uses mentioned in the statute. The paper which is destined and prepared for the use of writing receipts thereon is the paper meant by the words "paper liable to the duties;" and therefore all paper upon the face of which a mark appears resembling the mark which the act requires, is evidently "paper liable to the duties," because the preparation of thus marking it discovers the purpose for which it is designed. Upon the papers mentioned in the indictment, there appears a false stamp or impression resembling the true stamp which the law requires for receipts: this discovers the use for which they were destined and prepared, and brings them within the general words of the act, "paper liable to the said duties." The Judges are, therefore, unanimously of opinion that the prisoner was properly convicted; and that the words "paper liable to the said duties" are to be applied, according to the subject matter, to such paper, which, from the counterfeit mark upon it, appears to be prepared to be used, as if the mark were genuine, for a receipt." (*g*)

It appears also that some of the Judges were of opinion, that the second count which omits the words "liable to the said duties," was sufficient; for it was a charge of fraudulently uttering, &c. paper with a counterfeit impression, resembling the said stamps used in pursuance of the said statute, knowing, &c.; and this in substance was a charge of its being paper denoted by the said impression to be destined for writing receipts, and, as such, being paper liable to that duty. (*h*)

(*g*) Palmer's case, O. B. 1784, Hil. T. 1785. 1 Leach, 352. 2 East, P. C. c. 19, s. 19, p. 893.

(*h*) 2 East, P. C. c. 19, s. 19, p. 895.

Hall and Crutchfield's case. The words "duties of excise," and "duties under the management of the commissioners of excise," held to be synonymous.

A question was made in the following case, as to a distinction between the words "duties of excise," and "duties under the management of the commissioners of excise." The prisoners were indicted for forging a stamp on foreign muslins, printed, &c. here, with intent to defraud the king of the duty; and one of them having been convicted, an objection was taken by his counsel on these grounds. That the offence was originally created by the 25 Geo. 3, c. 72, s. 17, by which the duties, for securing of which the stamps were provided, were imposed. That by 27 Geo. 3, c. 13, s. 35, all the former duties are repealed, except duties due, and penalties and forfeitures incurred at the time of passing that act; and therefore it was argued that all penalties were annihilated unless re-enacted. That this, as well as all preceding statutes, took a distinction between *duties of excise*, and *duties under the management of the commissioners of excise*; according to what was observed by Mr. Justice Ashurst, in *Rex v. The Justices of Surrey*, 2 Term Rep. 504. That sec. 38 of the latter statute states that "all pains, penalties, fines and forfeitures of any nature or kind whatsoever, as well pains of death as others, for any offence in force before the tenth of May, 1787, made for securing the revenue of excise, or other duties under the management of the commissioners of excise, &c. shall extend to and be applied for, and in respect of the several *duties of excise*, and allowances, bounties, and drawbacks of duties of excise thereby charged and allowed, &c." That, therefore, those penalties and pains of death, being re-enacted only so far as they relate to *duties of excise*, and not to duties or sums *under the management of commissioners of excise*, (which was the case with respect to the duty in question) they could not be revived by construction: but being so highly penal, must be specially re-enacted. Another objection was also taken, that the indictment did not pursue the words of the statute; inasmuch as it stated the duty to be chargeable *for, on, and in respect of* foreign muslin, &c., whereas the words of the statutes imposing the duty were "for and upon" in some of the clauses, "on" in others, "upon" in others, and "for" in the schedule; but this objection was afterwards thought not worth urging. Upon the principal objection ten of the Judges, (all who were present at the conference) held that the conviction was right. Eyre, C. J., thought that the naming of *duties of excise* and *duties under the management of the commissioners of excise* was tautology. But all held it clear that the expressions were used as synonymous in this act; adverting to schedule F., in which the duties on muslins are denominated "duties of excise." (*i*)

Lee's case. Variance between a *lion passant* and a *lion rampant*.

On an indictment on the statutes 12 Geo. 3, c. 26, s. 8; 31 Geo. 2, c. 32, s. 14, and 24 Geo. 3, c. 53, s. 16, for removing from one silver kneebuckle to another silver kneebuckle certain stamps, marks, and impressions; to wit, the king's head, and the lion rampant, with intent to defraud the king, against the statute, &c., on producing the silver kneebuckle in evidence, it appeared that the mark was a lion passant, instead of a lion rampant; and the court held the variance fatal. (*j*)

(*i*) Rex *v.* Hall and Crutchfield, O. B. 1795. East. T. 1795. 2 East, P. C. c. 19, s. 19, p. 895.

(*j*) Lee's case, O. B. 1786. 1 Leach, 416.

Collicott's case.

The engraving a counterfeit stamp, similar in some parts though dissimilar in others to the legal stamp, cutting out the dissimilar parts, concealing the space from whence the dissimilar parts were cut out, and then uttering the similar parts as a genuine stamp, bolden to amount to a forgery, and guilty uttering.

It is sufficient in an indictment for forging a stamp to describe the stamp as a stamp provided and used in pursuance of a certain act of parliament.

In a modern case it was holden, that the engraving a counterfeit stamp similar in some parts, though dissimilar in others, to the legal stamp, cutting out the dissimilar parts, concealing the space from whence the dissimilar parts were cut out, and then uttering the similar parts as a genuine stamp, amounted to a forgery and guilty uttering. And it was also holden in the same case, that it is not necessary in an indictment for forging a stamp to set out the impression or inscription upon it, or to name the amount of the duty thereby denoted: but that it is sufficient to describe it as a stamp provided and used in pursuance of a certain act of parliament. The indictment was framed on the 44 Geo. 3, c. 98, for forging and uttering medicine stamps, and consisted of seven counts. The first count charged that the prisoner on the 1st of November, 1811, feloniously did forge and counterfeit, &c., *a certain mark* provided and used in pursuance of a certain act of Parliament, intitled, &c. The second count charged that he did feloniously utter *a certain paper* with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of the said act, he well knowing the said mark to be forged. The third count was for knowingly vending and selling a certain paper with a forged mark, &c. The four remaining counts were the same as the former, except that they described it as *a stamp* instead of *a mark*: and all the counts laid the intention to be to defraud his Majesty of the duties charged and imposed by the said act. It appeared upon the evidence, that the prisoner was a vender of patent medicines, and sold certain boxes of Dr. Jebb's pills, with the counterfeit label on them. Many of these counterfeit labels were found in his possession entire. They were of an oblong form, coloured with red ink, similarly to the stamps for patent medicines issued by government; and having like them, at one end, the word "stamp," and at the other end the word "office," printed transversely, and on a blank on the first mentioned end, printed longitudinally, the words "value above 1*s.*," and on a blank on the other end, also printed longitudinally, the words "not exceeding 2*s.* 6*d.*," as the legal stamps also have; and having in the centre a white circle, which, in the counterfeit was all blank, except that it bore the words "*Jones, Bristol*," printed thereon; whereas in the legal stamp that circular space was circumscribed with a red ring, and inscribed with another smaller red ring, and in the circular space between the two rings were printed the words, "duty three-pence;" and on the space within the inner red ring on the legal stamp was impressed in red ink the figure of a crown. When the prisoner used these stamps, he cut out the circular space bearing the words "Jones, Bristol," and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficiency of that part by a waxen seal extending over it. Stamps were uttered in this state by the prisoner affixed to the pills which he sold. Upon these facts the jury found the prisoner guilty: but two objections were taken in his behalf; first, that the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery; secondly, that the indictment was deficient for not setting out or describing what the stamp was that was forged. The objections were referred to the consideration of the twelve Judges; ten of whom (Lawrence, J., and Bayley, J., being absent) were of opinion

that the objections were unfounded, and the conviction right. Grose, J., in delivering their opinion, said:—"As to the first point, it was proved, that this stamp had, in every respect, and in all its parts, a perfect resemblance to a genuine stamp, excepting only that the centre part in a genuine stamp, which specifies and denotes the duty, was in the forged stamp cut out; and a paper with the words 'Jones, Bristol,' on it, pasted over the vacancy. It was also proved, that those parts which still remained were a perfect resemblance of the same parts on the genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer. An exact resemblance, or *fac simile*, is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. In this case the jury, by their verdict, have found that this stamp had a sufficient likeness to give it an aptitude to deceive, which is all the law requires. As to the second point, the indictment charges the prisoner with having forged a certain *mark*, and with having uttered a certain paper with a forged and counterfeited *mark*, resembling a mark provided and used in pursuance of the act: and the other counts describe it to be a *stamp*. The statute makes the forging and uttering of such *a mark* or *stamp*, as is thereby directed to be affixed to these articles, a capital offence. The indictment contains all the words that the act requires to constitute the offence." (*r*)

Trial in the county where the offences were committed, 53 Geo. 3, c. 108, s. 25.

With respect to the trial of offences against the stamp acts, the 53 Geo. 3, c. 108, s. 25, enacted, "that from and after the passing of this act, all criminal offences committed against or in breach of any act or acts of Parliament now in force, for granting or securing any of the duties under the management of the commissioners of stamps, shall and may be inquired of, tried, and determined, either in the county or city, or town and county where the offence shall be committed, or where the party or parties accused, or any of them, shall be apprehended."

(*k*) Collicott's case, O. B. 1812, argued before the judges, 25 April, 1812. 2 Leach, 1048. 4 Taunt. 300. Russ. & Ry. 212, 229.

CHAPTER THE THIRTY-EIGHTH.

OF THE FORGERY OF OFFICIAL PAPERS, SECURITIES, AND DOCUMENTS.

Forgeries of official papers, securities, and documents have been made in many instances the subject of especial legislative enactments.

Forging the mark, &c., of the *receiver of prefines* at the alienation office, 32 Geo. 2, c. 14, s. 9. 52 Geo. 3, c. 143, s. 5.

By the 32 Geo. 2, c. 14, the *receiver of the prefines* at the alienation office was directed to receive the post fine at the same time on every writ of covenant sued out for the passing of fines in the Common Pleas, and to indorse the receipt of the same thereon, with his name and mark of office. The ninth section then enacted, that if any person should make, forge, or counterfeit, or cause or procure, &c. the mark or hand of such receiver, whereby such receiver or any other person or persons should or might be defrauded, or suffer any loss thereby, every person convicted of such offence should be deemed guilty of felony, and suffer death without benefit of clergy. (*a*) The more recent statute, 53 Geo. 3, c. 143, s. 5, enacts, "that if any person shall make, forge, or counterfeit, or cause or procure to be made, forged, or counterfeited, the mark or hand of the receiver of the prefines at the alienation office, upon any writ of covenant, whereby such receiver or any other person shall or may be defauded, or suffer any loss thereby; every person so offending shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." (*b*)

Uttering a false certificate of a conviction for a previous felony.

The 7 & 8 Geo. 4, c. 28, s. 11, after reciting the expediency of providing for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, and enacting such punishment, regulates the form of indictment for the subsequent felony, and then enacts, that "a certificate containing the substance

(*a*) These offences appear to have had the benefit of clergy extended to them by the 52 Geo. 3, c. 143, s. 1, see note (*b*), and not having had any punishment expressly provided for them, and the benefit of clergy being abolished by the 7 & 8 Geo. 4, c. 28, seem now to be punishable in the manner pointed out in note (*u*), *ante*, p. 448, under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5.

(*b*) The first section of this statute enacts "that in all cases where any act to be done or committed after the passing of this act, *in breach of, or in resistance to* any part of the laws for collecting his Majesty's revenue in Great Britain, would by the laws now in force subject the offender to suffer death, as guilty of felony, without benefit of clergy, by virtue of the said laws, or any of them, such act, so to be done or committed, shall be deemed and taken to be felony with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act." The 1 Wm. 4, c. 66, having neither expressly repealed the 52 Geo. 3, c. 143, s. 5, nor made the offences contained in that section capital, they are now punishable in the manner pointed out in note (*h*), *ante*, p. 415, under the 1 Wm. 4, c. 66, ss. 1 & 26, and 1 Vict. c. 90, s. 5. As to principals in the second degree and accessories see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410.

and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight-pence, and no more, shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment." (*c*)

Forgery of contracts, certificates, &c., for the redemption or sale of the *land tax*. 42 Geo. 3, c. 116, s. 194.

The 42 Geo. 3, c. 116, consolidated the former acts for the redemption and sale of the *land tax;* and it enacted (by sec. 194), "that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract or contracts for the redemption or sale of any *land tax*, or any assignment or assignments of any such land tax, or of any such contract or contracts, or of any portion of land tax therein comprised, or any certificate or certificates of the commissioners of land tax or of supply, or of any chief magistrate authorized by this act to make out such certificate or certificates, or of the surveyor-general of the land revenue of the crown, or of the duchy of Cornwall, or any certificate or certificates, receipt or receipts, of the cashier or cashiers of the governor and company of the Bank of England, or any certificate or certificates, or attested copy of any certificate or certificates, directed by this act to be made out by the proper officer, or shall wilfully deliver or produce to any person or persons acting under the authority of this act, or shall utter any such forged, counterfeited, or altered contract or contracts, assignment or assignments, certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs, &c., or any body or bodies politic or corporate, or company or other person or persons whomsoever," then and in every such case, all and every person or persons so offending shall be adjudged guilty of felony, without benefit of clergy. (*d*) The 52

(*c*) As to hard labour and solitary confinement see the 7 & 8 Geo. 4, c. 28, s. 8, and 1 Vict. c. 90, s. 5, *ante*, p. 135, note (*b*). The 7 & 8 Geo. 4, c. 28, contains no provisions for the punishment of principals in the second degree and accessories; the principals in the second degree are therefore punishable in the same way as the principals in the first degree, and the accessories in the manner pointed out in note (*u*), *ante*, p. 448.

(*d*) These offences appear to have had the benefit of clergy extended to them by the 52 Geo. 3, c. 143, s. 1, *ante*, note (*b*), and not having had any punishment expressly provided for them, and the benefit of clergy being abolished by the 7 & 8 Geo. 4, c. 28, seem now to be punishable in the manner pointed out in note (*u*), *ante*, p. 448.

Geo. 3, c. 143, s. 6, enacts, "that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract, assignment, certificate, receipt, or attested copy of any certificate made out or purporting to be made out by any person or persons authorized to make out the same by any act of Parliament touching the redemption or sale of the land tax, or of any part thereof; or if any person shall wilfully utter any such forged, counterfeited, or altered contract, assignment, certificate, receipt, or attested copy of certificate, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs or successors, or any body or bodies politic or corporate, or other person or persons;" every person so offending shall be adjudged guilty of felony without benefit of clergy. (*d*)

Forgery of excise permits, &c.

2 Wm. 4, c. 16, s. 3. Unauthorized persons making paper in imitation of excise paper, or forging plates or types, &c.

The 23 Geo. 3, c. 70, s. 9, made the forgery of *excise permits*, &c., a capital felony: (*e*) and a clause nearly similar was contained in the 52 Geo. 3, c. 143, s. 9; and the 2 Wm. 4, c. 16, which was passed to consolidate the laws regulating the granting of permits under the excise laws, by sec. 3, enacts, that "every person who shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his, her, or their custody or possession, not being authorized by the said commissioners, and without lawful excuse, the proof whereof shall lie on the person accused, any mould or frame, or other instrument having therein the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the said commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; and every person, except as before excepted, who shall make, or cause or procure to be made, or aid or assist in the making, any paper in the substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to or appearing in the substance of the paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever in the substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or of any of them intended to imitate and pass for the same shall be visible; and every person, except as before excepted, who shall by any art, mystery, or

(*d*) Mr. Lonsdale observes, (St. Cr. L. 76), that the 52 Geo. 3, c. 143, s. 6, appears to be superseded by the 1 Wm. 4, c. 66, s. 10 (*post*, next chapter), as far as relates to the forging of any receipt. With respect to other instruments above mentioned, the forgery of them not having been made punishable with death by the 1 Wm. 4, c. 66, although previously a capital crime, and that act not having repealed the 52 Geo. 3, c. 143, s. 6, persons convicted of such offences are liable [under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5,] to the punishment pointed out in note (*h*), *ante*, p. 415. As to the punishment of principals in the second degree and accessories see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410.

(*e*) See *ante*, p. 459, note (*b*).

contrivance, cause or procure, or aid or assist in causing or procuring the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the commissioners of excise for permits, or any or part of such words, figures, marks, or devices, or any of them intended to imitate and pass for the same, to appear visible in the substance of any paper whatever; and every person, not authorized or appointed as aforesaid, who shall engrave, cast, cut or make, or cause or procure to be engraved, cast, cut, or made, or aid or assist in engraving, casting, cutting, or making any plate, type, or other thing in imitation of or to resemble any plate or type, made or used by the direction of the commissioners of excise, for the purpose of marking or printing the paper to be used for permits; and every person, except as before excepted, who shall knowingly have in his or her custody or possession, without lawful excuse, proof whereof shall lie on the person accused, any such plate or type; shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, or shall be imprisoned, at the discretion of the court before whom such person shall be tried, for any period not less than two years." (*e*)

2 Wm. 4, c. 16, s. 4. Forging or counterfeiting excise permits, &c.

By sec. 4, "every person who shall counterfeit or forge, or cause or procure to be counterfeited or forged, or assist in counterfeiting or forging any permit, or any part of any permit, or shall counterfeit any impression, stamp, or mark, figure or device provided or appointed, or to be provided or appointed by the commissioners of excise to be put on such permit, or shall utter, give, or make use of any counterfeited or forged permit, knowing the same or any part thereof to be counterfeited or forged, or shall utter, give, or make use of any permit with any such counterfeited impression, stamp, or mark, figure or device, knowing the same to be counterfeited; or if any person or persons shall knowingly or wilfully accept or receive any counterfeited or forged permit, or any permit with any such counterfeited impression, stamp or mark, figure or device thereon, knowing the same to be counterfeited, shall for every such offence be adjudged guilty of a misdemeanor, and shall be transported for the term of seven years, or fined and imprisoned at the discretion of the court."

Sec. 15. Officers delivering out false permits.

By sec. 15, "every officer of excise who shall deliver out, or suffer to be delivered out, any paper prepared or provided, or appointed by the commissioners of excise to be used for permits in blank, or before such permit shall be filled up and issued agreeable to and in conformity with a request note; and every officer who shall knowingly give or grant any permit to any person not entitled to receive the same, or shall knowingly give or grant any false or untrue permit, or shall make any false or untrue entry in the counterpart of any permit given or granted by him, or shall knowingly or willingly receive or take any goods or commodities into the stock of any person or persons brought in with any false or untrue or fraudulent permit, or shall knowingly or willingly grant

(*e*) This statute contains no provisions as to principals in the second degree or accessories; the principals in the second degree, therefore, are punishable according to the common law rule, in the same manner as principals in the first degree, and the accessories are punishable in the manner stated in note (*u*), *ante*, p. 448, as for a felony for which no punishment has been expressly provided.

any permit for the removal of any goods or commodities out of or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or shall knowingly or willingly give any false credit in the stock of any person or persons beyond the credit to which such stock is justly and truly entitled, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or if any such officer shall knowingly or willingly suffer the same to be done directly or indirectly; every officer so offending in any of the cases aforesaid, shall be guilty of a misdemeanor, and on conviction shall suffer such punishment by fine and imprisonment, or fine or imprisonment as the court shall award; and every officer so convicted shall from thenceforth be incapable of holding any office or place in or relating to any of the revenues of the United Kingdom."

Forging, &c., debentures or certificates for the return of money from duties of customs or excise, 52 Geo. 3, c. 143, s. 10.

The 52 Geo. 3, c. 143, s. 10, enacts, "that if any person shall, with intent to defraud his Majesty, falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or willingly assist in falsely making, forging, counterfeiting or altering any *debenture*, or any *certificate* for the payment or return of any money, or any part of any such debenture or certificate, or any signature thereon, in any case in which such debenture or certificate is by any act or acts of Parliament relating to the duties of customs (*e*) or excise required or directed to be given or granted; or shall wilfully, with such intent as aforesaid, utter, publish, or make use of any such debenture or certificate, or part thereof, so being wholly or in part falsely made, forged, counterfeited or altered;" every person so offending shall be adjudged guilty of felony, without benefit of clergy. (*f*)

Forging, &c., the name or handwriting of the *receiver-general, comptroller, &c., of the excise*, 46 Geo. 3, c. 75, s. 8.

The 46 Geo. 3, c. 75, s. 8, enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the *receiver-general of the excise* for the time being, or of the comptroller of the cash of the excise, or the person or persons duly authorized as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands

(*e*) Repealed as to the customs by the 3 & 4 Wm. 4, c. 50, s. 3.

(*f*) Mr. Lonsdale (St. Cr. L. 79,) observes that the certificates mentioned in the above enactment, so far as relates to the payment of money, appear to be warrants or orders for the payment of money within the meaning of the 4th sec. of 1 Wm. 4, c. 66, and as such the forgery thereof (the same having been a capital offence at the time of the passing of the last-mentioned act) is now punishable under the 1 Vict. c. 84, ss. 2, 3 (*ante*, p. 413). Would not the certificates for the return of money intended by the same enactment be also construed to be warrants or orders for the payment of money? In which case the forgery thereof is also punishable under the 1 Vict. c. 84, ss. 2, 3. As regards the party beneficially interested under such a certificate, it would be a warrant for the return of money; but as regards the person to whom it was directed, and who had to make the return, it would be an order for the payment of the money. At all events the forgery of such certificates, as well as the debenture mentioned above, is punishable under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, as having been an offence punishable with death at the time of the passing of the 1 Wm. 4, c. 66, and not made so punishable by that act. It is nowise material, however, as regards the punishment of forging such last-mentioned certificate, whether that offence be punishable under the former or the latter of the above statutes, the penalty being the same in both cases. As to the punishment of principals in the second degree and accessories see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410.

or custody of the governor and company of the Bank of England, on account of the receiver-general of the excise, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general, or the person or persons authorized as aforesaid, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every person so offending, shall be guilty of felony, without benefit of clergy. (*g*)

Granting, obtaining, or using *false permits* in Ireland, 48 Geo. 3, c. 82, s. 4.

By the 48 Geo. 3, c. 82, which relates to *Ireland* only, it was enacted, "that if any person whatever shall fraudulently, or without being duly authorized thereto, issue or give out, or cause to be issued or given out, or be aiding or assisting in issuing or giving out any blank *permit*, or any permit not duly authorized by a preceding request-note; or shall fill up any blank permit, not duly authorized by a preceding request-note; or if any person shall fill up or issue any permit not corresponding to or answering with the duplicate thereof in the possession of the officer; or if any person shall obtain or make use of any permit so unduly or fraudulently issued;" such person, so offending in any of the cases aforesaid, shall be adjudged a felon, and be transported for the term of life, or for seven years, or be sentenced to such other less punishment as the court who shall try such person shall direct.

Forging instruments in the name of the *receiver-general of the stamp duties, &c.*, 46 Geo. 3, c. 76, s. 9.

The 46 Geo. 3, c. 76, s. 9, enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of the *receiver-general* (*h*) *of the stamp duties* for the time being, or of his clerk, or of either of the commissioners of stamps, (*i*) to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the stamp duties; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any draft, instrument, or writing in form of a draft, made by such receiver-general or his clerk; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever;" every person so offending shall be guilty of felony, without benefit of clergy. (*j*)

Forgery on the receiver-general of the customs.

The 3 & 4 Wm. 4, c. 51, entitled "An act for the management of the customs," by sec. 27 enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any receiver-

(*g*) The instruments mentioned in this section seem to be warrants for the payment of money within the meaning of the 1 Wm. 4, c. 66, s. 4, and the forgery of them having been made capital by that section, is now punishable under the 1 Vict. c. 84, ss. 2 & 3, *ante*, p. 413. As to principals in the second degree and accessories see the 1 Wm. 4, c. 66, s. 25, *ante*, p. 410.

(*h*) Now by 5 & 6 Wm. 4, c. 20, "the receiver-general of stamps and taxes."

(*i*) Now by 4 & 5 Wm. 4, c. 60, s. 8, which consolidates the boards of stamps and taxes, "the commissioners of stamps and taxes."

(*j*) The observations in note (*g*), apply to this section also.

general of the customs, or of any comptroller-general of the customs, or of any person acting for them respectively as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of the customs; or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by such receiver-general or person aforesaid; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever, every such person or persons so offending, being thereof lawfully convicted, shall be and is and are hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life." (*k*)

7 & 8 Geo. 4, c. 53, s. 56. Forging any instrument to obtain money from the bank on account of the receiver-general.

The 7 & 8 Geo. 4, c. 53, s. 56 enacts, "that if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in forging or counterfeiting, the name or handwriting of any receiver-general of excise, or of any excise comptroller of the cash as aforesaid, or of any of the persons duly authorized as aforesaid, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money, bills, notes, drafts, checks, or orders, for the payment of money, in the hands or custody of the governor and company of the Bank of England, on account of such receiver-general as aforesaid; or if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting, of any draft, instrument, or writing in the form of a draft, instrument, or writing made by any receiver-general of excise, or by any excise comptroller of the cash as aforesaid, or by any person or persons authorized as aforesaid, or shall utter or publish any draft, instrument, or writing so forged or counterfeited, knowing the same to be forged or counterfeited, with an intention to defraud his Majesty or any person whomsoever; every person so offending, and being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." (*m*)

1 Wm. 4, c. 66, s. 3. Forging Exchequer bills, debentures, &c.

The 1 Wm. 4, c. 66, s. 31, repealed the 48 Geo. 3, c. 1, s. 9, and by sec. 3, enacts, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered any Exchequer bill, or Exchequer debenture, or any indorsement

(*k*) The 1 Vict. c. 84, s. 2, recites this section, and the present punishment is regulated by ss. 2 & 3, *ante*, p. 413; neither the 3 & 4 Wm. 4, c. 51, or the 1 Vict. c. 84, contain any provisions as to principals in the second degree or accessories. See therefore note (*u*), *ante*, p. 448

(*m*) Mr. Lonsdale (St. Cr. L. 90) observes that this section appears to be superseded by the 1 Wm. 4, c. 66, s. 10, so far as relates to the forging of any draft, instrument, or writing, for or in order to the receiving or obtaining any of the bills, notes, drafts, checks, or orders for the payment of money in the hands or custody of the governor and company of the Bank of England, on account of the receiver-general of excise. With respect to the other instruments above mentioned, *viz.*, those for or in order to the receiving or obtaining any of the money in the Bank of England on account of such receiver-general, they appear to be warrants for the payment of money within the 1 Wm. 4, c. 66, s. 4, and as such, the forgery thereof having been a capital offence at the time of the passing of that act, is now punishable under the 1 Vict. c. 84, ss. 2 & 3, *ante*, p. 413. As to principals and accessories see *ante*, p. 410.

on, or assignment of any Exchequer bill or Exchequer debenture, with intent, in any of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." (*n*)

5 & 6 Vict. c. 66, s. 9. Manufacturing or using paper, plates, or dies intended to imitate those used for exchequer bills.

The 5 & 6 Vict. c. 66, entitled, "An act for the further regulating the preparation and issue of Exchequer bills," by sec. 9 enacts, "that every person who shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his possession, not being legally authorized by the commissioners of excise or commissioners of her Majesty's treasury, and without lawful excuse, (the proof whereof shall lie on the person accused), any instrument having therein any words, letters, figures, marks, lines, or devices, peculiar to and appearing in the substance of any paper provided, or to be provided or used for Exchequer bills, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing Exchequer bills, or any die peculiarly used for preparing any such plate, or for sealing such Exchequer bills, or any plate, or die intended to imitate such plates or dies respectively; and also every person, except as before excepted, who shall make, or cause or procure to be made, or aid or assist in making any paper, in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided, or to be provided, or used for Exchequer bills, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same; and also every person, except as before excepted, who shall knowingly have in his possession without lawful excuse (the proof whereof shall lie on the person accused) any paper whatever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate the same; and also every person, except as before excepted, who shall cause, or assist in causing, any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or who shall take or assist in taking any impression of any such plate or die as aforesaid, shall be guilty of felony." (*o*)

Sec. 10. Persons unlawfully having in possession paper to be used as exchequer bills.

By sec. 10, "every person not lawfully authorized, and without lawful excuse, (the proof whereof shall lie on the person accused), who shall purchase, or receive, or take, and have in his custody, any paper manufactured and provided by or under the directions of the commissioners of excise, or commissioners of her Majesty's treasury, for the purpose of being used as Exchequer bills, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate or die as aforesaid, shall for every such offence be

(*n*) See the whole section, *supra*, p. 424. The present punishment is regulated by the 1 Vict. c. 84, ss. 2 & 3, *ante*, p. 413. As to principals in the second degree and accessories see sec. 25 of 1 Wm. 4, c. 66, *ante*, p. 410.

(*o*) As this is a felony for which no punishment is expressly provided, it is punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5,) in the manner pointed out in *note* (*u*), *ante*, p. 448. The principals in the second degree and accessories are in this instance punishable in the same manner as the principals in the first degree.

guilty of a misdemeanor, and being convicted thereof shall, at the discretion of the court before whom he shall be tried, be imprisoned for any period not more than three years, nor less than six calendar months."

Forging *certificates* and *receipts* relating to *exchequer bills*, 51 Geo. 3, c. 15, s. 71.

The statutes authorizing issues of Exchequer bills frequently contain a clause relating to the forging, &c. of the certificates or receipts therein mentioned. Thus by the 51 Geo. 3, c. 15, s. 71, "If any person or persons shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or willingly act or assist in the forging, counterfeiting, or altering, any certificate or certificates of the said commissioners by this act appointed as aforesaid, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the Bank of England, in pursuance of this act; or shall wilfully deliver to the auditor of the receipt of his Majesty's Exchequer for the time being, or any officer for the time being, or to any officer appointed by him, or to the said commissioners by this act appointed, or any of them, or to any officer or officers appointed by them, or any of them, in the execution of the powers of this act, or shall utter any such forged, counterfeited, or altered certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs, &c., or any body or bodies politic or corporate, or any person whomsoever;" in every such case, every person so offending shall be adjudged guilty of felony, without benefit of clergy. A clause nearly similar is contained in the 3 Geo. 4, c. 86, s. 54, (*p*) the 2 & 3 Vict. c. 97, and the 5 Vict. c. 8. (*q*)

Forging certificates, &c., relating to the *discharge* of *exchequer bills*.

The statutes also occasionally passed in order to grant annuities for the *discharge* of certain *Exchequer bills*, made the forging of the certificates, &c. therein mentioned, capital offences: as the 50 Geo. 3, c. 23, s. 11; 53 Geo. 3, c. 41, s. 26, and the 58 Geo. 3, c. 23, s. 38.

1 Vict. c. 36, s. 34. Forging or altering franks.

The 1 Vict. c. 36, s. 34, "in order to prevent the imitation and forgery of lawful franks," enacts, "that every person who shall forge or counterfeit the handwriting of another person in the superscription of a post letter, or who shall alter or change upon a post letter the superscription thereof, or who shall write or send by the post, or cause to be written or sent by the post, a letter the superscription whereof in whole or in part shall be forged or counterfeited, or altered, knowing the same to be forged, counterfeited, or altered, with intent in either of those cases to avoid the payment of the duty of postage, shall in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence and being convicted, thereof shall be transported beyond the seas for the term of seven years." (*r*)

(*p*) Mr. Lonsdale (St. Cr. L. 87) observes that the 3 Geo. 4, c. 86, appears to be superseded by the 1 Wm. 4, c. 66, s. 10, so far as relates to the forging the receipts therein mentioned. With respect to the other offences therein described the 1 Wm. 4, c. 66, not having made them punishable with death, although previously so punishable, and the 3 Geo. 4, c. 86, not having been repealed by that act, persons convicted thereof are liable, under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, to the punishment stated in note (*h*), *ante*, p. 415.

(*q*) *Ante*, p. 420.

(*r*) See *ante*, p. 205, *et seq.*, for the general provisions of this act. By the 2 & 3 Vict. c. 52, s. 3, the Lords of the Treasury were empowered to suspend wholly or in part any parliamentary or official privilege of sending and receiving letters by the post free of postage, or any other franking privilege of any description whatsoever; and the 3 & 4 Vict. c. 96, reciting this act, pro-

The forging the name or handwriting of the *receiver-general of the post office,* or persons employed by him, to any draft, instrument, &c. has been made the subject of especial legislative enactment.

1 Vict. c. 36, s. 33. Forging the handwriting of the receiver-general of the post office in England or Ireland, felony.

The 1 Vict. c. 36, s. 33, enacts, "that every person who shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, the name or handwriting of the receiver-general for the time being of the general post office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the hands or custody of the governor and company of the Bank of England or Ireland, on account of the receiver-general of the post office, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any draft, warrant, or order of such receiver-general, or of any person employed by or under him, for money or for payment of money, with intent to defraud any person whomsoever, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for life." (*s*)

3 & 4 Vict. c. 96, s. 22. Forging or fraudulently using plates or dies used for marking postage.

The 3 & 4 Vict. c. 96, "An act for the regulation of the duties of postage," by sec. 22 enacts "that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any die, plate, or other instrument, or any part of any die, plate, or other instrument, which hath been, or shall, or may be provided, made, or used by or under the direction of the commissioners of stamps and taxes, or by or under the direction of any other person or persons legally authorized in that behalf, for the purpose of expressing or denoting any of the rates or duties which are or shall be directed to be charged under or by virtue of the authority contained in the said recited act of the last session of Parliament, (*t*) or under or by virtue of this act; or if any person shall forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression, or any part of the stamp, mark, or impression, of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, upon any paper, or other substance or material whatever; or if any person shall knowingly and without lawful excuse, (the proof whereof shall lie on the person accused), have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument, resembling or intended to resemble, either wholly or part, any die, plate, or other instrument, which hath been, or shall, or may be so provided, made, or used as aforesaid, or if any person shall stamp or mark, or cause or procure to be stamped or marked, any paper, or other substance or material whatsoever, with any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid: or if any person shall use, utter, sell, or expose to sale, or shall cause or procure to be used, uttered, sold, or exposed to sale, or shall knowingly and without lawful excuse, (the proof whereof shall lie on the person accused) have in his possession any paper, or other substance or material, having thereon the impression or any part of the impression,

vides that all letters shall be subject to the regulations and rates in that act contained.

(*s*) See last note.

(*t*) 2 & 3 Vict. c. 52, s. 3.

of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark or impression to be false, forged, or counterfeit; or if any person shall, with intent to defraud her Majesty, her heirs, or successors, privately or fraudulently use, or cause or procure to be privately or fraudulently used, any die, plate, or other instrument, so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or shall with such intent privately or fraudulently stamp or mark, or cause or procure to be stamped or marked, any paper or other substance or material whatsoever, with any such die, plate, or other instrument as last aforesaid; or if any person shall knowingly and without lawful excuse, (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material so privately or fraudulently stamped or marked as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years, as the court shall award." (*t*)

3 & 4 Vict. c. 96, s. 29. Manufacturing or using paper similar to that used for postage covers.

By sec. 29, "if any person shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his custody or possession, not being legally authorized by the commissioners of excise, or other person or persons appointed by the commissioners of her Majesty's treasury, and without lawful excuse, (the proof whereof shall lie on the person accused), any mould or frame, or other instrument, having therein any words,

(*t*) By sec. 23, "if any person shall fraudulently get off or remove, or cause or procure to be gotten off or removed from any letter or cover, or any paper or other substance or material, the stamp or impression of any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, with intent to use, join, fix, or place such stamp or impression for, with, or upon any other letter, cover, paper, or other substance or material; or if any person shall fraudulently use, join, fix, or place for, with, or upon any letter or cover, or any paper or other substance or material, any such stamp or impression as aforesaid which shall have been gotten off or removed from any other letter, cover, paper, or other substance or material; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from, or shall cause or procure to be so erased, cut, scraped, discharged, or gotten out of or from any letter or cover, or any paper or other substance or material, any name, date, or other matter or thing [illegible] written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such letter or cover, paper, or other substance or material, or that the same may be used for the purpose of defrauding her Majesty, her heirs or successors, of any of the rates or duties aforesaid; or if any person shall make, do, or practise, or be concerned in any other fraudulent act, contrivance, or device whatever, not specially provided for by this or some other act of parliament, with intent or design to defraud her Majesty, her heirs, or successors, of any of the rates or duties aforesaid; every person so offending in any of the several cases in this clause mentioned shall forfeit and pay to her Majesty, or her heirs and successors, the sum of twenty pounds, to be recovered with full costs of suit, and all expenses attending the same." The 3 & 4 Vict. c. 96, contains no provisions for the punishment of accessories after the fact, they are therefore punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5,) in the manner stated in note (*u*), *ante*, p. 448.

letters, figures, marks, lines, threads, or devices peculiar to and appearing in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any machinery, or parts of machinery, for working any threads into the substance of any paper or any such thread, and intended to imitate or pass for such words, letters, figures, marks, lines, threads, or devices: or if any person, except as before excepted, shall make, or cause or procure to be made, or aid or assist in the making of any paper, in the substance of which shall be worked or shall appear visible any words, letters, figures, marks, lines, threads, or other devices peculiar to and worked into or appearing visible in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same: or if any person, except as before excepted, shall knowingly have in his custody or possession, without lawful excuse (the proof whereof shall lie on the person accused) any paper whatever, in the substance whereof shall be worked, or appear visible, any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate or pass for the same; or if any person, except as aforesaid, shall, by any art, mystery, or contrivance, cause or procure, or aid or assist in causing or procuring, any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same, to appear worked into or visible in the substance of any paper whatever, then and in every such case every person so offending shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, or shall be imprisoned at the discretion of the court before whom such person shall be tried, for any period not less than two years." (*u*)

3 & 4 Vict. c. 96, s. 30. Receiving paper for postage covers before it is stamped.

By sec. 30, "if any person, not lawfully authorized, and without lawful excuse, (the proof whereof shall lie on the person accused) shall purchase or receive, or take or have in his custody or possession, any paper manufactured and provided by or under the directions of the commissioners of excise, or other person or persons appointed to provide the same by the commissioners of her Majesty's treasury, for the purpose of being used for postage covers, envelopes, or stamps, and for receiving the impression of the dies, plates, or other instruments, provided, made, or used under the directions of the commissioners of stamps and taxes, or other person or persons legally authorized in that behalf, before such paper shall have been duly stamped with such impression and issued for public use, every such person shall for such offence be guilty of a misdemeanor, and being convicted thereof shall, at the discretion of the court before whom such person shall be tried, be imprisoned for any period not more than three years, nor less than six calendar months." (*v*)

(*u*) See last note, *ad finem.*

(*v*) Sec. 66, "for the more effectual prosecution of offences committed against the post-office" enacts, "that in any indictment or criminal letters for any offence committed upon or in respect of any property which may be laid in or stated to belong to the postmaster-general, it shall be sufficient to state any such property to belong to and to lay it in "her Majesty's postmaster-general," and it shall not be necessary to specify the name or addition of any such postmaster-general; and that whenever, in any indictment or criminal letters for any offence committed against the post office acts, it shall be necessary

The making or giving a *false certificate*, &c. upon the sale or disposal of *naval stores*, is subjected to a pecuniary fine of 200*l.* by the 39 & 40 Geo. 3, c. 89, s. 26.

Forging, &c., the name or hand of the *registrar of the court of admiralty*, &c.

The 53 Geo. 3, c. 151, s. 12, relates to the forging, &c., the name or hand of the *registrar* of the court of admiralty, or of appeals for prizes, or of the cashiers of the Bank, &c. to any certificate or writing, for the purpose of obtaining any of the money or effects of the suitors in those courts, and makes the offenders guilty of felony. (*w*)

Forging, &c., the handwriting of the accountant-general, &c., of the court of exchequer to any certificate, &c. to receive suitors' effects in the bank.

The 1 Geo. 4, c. 35, s. 27, enacts, that "if any person shall forge, &c., the name or handwriting of any accountant-general of the court of Exchequer or any Lord Chief Baron, or any of the barons of the said court, or of the clerk of the reports, or of any of the cashiers of the Bank of England, or of any officer of any other body politic, &c. to any certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, receipt, instrument, or writing whatsoever, for or in order to the receiving or obtaining any money or effects of any of the suitors of that court, or shall forge, &c. any certificate, &c., or shall utter, &c., or shall claim or demand payment of any sum or sums therein mentioned with intent to defraud, &c., such offender shall be guilty of felony without benefit of clergy." (*x*)

Forging warrants, orders, &c., made under the 4 & 5 Wm. 4, c. 15, relating to the exchequer.

The 4 & 5 Wm. 4, c. 15, entitled, "an act to regulate the office of the receipt of his Maiesty's Exchequer at Westminster," by sec. 28 enacts, "that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering, any warrant, order for payment, or other document whatsoever, by this act directed or authorized to be issued or made, or shall utter or publish as true, or knowingly or willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such warrant, order for payment, or other document whatsoever, with intent to defraud his Majesty, the governor and company of the Bank of England, or any other person or persons, any person so offending shall be deemed guilty of felony, and shall upon conviction be transported beyond the seas for the term of his natural life." (*y*)

Counterfeiting certificates

The 2 & 3 Wm. 4, c. 125, s. 64, entitled "An act for enabling his Majesty to direct the issue of Exchequer bills to a limited

to mention for any purpose whatever, "her Majesty's postmaster-general," it shall be sufficient to describe such postmaster-general as "her Majesty's postmaster-general," without any further or other name, addition, or description whatsoever."

(*w*) This statute provides no express punishment for this offence, consequently principals in the first degree are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448, and the principals in the second degree and accessories are punishable in the same manner.

(*x*) Mr. Lonsdale (St. Cr. L. p. 86) observes, that the language in which the instruments mentioned in this enactment are described appears to be sufficiently comprehensive to include warrants or orders for the payment of money within the 1 Wm. 4, c. 66, s. 4, and to that extent the forgery of such instruments is punishable under the 1 Vict. c. 84, ss. 2 & 3 (*ante*, p. 413). With respect to the forgery of the above-mentioned instruments generally the 1 Wm. 4, c. 66, not having made such offences punishable with death, although previously so punishable, and the 1 Geo. 4, c. 35, s. 37, not having been repealed by that act, persons convicted thereof are liable [under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5,] to the punishment mentioned in note (*h*), *ante*, p. 415.

(*y*) This act contains no provisions for the punishment of principals in the second degree and accessories, they are, therefore, punishable in the manner stated in note (*u*), *ante*, p. 448.

of commissioners, &c., under 2 & 3 Wm. 4, c. 125, relating to exchequer bills for relief of Trinidad, British Guiana, and St. Lucie.

amount, for the purpose and in the manner therein mentioned, and for giving relief to Trinidad, British Guiana, and St. Lucie," enacts, "that if any person or persons shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any certificate or certificates of the said commissioners, by this act appointed as aforesaid, or any of them, or any receipt or receipts to be given by the cashier or cashiers of the governor and company of the Bank of England in pursuance of this act, or shall wilfully deliver to the auditor of the receipt of his Majesty's Exchequer for the time being, or to any officer appointed by him, or to the said commissioners by this act appointed, or any of them, or to any officer or officers appointed by them or any of them, in the execution of the powers of this act, or shall utter any such forged, counterfeited, or altered certificate or certificates, receipt or receipts, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs, or successors, or any body or bodies politic or corporate, or any person whomsoever, then and in every such case, all and every person or persons so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony." (z)

5 & 6 Wm. 4, c. 51. Extending the 2 & 3 Wm. 4, c. 125 to Dominica.

The 5 & 6 Wm. 4, c. 51, entitled "An act for granting relief to the Island of Dominica," and to amend the 2 & 3 Wm. 4, c. 125, by sec. 5, enacts that "all and every the several clauses, powers, provisions, enactments, penalties, and restrictions, in the said act contained, so far as the same can be made applicable and are not varied by this act, shall be taken to extend to this act, and to every thing to be done in pursuance of this act, and as if all such clauses, powers, provisions, and enactments were herein repeated and made applicable to the said island of Dominica, and to the loans and grants to be made in pursuance of this act; and to every matter and thing to be done in pursuance of this act; and all and every the securities to be taken in pursuance of this act shall be taken in such manner as by the said act is directed with respect to the securities thereby authorized or directed to be taken; and all and every such securities shall have such force, priority, and effect, in all respects as if they were taken in pursuance of and under the authorities of the said in part recited act; and all and every the rules, orders, and directions made or to be made by the said commissioners shall apply to the said island of Dominica, and the loans to be granted and the securities to be taken in pursuance of this act, in all respects whatsoever, as if the loans hereby authorized to be made had been authorized by the said act."

Forging, &c., the hand of the *treasurer of the ordnance,* 46 Geo. 3, c. 45, s. 9.

By the 46 Geo. 3, c. 45, s. 9, the forging the hand of the *treasurer of the ordnance, &c.* to any draft or writing for obtaining money from the Bank of England, and the uttering any such draft, &c. knowing the same to be forged, were made capital offences. (a)

(z) The 1 Vict. c. 84, recites this section, and the present punishment for offences contained in it is provided by sec. 1 & 3 of that act. See *ante*, p. 413. Neither the 2 & 3 Wm. 4, c. 125, nor the 1 Vict. c. 84, contain any provision for the punishment of principals in the second degree and accessories. The principals in the second degree, therefore, are punishable in the same manner as the principals in the first degree and the accessories (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5,) in the manner stated in note (u), *ante*, p. 448.

(a) The instruments enumerated in this enactment seem to be warrants for the pay-

The 54 Geo. 3, c. 151, s. 16, makes the forging, &c. the name or hand of the *agent general for volunteers and local militia* an offence liable to capital punishment. It enacts, "that if any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly or wilfully act or assist in forging or counterfeiting the name or hand of the agent general for the time being, or his deputy, or the person or persons duly authorized as aforesaid, to any bill of exchange, acceptance, draft, or instrument in writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, on account of the said agent general; and shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting any bill of exchange, acceptance, draft, instrument, or writing in form of a draft, made by such agent general or his deputy, or the person or persons authorized as aforesaid; or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intention to defraud any person whomsoever:" every such person so offending shall be adjudged guilty of felony without benefit of clergy. (*b*)

Forging, &c., the name or hand of the *agent-general for volunteers and local militia*, 54 Geo. 3, c. 151, s. 16.

Forgery and false personation for the purpose of obtaining the *pensions, &c.* of invalid soldiers were made punishable by the statute 46 Geo. 3, c. 69, s. 8. (*c*) And forgery and false personation for the purpose of obtaining the prize-money or bounty-money of soldiers, has been made the subject of severe punishment. (*d*) And forgery and false personation for the purpose of obtaining prize-money, pay, &c. of persons in the naval or marine services, were from time to time made punishable by a variety of statutes. (*e*)

Forgery and false personation for the purpose of obtaining the pay, prize-money, pensions, &c., of soldiers and sailors.

The 2 Wm. 4, c. 53, entitled "An act for consolidating and amending the laws relating to the payment of army prize money," by sec. 49 enacts, amongst other things, that "if any person shall forge, or counterfeit, or alter, or cause, or procure to be forged or counterfeited, or altered, or knowingly and willingly act or aid, or assist in forging or counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize money, grant, bounty money, share, or other allowance of money due or payable, or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served, or be supposed to have served, in his Majesty's army or other military service, or the name or handwriting of any officer or under officer, clerk, or servant of or in the employ of the commissioners of the said Royal Hospital at Chelsea, or the name or handwriting of

2 Wm. 4, c. 53, s. 49, Forging, &c., the names of officers, &c., entitled to prize-money, &c. or of officers of the hospital at Chelsea, or letters of attorney, wills, &c.

ment of money within the 1 Wm. 4, c. 66, s. 4, and the forgery of them is now punishable under the 1 Vict. c. 84, ss. 2 & 3, *ante*, p. 413.

(*b*) The instruments enumerated in this enactment appear to be contained in the 1 Wm. 4, c. 66, s. 4, and the forgery of them is now punishable under the 1 Vict. c. 84, ss. 2 & 3, *ante*, p. 413.

(*c*) Repealed, 7 Geo. 4, c. 16.

(*d*) 49 Geo. 3, c. 123, s. 28.

(*e*) Amongst others the 31 Geo. 2, c. 10, s. 24. 9 Geo. 3, c. 30, s. 6. 32 Geo. 3, c. 33, s. 23. 32 Geo. 3, c. 34, s. 29. 32 Geo. 3, c. 67, s. 12. 35 Geo. 3, c. 94, s. 34. 35 Geo. 3, c. 28, s. 30. 45 Geo. 3, c. 72, s. 121. 49 Geo. 3, c. 123, ss. 13, 28, 36. 49 Geo. 3, c. 108, s. 10. 54 Geo. 3, c. 93, s. 89. 54 Geo. 3, c. 110, s. 6. 55 Geo. 3, c. 60, s. 32.

any officer or person in any way concerned in the paying or the ordering, directing, or causing the payment of any such prize money, grant, bounty money, share, or other allowance of money due or payable, or supposed to be due or payable, as aforesaid, or shall falsely make, forge, counterfeit, or alter, or willingly act, aid, or assist in the false making, forging, counterfeiting, procuring, or altering any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, relating to or in anywise concerning the payment of or the obtaining or claiming any such prize money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, in order to receive, obtain, or claim, any such prize money, grant, bounty-money, share, or other allowance of money, due or payable, or supposed to be due or payable as aforesaid, or shall utter or publish as true, or knowingly and willingly act or aid, or assist in uttering or publishing as true, any falsely made, or forged, or counterfeited, or altered letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, with intention to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim from the said commissioners of the said Royal Hospital, or from any officer, under officer, clerk, or servant of the said commissioners, or from any person whatsoever authorized, or supposed to be authorized, to pay the same, the payment of any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, with an intention to defraud any person or persons whatsoever, or any body, or bodies politic or corporate whatsoever, or shall knowingly take a false oath in order to obtain letters of administration, or the probate of any will, in order to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account or in respect of the service of any officer, non-commissioned officer, soldier, or other person as aforesaid, who shall have really served, or be supposed to have served, in his Majesty's army or other military service, or shall demand or receive any prize money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, upon letters of administration, or a probate of a will, knowing the will on which such probate shall have been obtained to be false, forged, or counterfeited, or knowing such letters of administration, or the probate of such will as last aforesaid, to have been obtained by means of any such false oath, with intention to defraud any person or persons whatsoever, or any body or bodies politic or corporate whatsoever, all and every person so offending being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, as the court before whom such person or persons shall be convicted shall adjudge." (*f*)

(*f*) The 2 Wm. 4, c. 53, contains no express provision for the punishment of accessories after the fact, consequently they are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

The 7 Geo. 4, c. 16, entitled "An act to consolidate and amend the several acts relating to the Royal Hospitals for soldiers at Chelsea and Kilmainham," by sec. 38 enacts, that "if any person shall willingly and knowingly personate, or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person, entitled, or supposed to be entitled to any pension, wages, pay, grant, or other allowance of money, prize-money, or relief, due or payable, or supposed to be due or payable, for or on account of any serviced one or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in his Majesty's army, or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, or soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant, or other allowance of money, prize-money, or relief, due or payable, or supposed to be due or payable, for or on account of any services done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid: or if any person shall forge or counterfeit, or alter, or cause or procure to be forged or counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person, entitled or supposed to be entitled, to any pension, wages, pay, grant, allowance of money, prize-money, or relief, due or payable, or suposed to be due or payable, for or on account of any such service, or supposed service, as aforesaid, or the name or handwriting of any officer, under officer, clerk, or servant of the said commissioners of the said Hospital at Chelsea, or of any officer or person in any way concerned in the paying or ordering, directing, or causing the payment of the said pensions, wages, pay, money, allowance of money, prize-money, or relief, or any of them; or shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering, any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, relating to or anywise concerning the payment or obtaining, or claiming any pension, wages, pay, grant, allowance of money, prize-money, or relief, for and in order to the receiving, obtaining, or claiming any such pension, wages, pay, grant, allowance of money, prize-money, or relief; or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, with intent to obtain the payment of any such pension, wages, pay, money, or allowance of money, prize-money, or relief, from the said commissioners of the said Hospital at Chelsea, or from any officer, under officer, clerk, or servant of the said commissioners, or from the person authorized, or supposed to be authorized, to pay the same, or with intent to defraud any person whatsoever, or any corporation whatsoever;

7 Geo. 4, c. 16, s. 38. Forging Chelsea pensions, &c.

every person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be transported for life, or for such term of years as the court shall adjudge." (*g*)

An indictment for forging a letter of attorney, &c., relating to a pension supposed to be payable under the 7 Geo. 4, c. 16, s. 38, is good. It is not necessary that the pension to which the document relates should actually be existing.

The first count of an indictment founded upon the 7 Geo. 4, c. 16, s. 38, charged that the prisoner feloniously forged "a certain receipt relating to and concerning the payment of a certain pension, viz., of 4*l.* 11*s.* 0½*d.*, supposed to be payable to one Nicholas Morrill, as an out-pensioner of Chelsea Hospital for a certain time, viz., for ninety-two days, from 1st July 1838 to 30th September following, both days included, which said forged receipt is as follows, viz:—

"Assignment receipt, 426
84th foot, NICHOLAS MORRILL. 1*s.* ½*d. per diem.*
"SHEFFIELD."

"We the undersigned churchwarden and overseer of the parish of Brightside, Brierlow, in the county of York, do hereby acknowledge to have received of T. C. Brookbank, Esquire, agent for the out-pensioners of Chelsea Hospital (by the hand of Mr J. Thompson), the sum of 4*l.* 11*s.* 0½*d.*, being the amount due to the above-named out-pensioner of the said hospital for ninety-two days, from 1st July, 1838, to 30th September following, both days included, by virtue of an assignment made by the aforesaid pensioner, conformably to an act of Parliament passed in the 59th year of the reign of his Majesty King Geo. 3, entitled "An act to amend the laws for the relief of the poor," five per cent. being deducted pursuant to the act of parliament, 28 Geo. 2, c. 1.

"4*l.* 11*s.* 0½*d.* "JOHN WILSON, Churchwarden.
"Witness, J. PRINGLE." "THOMAS GRAY, Overseer of the Poor.

"We the undersigned churchwarden and overseer of the parish aforesaid, do hereby certify that the above-named out-pensioner is alive, and entitled to his pension, being no otherwise provided for by government."

"Dated this 19th day of October, 1838.

"JOHN WILSON, Churchwarden.
"THOMAS GRAY, Overseer of the Poor."

"80."

For and in order to the receiving the said pension, with intent thereby to obtain the payment of the said pension from the lords and others, commissioners of Chelsea Hospital: against the form," &c. Of the other counts, some charged the forging and others the uttering of the receipt, omitting the certificate, others the forging, and the rest the uttering of the certificate only, omitting the receipt, varying in each class the statement of the intent, but all alleging in the language set out from the first count, that the forged instrument

(*g*) Mr. Lonsdale (St. Cr. L. 132) observes, that the above enactment appears to be superseded as far as relates to prize-money by the 2 Wm. 4, c. 53, s. 49, *post*, p. 473. The 7 Geo. 4, c. 16, contains no provision for the punishment of accessories after the fact; they, therefore, are punishable (under the 7 & 8 Geo. 4, c 28, ss. 8 & 9, and the 1 Vict. c, 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

related to, &c., &c., "the payment of a certain pension (specifying the amount) supposed to be payable to the said Nicholas Morrill as an out pensioner of the said hospital." And no count alleging such pension to be in fact payable; or that Nicholas Morrill was an out pensioner. It was moved in arrest of judgment, that in order to constitute an offence under the latter branch of the thirty-eighth section, it was necessary that there should be an actually existing pension at the time of the commission of the act of forging or uttering, and that the indictment should allege the actual existence of such pension, and that it was not sufficient under that branch of the section to allege (as in this indictment) that the instrument forged related to a pension supposed to be payable. The forged instrument in question was proved to have been made and uttered by the prisoner for the purpose of procuring payment of a pension that had ceased to exist by the death of the pensioner before the period for which the receipt was signed; and therefore, as the objection was one that affected not only the form of this indictment, but involved the question of the prisoner's guilt upon this and other similar charges, Erskine, J., reserved the question for the opinion of the Judges; before whom it was contended that the offence as stated in this indictment, was not an offence comprehended in the clause recited, there being no allegation of an actual existing pension payable to some person, but only of a pension supposed to be payable. The latter part of the thirty-eighth section of the act created no offence, except in respect of a pension actually in existence, and there must be some person in existence to whom it was payable. There were in this branch of the section no such words as "supposed to be due and payable;" those words were found in the first part of the section, and they appeared to have been intentionally omitted in the enactment respecting this offence. But even if the words were in the clause, the allegation would be bad for uncertainty, inasmuch as it did not state by whom the pension was supposed to be payable; it might be a supposition in the mind of the prisoner only, and that would not be enough. But the Judges present were all of opinion that the conviction was right, (except Littledale, J., and Coleridge, J., who thought otherwise), and the conviction was affirmed. (*h*)

Falsely personating the name, &c., of a pensioner at Greenwich hospital, or forging, &c.

The personating or falsely assuming the name and character of a pensioner at Greenwich Hospital, and the forging of any documents for the purpose of obtaining the pensions paid at that establishment, have been from time to time subjected to severe punishments. (*i*) A general enactment as to the offence of falsely personating the name or character of either soldier or sailor, for the purpose of obtaining any pension, prize-money, &c. has been already referred to, and will be mentioned in a subsequent chapter. (*j*)

11 Geo. 4, c. 20, s. 83. Forging tickets, pay-lists, &c., in order to

The 11 Geo. 4, c. 20, entitled "An act to amend and consolidate the laws relating to the pay of the royal navy," by sec. 83 enacts, "that if any person shall forge, or offer, utter, dispose of, or put off, knowing the same to be forged, any ticket, pay list, extract from

(*h*) Reg. *v.* Pringle, 2 Moo. C. C. R. 127. S. C. 9 C. & P. 408.

(*i*) See 3 Geo. 3, c. 16, s. 6. 43 Geo. 3, c. 119, s 17. 54 Geo. 3, c. 110, s. 6. 58 Geo. 3, c. 64, ss. 4, 6. 59 Geo. 3, c. 56, s. 12, 17; and 4 Geo. 4, c. 46, s. 1, which repeals so much of the 3 Geo. 3, c. 16, as excluded benefit of clergy from offenders personating any out-pensioner of Greenwich Hospital, and makes the felony thereby created punishable at the discretion of the court, by transportation for life, or for any term not less than seven years, or by imprisonment and hard labour, not exceeding seven years.

(*j*) Post, chap. 40.

obtain pay or prize-money in the navy.

any ship's books, or any certificate whatever, authorized or required by this act, or any inspector's or other cheque, or any letter of attorney, assignment, power or authority, in order to obtain or to enable any other person to receive any wages, pay, half-pay, prize money, bounty money, or other allowance of money due or supposed to be due in respect of the services of any commission, warrant or petty officer, or seaman, or any commission or non-commissioned officer of marines or marine, or any other person, performed or supposed to be performed in the royal navy, or if any person shall forge, or offer, utter, dispose of, or put off, any purser's or other certificate to a bill of exchange, or any approval of any such bill, respectively required by this act; or if any person shall forge, or utter, or put off, knowing the same to be forged, any receipt for wages payable under allotment or otherwise in respect of the services of any person on board of any of his Majesty's ships, or shall forge the name or handwriting of any officer of the royal navy or royal marines to any receipt for half-pay, or arrears of half-pay, or the name or handwriting of any widow to any receipt for any pension or arrears of pension, or the name or handwriting of any person to any receipt for an allowance from the compassionate fund of the navy; or shall offer, utter, dispose of, or put off, any forged receipt for half-pay or arrears of half-pay, or for any widow's pension or arrears of such pension, or for any allowance from the compassionate fund, knowing any such receipt to be forged, with intent in any of the said cases to defraud any person whomsoever, every person so offending shall be deemed guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years." (*k*)

Sec. 86. Subscribing false petitions to the treasurer of the navy, &c.

By sec. 86 "if any person shall subscribe any false petition or application to the treasurer of his Majesty's navy, or to the paymaster of royal marines, falsely and deceitfully representing herself or himself therein to be the widow, executor, nearest or one of the nearest of kindred of any deceased commission or warrant officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines or marine, or shall utter or publish any such petition or application, knowing the same to be false, in order to procure, or to enable any other person to procure, a certificate from the said inspector of seamens' wills, or from the paymaster of royal marines as hereinbefore respectively provided, thereby to obtain, or to enable any other person to obtain, without probate or letters of administration, payment of any wages, pay, half-pay, or pension, or any allowance from the compassionate fund of the navy, or payment of any wages, prize-money, or allowances payable in respect of the services of any officer, seaman, or marine

(*k*) By sec. 88, in the case of every offence made felony by this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable: and every accessory after the fact, to any such felony, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and where any person shall be convicted of any offence punishable under this act, for which imprisonment shall or may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet. See the 1 Vict. c. 90, s. 5, limiting the duration of solitary confinement, *ante*, p. 413.

in the royal navy, or thereby to obtain, or to enable any other person to obtain, probate of the will or letters of administration of the effects of any deceased petty officer, seaman, non-commissioned officer of marines, or marine; or if any person shall receive or demand any wages, pay, half-pay, prize-money, bounty-money, pension, or arrears thereof, or any other allowance due or payable in respect of the services of any commission or warrant officer of the navy, or commission officer of royal marines, or of any petty officer, seaman, non-commissioned officer of marines, or marine, upon or by virtue of any certificate of the inspector of seamens' wills, or paymaster of royal marines respectively as aforesaid, knowing any such certificate to have been obtained by any false representation or pretence; every such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, and not less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*l*)

11 Geo. 4, c. 20, s. 87. Forging extracts from registers, &c.

By sec. 87, "if any person shall forge, or shall utter, offer, or exhibit, knowing the same to be forged, any paper writing purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, baptism, or burial, in order to sustain any claim to any wages, prize-money, or other monies due or payable in respect of the services of any officer, seaman, or marine, in his Majesty's navy, or to sustain any claim to any half-pay, payable to an officer of the royal navy or marines, or to any pension as the widow of an officer, or to any payment or allowance from the compassionate fund of the navy, or to any gratuity or bounty of his Majesty given to the relatives of persons slain in fight with the enemy; or if any person shall make any false affidavit, or utter or exhibit any false affidavit, certificate, or other voucher or document, in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the royal navy, or in order to sustain any claim to any wages, prize-money, or other monies, or to any half-pay or pension, or arrears thereof, or any allowance from the compassionate fund of the navy, or to any gratuity or bounty as aforesaid, with intent to defraud any person whomsoever, every person in any of the said cases offending shall be deemed guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years and not less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*l*)

Forging certificates, &c., under the 2 Wm 4, c. 40. An act relating to the civil business of the navy.

The 2 Wm. 4, c. 40, entitled "An act to amend the laws relating to the civil business of the navy, &c.," by sec. 32 enacts, "that if any person shall forge or falsely make any certificate to be given under the authority of this act by the commissioners for executing the office of lord high admiral, or any of them, or by any superintendent, of the purchase or sale of any naval or victualling stores, or shall utter or publish any false or altered certificate of any such purchase or sale, knowing the same to be false; or if any person shall take a false oath, or make a false affirmation, or give false evidence before any commissioner or commissioners for executing the office of lord high admiral aforesaid, or before any superintendent or inspector of seamens' wills, touching any matter which the said commissioners or

(*l*) See the last note.

any of them, or any superintendent or inspector, are or is authorized to inquire into; every such person, being duly convicted of any such offence or offences, shall be liable to suffer such punishment, pains, and penalties, as persons guilty of wilful and corrupt perjury are by law subject to." (*l*)

Sec. 33. Subscribing, &c., false petitions to the inspector of seamens' wills.

By sec. 33, "the petition for probate of will or letters of administration of the effects of any deceased petty-officer or seaman, or non-commissioned officer of marines or marine, or for obtaining a cheque or certificate in lieu of probate or letters of administration, in cases of claims, where the deceased's assets shall not exceed thirty-two pounds and twenty pounds respectively, shall be addressed to the inspector of seamens' wills, and shall be forwarded to the secretary of the Admiralty; and if any person shall subscribe, transmit, utter, or publish, any false petition or application to the said inspector, knowing the same to be false, in order to obtain, or to enable any other person to obtain, any cheque or certificate in lieu of probate or letters of administration as aforesaid, every person so offending shall be deemed guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*m*)

Forging certificates for half-pay, &c., under the 2 & 3 Wm. 4, c. 106.

The 2 & 3 Wm. 4, c. 106, an act to enable officers in the army, &c., to draw for and receive their half pay, enacts, by sec. 3, that "if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting of any such authority or certificate, or bill of exchange, or shall utter as true any such false, forged, or counterfeited authority or certificate, or bill of exchange, knowing the same to be false, forged, or counterfeited, with intent to defraud any person or persons, body or bodies politic or corporate, every such person so offending shall be deemed guilty of felony, and being thereof lawfully convicted shall be transported for seven years, or suffer imprisonment for any term not exceeding four years, as the court shall direct." (*n*)

5 & 6 Wm. 4, c. 24, s. 3. Forging certificates of service in the navy, or protections from such service.

The 5 & 6 Wm. 4, c. 24, entitled "An act for the encouragement of voluntary enlistment of seamen, and to make regulations for more effectually manning his Majesty's navy," by sec. 3, "in order to prevent, as far as may be, frauds and impositions with respect to protections," enacts, that if any person shall forge or counterfeit any certificate of service in his Majesty's navy, or any instrument purporting to be a protection from such service, or shall fraudulently utter or publish any forged certificate of such service, or any forged instrument purporting to be a protection from such service, knowing the same to be forged, or shall fraudulently alter any certificate or protection which shall have been duly granted or issued; or if any

(*l*) For this punishment see the Chapter on Perjury, *post*.

(*m*) The 2 Wm. 4, c. 40, contains no express provisions for the punishment of principals in the second degree and accessories; the principals, therefore, in the second degree are punishable in the same manner as the principals in the first degree, and the accessories are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner pointed out in note (*u*), *ante*, p. 448.

(*n*) This act contains no provisions for the punishment of accessories after the fact, they therefore are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

person shall forge or fraudulently alter any extract from a baptismal register, or shall knowingly utter any false or fraudulently-altered extract from a baptismal register, or any false affidavit, certificate, or other document, in order to obtain from the Admiralty Office a protection from his Majesty's naval service for himself or any other person; or if any person, being in the possession of a protection, shall lend, sell, or dispose thereof to any other person, in order fraudulently to enable such other person to make an unlawful use of the same; or if any person shall produce, utter, or make use of as a protection for himself any protection which shall have been made out or issued for any other individual; every person in any such manner offending shall be deemed guilty of a misdemeanor, and such protection shall thenceforward be null and void."

2 & 3 Vict. c. 51. s. 8. Fraudulent assignment of pensions in the army, navy, &c.

The 2 & 3 Vict. c. 51, entitled, "An act to regulate the payment and assignment in certain cases of pensions granted for service in her Majesty's army, navy, royal marines and ordnance," by sec. 8, reciting that "great frauds have been practised, and exorbitant and usurious interest obtained from pensioners, upon assignments made under colour of the said act of the fifty-ninth year of the reign of his said late Majesty King George 3, and according to the form set out in the said act, although the money advanced thereon has not been advanced out of parish funds, nor to reimburse a parish for relief given to the prisoner by the churchwardens and overseers," enacts, that "if any person entitled to pension or other allowance shall assign or aid or assist in making an assignment thereof, or of any quarterly or other payment thereof, to any person or persons whatsoever, except to the guardians of any union or parish, or to the churchwardens and overseers of the poor of the parish wherein such pensioner resides, or to the heritors and kirk session of any place in Scotland where such pensioner resides, and except for relief granted out of the funds of such union, parish, or townland to such pensioner, or his wife or family residing with him in such parish, it shall be lawful for the lords and others, commissioners of Chelsea Hospital, so far as relates to army or other pensions payable by such commissioners, and for the Lord High Admiral, or commissioners for executing the office of Lord High Admiral, with respect to naval and marine pensions or other allowance, immediately to take away the pension from the person so offending, or to suspend for any definite period the future payments thereof; and if any person or persons shall procure or induce a pensioner to make or aid, or assist him in making any assignment of pension, superannuation, or other allowance as aforesaid, to any person or persons other than the guardians of any union or parish as aforesaid, or the churchwardens and overseers of the parish wherein such pensioner resides, or any heritors and kirk session in Scotland as aforesaid, or shall make or aid or assist in making any assignment which shall not be given by the said pensioner or person entitled to other allowance as aforesaid, and received by the said guardians, parish officers, or heritors and kirk session, as a security for relief given or money granted or advanced out of the funds of such union, parish, townland, or place, and for reimbursing the guardians, churchwardens and overseers, or heritors and kirk session advancing the same, or shall receive or accept as payment or security for money or for goods advanced or agreed to be advanced to or lent or given to any such pensioner or person

entitled as aforesaid, or shall demand or charge any interest or pecuniary or other compensation, for advancing money upon any pension or other allowance so assigned or taken, or pretended to be assigned or taken, such person or persons shall for every such offence be deemed guilty of a misdemeanor, and shall upon every conviction thereof be punished by such fine or imprisonment, or both, as the court before which such person or persons shall be convicted shall adjudge."

Sec. 9. Forging minutes, copies, assignments of pensions, &c.

By sec. 9, "if any person shall forge, or counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any minute, copy of minute, assignment of pension, superannuation, or other allowance as aforesaid, order, certificate, receipt, document or authority whatsoever relating to or in anywise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such minute, copy, assignment, order, certificate, receipt, document, or authority relating to or anywise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or the name of any pensioner, justice of the peace, guardian, parish officer, or other officer, or any other person authorized, or supposed, or purporting to be authorized, to sign any such minute, copy, assignment, order, certificate, receipt, document, or authority, with intent or in order to obtain or to enable any other person to obtain, the payment of any such pension or pension-money, or other allowance as aforesaid from the commissioners of Chelsea Hospital or her Majesty's Paymaster-General respectively, or from any officer, under officer, clerk, or servant of the said commissioners of Chelsea Hospital, or of her Majesty's Paymaster-General respectively, or from any person authorized or supposed to be authorized to pay any pension or pension-money or other allowance as aforesaid, every such person so offending shall be guilty of felony, and shall and may be transported for such term of years, or suffer such other punishment as the court before which such person or persons shall be convicted shall adjudge." (*n*)

Lyon's case. Forging a power of attorney, to receive prize-money, holden to be a capital offence though not in the form prescribed by a particular statute, 45 Geo. 3, c. 72, s. 92.

A point may be here noticed, which arose upon the construction of the statutes by which powers of attorney to receive prize-money were regulated. The prisoner had been convicted upon an indictment which contained counts charging him with having forged a power of attorney of one J. O., a midshipman in his Majesty's service, to receive certain prize-money then due, and also counts on the 2 Geo. 2, c. 25, charging him generally with the forgery of a deed. By the 45 Geo. 3, c. 72, s. 92, a form was prescribed for a negotiable order, by a petty officer on the agent, or treasurer of Greenwich Hospital, with a certificate subjoined, &c., and the principal point made on behalf of the prisoner was, whether this prescribed form of an order invalidated every power for the purpose of receiving prize-money couched in other terms and in a different form than were

(*n*) This act contains no provision for the punishment of accessories after the fact, they therefore are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

contained in that statute. It is understood that, the point being submitted to the consideration of the twelve Judges, all of them (with the exception of Graham, B., who dissented) thought that the forging a power of attorney, though not in the prescribed form, was a capital offence, and that the conviction was right; and that most of the Judges thought that the power of attorney in question was a deed within the 2 Geo. 2, c. 25 (now repealed). (*o*)

Muster books in the navy-office, evidence.

It has been holden that the *muster books* of the King's ships, documented in the navy-office, to which returns are regularly made, by the several commanders, of the names, &c., of their respective crews, may be admitted as evidence of the persons therein named, having served on board the several ships in the capacities there mentioned. (*p*)

Forging, &c. any *mediterranean pass*, 4 Geo. 2, c. 18, s. 1.

The 4 Geo. 2, c. 18, s. 1, having reference to the treaties between this kingdom and the Barbary powers; by which, on producing a pass in a certain form, those powers agreed to let British vessels go free, enacted, "that if any person or persons shall within Great Britain or Ireland, or any other of his Majesty's dominions, or without, falsely make, forge or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or wittingly or knowingly act or assist in the false making, forging, or counterfeiting, any pass or passes for any ship or ships whatsoever, commonly called a Mediterranean pass or Mediterranean passes, or shall counterfeit the seal of the said office, or the hand or hands of the Lord High Admiral of Great Britain and Ireland for the time being, or of any commissioner or commissioners for executing the said office for the time being, to any such pass or passes, or shall alter or erase any true and authentic pass or passes issued or made out by the Lord High Admiral of Great Britain and Ireland, or the commissioners for executing the said office for the time being, or shall utter or publish as true any such false, forged, counterfeited, altered, or erased pass or passes, knowing the same to be false, forged, counterfeited, altered, or erased, all and every such person and persons, being in due form of law convicted of any of the offences aforesaid in any proper court of Great Britain, Ireland, or any of his Majesty's plantations beyond the seas, where such offence shall be committed respectively, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." (*q*) By the second section it is provided, that such offences committed in any country or place out of Great Britain, either within or without his Majesty's dominions, may be inquired of, &c., in any county of Great Britain, by virtue of the King's commission of oyer and terminer and gaol delivery, or before any court of justiciary in Scotland, &c.

5 Geo. 4, c. 113, s. 10. Forging, &c.,

The 5 Geo. 4, c. 113, entitled "An act to amend and consolidate the laws relating to the abolition of the slave trade," enacts, by sec. 10, "that if any persons shall wilfully and fraudulently forge or counter-

(*o*) Rex *v.* Ricketts Lyon, O. B. 1813, MS.

(*p*) Rhodes's case, 1 Leach, 24. Rex *v.* Fitzgerald and Lee, 1 Leach, 20. 2 East, P. C. c. 19, s. 25, p. 911. Tannet's case, *cor.* Wood, B., Kent Lent. Ass. 1818, MS.

(*q*) This section not being repealed by the 1 Wm. 4, c. 66, and the offences therein contained not being made capital by that act, such offences are now punishable (under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5,) in the manner pointed out in note (*h*), *ante*, p. 415. As to principals in the second degree and accessories, see the 1 Wm. 4, c. 66, s. 25, and 1 Vict. c. 90, s. 5, *ante*, p. 410.

certificates, &c., relating to the *slave trade.*

feit any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt, (such receipts being required by this act,) or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate: then and in every such case the person or persons so offending, and their procurers, counsellors, aiders and abettors, shall be and are hereby declared to be felons, and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the court before whom such offender or offenders shall be tried and convicted." (*r*)

5 & 6 Wm. 4, c. 45, s. 12. Forging receipts, certificates, &c., under the acts for abolishing slavery.

The 5 & 6 Wm. 4, c. 45, entitled, "An act to carry into further execution the provisions of an act passed in the third and fourth years of his present Majesty, for compensation to owners of slaves upon the abolition of slavery," by sec. 12 enacts, that "if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting, any receipt or receipts for the whole of or any part or parts of the contributions towards the said sum of fifteen millions, either with or without the name or names of any person or persons being inserted therein as the contributor or contributors thereto, payer or payers thereof, or of any part or parts thereof, or any certificate or other instrument to be issued by the commissioners for the reduction of the national debt, or shall alter any number, figure, or word therein, or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, certificate or certificates, instrument or instruments, with intent to defraud the governor and company of the Bank of England, or the commissioners for the reduction of the national debt, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." (*s*)

Forging, &c. *Quarantine* certificates, 6 Geo. 4, c. 78, s. 25.

The 6 Geo. 4, c. 78, s. 25, enacts, "that if any person shall knowingly or wilfully forge or counterfeit, interline, erase or alter, or procure to be forged or counterfeited, interlined, erased or altered, any certificate directed or required to be granted by any order of his Majesty, his heirs or successors, in council, now in force or hereafter to be made, touching quarantine, or shall publish any such forged

(*r*) This provision seems incidentally repealed by the 3 & 4 Wm. 4, c. 73, which abolishes slavery in the British colonies.

(*s*) The present punishment for these offences is regulated by the 1 Vict. c. 84, ss. 1 & 3, *ante*, p. 413; neither the 5 & 6 Wm. 4, c. 45, nor the 1 Vict c. 84, makes any provision for the punishment of accessories after the fact; they are therefore punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

or counterfeited, interlined, erased, or altered certificate, knowing the same to be forged or counterfeited, interlined, erased or altered, or shall knowingly and wilfully utter and publish any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false, he or she shall be guilty of felony." (*t*)

Forging documents relating to the monies, &c., of suitors in chancery, 12 Geo. 1, c. 32, s. 9.

The 12 Geo. 1, c. 32, which was passed for the better securing the monies and effects of the suitors of the Court of Chancery, enacts by sec. 9, "that if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting the name or hand of the said accountant-general, the said registrar, the said clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, to any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing whatsoever, for or in order to the receiving or obtaining any the money or effects of any of the suitors of the said court of Chancery, or shall forge or counterfeit, or procure to be forged or counterfeited, or wilfully act or assist in forging or counterfeiting any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing in form of a certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, made by such accountant-general, registrar, clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever;" then every such person so offending shall be adjudged to be guilty of felony without benefit of clergy. (*u*)

Gibson's case. Forging a writing, purporting to be *an office copy of a report of the accountant-general*, of money being paid into the bank; and also *an office-copy of a*

In a case upon this statute the prisoner was indicted for forging a writing, purporting to be *an office-copy of a report of the accomptant general* of money being paid into the Bank pursuant to an order of Chancery, and also *an office-copy of a certificate of one of the cashiers of the Bank*, of the payment of the money into the Bank. The second count was for publishing the same, knowing them to be forged, with intent to defraud, &c. And the third and fourth counts were, the one for forging, the other for publishing a writing in form of a writing purporting to be *an office-copy of the certificate of the accomptant-general*, and *an office-copy of the receipt of the cashier of the*

(*t*) As no punishment is expressly pointed out by the act either for principals or accessories, they are all punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner pointed out in note (*u*), *ante*, p. 448.

(*u*) Mr. Lonsdale (St. Cr. L. 68,) observes that the language in which these instruments are described appears to be sufficiently comprehensive to include "warrants or orders for the payment of money" within the 1 Wm. 4, c. 66, s. 4, and to that extent the forgery of those instruments (the same having been a capital offence at the time of the passing of the last-mentioned act) is punishable under the 1 Vict. c. 84, ss. 2 & 3 (*ante*, p. 413). It is nowise material, however, as regards the extent of the punishment, whether such forgery be punishable under the last-mentioned act, or under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, (which it is at all events, as having been an offence punishable with death at the time of the passing of the 1 Wm. 4, c. 66, and not made so punishable by that act) the punishment being the same in both cases. With respect to the forgery of the above-mentioned instruments generally, (that offence not having been made punishable with death by the 1 Wm. 4, c. 66, although previously so punishable, and the 12 Geo. 1, c. 32, s. 9, not having been repealed by the 1 Wm. 4, c. 66) persons convicted thereof are liable under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, to the punishment pointed out in note (*h*), *ante*, p 415 As to the punishment of principals in the second degree and accessories see *ante*, p. 410.

certificate of one of the cashiers of the bank, was within the 12 Geo. 1, c. 32, s. 9.

Bank. There were other counts in the indictment, of which the defendant was acquitted. The certificate and receipt were set out verbatim in all the counts, and the offence was laid to be done with intent to defraud William Hunt. Upon the trial a special verdict was found, which was afterwards argued before Lord Mansfield and nine of the other Judges. After the argument, Lord Mansfield observed, that the verdict left but one question to consider, namely, Whether the offence was within the 12 Geo. 1, c. 32, s. 9, and said that if they had any doubts, the Judges would appoint it to be argued again the next term; and therefore their Lordships deferred giving their opinion. But, in a subsequent term, eleven of the Judges met at Serjeants' Inn; and they were of opinion that *the indictment and special verdict were sufficient,* and needed no amendment; and that the case was within the statute. (*v*)

1 Wm. 4, c. 66, s. 20. Inserting any false entry in any register of baptisms, marriages, or burials; forging or altering any such entry, &c.

The 1 Wm. 4, c. 66, which partially repeals the 4 Geo. 4. c. 76, (*w*) by sec. 20 enacts, "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial; or shall forge or alter in any such register any entry of any matter relating to any baptism, marriage or burial; or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered, or shall utter any copy of such entry, knowing such to be false, forged, or altered, or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register or any part thereof: or shall forge, or alter, or shall utter, knowing the same to be forged or altered, any license of marriage: every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years." (*x*)

Sec. 21.

Sec. 21 provides and enacts, "that no rector, vicar, curate, or

(*v*) Gibson's case, O. B. 1766, Hil. T. 1768, 1 Leach, 61. 2 East, P. C. c. 19, s. 22, p. 899, in which last authority the special verdict is fully stated, and the arguments of counsel given at considerable length, for the reason that the particular grounds on which the case was decided are not declared in the note. The prisoner was executed, 1 Leach, 63.

(*w*) The 1 Wm. 4, c. 66, repeals so much of the 4 Geo. 4, c. 76, "as relates to any person who shall knowingly and wilfully insert in the register book any false entry of any matter relating to any marriage, or shall falsely make, alter, forge, or counterfeit any such entry in the register, or any license of marriage, or shall utter or publish as true any false, altered, forgered [sic in the statute], or counterfeited register of marriage, or a copy thereof, or any false, altered, forged, or counterfeited license of marriage, knowing such register or license of marriage respectively to be false, altered, forged, or counterfeited, or shall wilfully destroy any register book of marriages or any part thereof, or shall cause or procure, or assist in the commission of any of the said several offences."

(*x*) As to the principals in the second degree and accessories, and hard labour and solitary confinement see *ante*, p. 410. Mr. Lonsdale (St. Cr. L. 105) observes, that the above enactment appears to be incidentally repealed by sec. 43 of the 6 & 7 Wm. 4, c. 86 (*post*, p. 487), so far as relates to the falsifying or destroying marriage register books. With respect to registers of baptisms and burials it is still in force, sec. 49 of the 6 & 7 Wm. 4, c. 86, providing that nothing therein contained shall affect the registration of baptisms or burials as then by law established.

officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial respectively by him solemnized, shall be liable to any of the penalties herein mentioned if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid; provided also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid."

Rector, &c., not liable to any penalty for correcting, in the mode prescribed, accidental errors in the register.

Sec. 22, reciting that "copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declaration of the rector, vicar, curate, or officiating minister of every parish, district-parish, and chapelry in England where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which such parish, district-parish, or chapelry may be situated," enacts, "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall utter knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year." (*y*)

Inserting in any copy of a register of baptisms, marriages, or burials, transmitted to the registrar, any false entry; or forging or verifying any copy knowing it to be false.

The 6 & 7 Wm. 4, c. 86, entitled "An act for registering births, deaths, and marriages, in England," by sec. 43 enacts, "that every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such register-book, or any part or certified copy of any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register-book or certified copy thereof, or shall wilfully insert or cause to be inserted in any register-book or certified copy thereof any false entry of any birth, death, or marriage, or shall wilfully give any false certificate,

Forging registers kept under the 6 & 7 Wm. 4, c. 86, the act for registering births, deaths, and marriages.

(*y*) Mr. Lonsdale (St. Cr. L. 184,) makes similar observations upon this section to those mentioned in note (*x*), *ante*, p. 486.

or shall certify any writing to be a copy or extract of any register book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony." (z)

6 & 7 Wm. 4, c. 86, s. 44. Accidental errors may be corrected.

By sec. 44, "no person charged with the duty of registering any birth, death, or marriage, who shall discover any error to have been committed in the form or substance of any such entry, shall be therefore liable to any of the penalties aforesaid if within one calendar month next after the discovery of such error, in the presence of the parents of the child whose birth may have been so registered, or of the parties married, or of two persons attending upon any person in his or her last illness whose death may have been so registered, or in case of the death or absence of the respective parties aforesaid, then in the presence of the superintendent registrar, and of two other credible witnesses who shall respectively attest the same, he shall correct the erroneous entry, according to the truth of the case, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereunto the day of the month and year when such correction shall be made; provided also, that in the case of a marriage register he shall make the like marginal entry, attested in like manner in the duplicate marriage register-book to be made by him as aforesaid, and in every case shall make the like alteration in the certified copy of the register-book to be made by him as aforesaid, or in case such certified copy shall have been already made, provided he shall make and deliver in like manner a separate certified copy of the original erroneous entry, and of the marginal correction therein made."

6 & 7 Wm. 4, c. 85, s. 38. Signing false notices and certificates for marriage.

The 6 & 7 Wm. 4, c. 85, entitled, "An act for marriages in England," by sec. 38, enacts, that "every person who shall knowingly and wilfully make any false declaration or sign any false notice or certificate required by this act, for the purpose of procuring any marriage, and every person who shall forbid the issue of any superintendent registrar's certificate by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury." (a)

Forging registers deposited under the 3 & 4 Vict. c. 92.

The 3 & 4 Vict. c. 92, entitled, "An act for enabling courts of justice to admit non-parochial registers as evidence of births, or baptisms, deaths, or burials, or marriages," by sec. 8, enacts, that "every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming, or dedication, death, or burial, or marriage, which shall be deposited with the registrar-general by virtue of this act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records any false entry of any birth or baptism, naming, or dedication, death, or burial, or marriage, or shall wilfully give any

(z) As no punishment is expressly specified for this offence it is punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (u). *ante*, p. 448, and the principals in the second degree and accessories are in this instance punishable in the same manner as the principals in the first degree.

(a) For this punishment see the Chapter on *Perjury*, *post*.

false certificate, or shall certify any writing to be an extract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony." (*b*)

The statutes authorizing government to raise money by way of annuities, as the 29 Geo. 3, c. 41, the 48 Geo. 3, c. 142, and the 49 Geo. 3, c. 64, usually contain clauses making it a capital offence to forge, &c., any register, certificate, affidavit, &c., therein mentioned, or to personate any true nominee.

10 Geo. 4, c. 24, s. 41. Forging registers, certificates, transfers of annuities, &c., granted by the commissioners for the reduction of the national debt.

The 10 Geo. 4, c. 24, entitled, "An act to enable the commissioners for the reduction of the national debt to grant life annuities, and annuities for terms of years," by sec. 41, enacts, that "if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any register or registers of the birth, or baptism, or death, or burial, of any person or persons to be appointed a nominee or nominees under the provisions of this act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this act, or any certificate of any justice of the peace or magistrate, or of any officer acting under the said commissioners for the reduction of the national debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister, or consul, or chief magistrate of any province, town, or place, or other person authorized by this act to grant any certificate of the life or death of any nominee; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or certificates of any officer of the commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or the name or names of any person or persons in or to any transfer of any bank annuities or long annuities, or in or to any certificate or other instrument for the payment of money for the purchase of any annuity under the provisions of this act, or in or to any transfer or acceptance of any such annuity in the books of the governor and company of the Bank of England, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any bank annuities or long annuities, or any life annuity, or any annuity for years of whatsoever kind, under the provisions of this act, or authorizing or purporting to authorize the receipt of any life annuity, or any annuity for years of whatsoever kind, granted under this act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully

(*b*) As this is a felony for which the 3 & 4 Vict. c. 92, provides no express punishment, the principals in the first degree are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448; and the principals in the second degree and the accessories are in this instance punishable in the same manner as the principals in the first degree.

utter or deliver or produce to any person or persons acting under the authority of this act any such forged register or copy of register, or any such forged certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs and successors, or with intent to defraud any person or persons whomsoever, then and in every such case all and every persons and person so offending and being lawfully convicted thereof shall be adjudged guilty of felony, and shall suffer death." (*c*)

2 & 3 Wm. 4, c. 59, s. 19. Forging declarations, certificates, transfers of annuities, &c.

The 2 & 3 Wm. 4, c. 59, entitled, "An act to transfer the management of certain annuities on lives from the receipt of his Majesty's Exchequer to the management of the commissioners for the reduction of the national debt," &c., by sec. 19, enacts, that "if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by this act, or by the commissioners for the reduction of the national debt, under any of the provisions of this act, or under any authority given to them for that purpose; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or order of any officer of the commissioners for the reduction of the national debt, or the name or names of any person or persons in or to any transfer of any annuity, or in or to any certificate, order, warrant, or other instrument for the payment of money for the purchase of any annuity under the provisions of this act, or in or to any transfer or acceptance of any such annuity in the books of the commissioners for the reduction of the national debt, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize the transfer or acceptance of any annuities or any life annuity of whatsoever kind, or authorizing or purporting to authorize the receipt of any life annuity of whatsoever kind granted under any of the said recited acts or this act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully utter or deliver, or produce to any person or persons acting under the authority of this act any forged register or copy of register of any birth, baptism, or marriage, or any forged declaration, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud his Majesty, his heirs and successors, or with intent to defraud any person or persons whomsoever; then and in every such case all and every person and per-

(*c*) Mr. Lonsdale (St. Cr. L. 94,) observes, that several branches of the above enactment appear to be superseded by the 1 Wm. 4, c. 66, ss. 6, 10, 20. With respect to the remaining branches, the offences therein described not having been repealed by the 1 Wm. 4, c. 66, and that act not having made them punishable with death, although previously so punishable, persons convicted thereof are liable (under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5) to the punishment stated in note (*h*), *ante*, p. 415. As to the punishment of principals in the second degree and accessories, see *ante*, p. 410.

sons so offending and being lawfully convicted thereof, shall be adjudged guilty of felony, and suffer death." (*d*)

Forging any memorial, certificate, &c., of deeds, wills, &c. of land, &c., registered in the West and North Ridings of Yorkshire, or in Middlesex; 2 & 3 Ann. c. 4. 5 & 6 Ann. c. 18. 7 Ann. c. 20. 8 Geo. 2, c. 6.

By the 2 & 3 Anne, c. 4, which was passed for the public registering of all deeds, conveyances, and wills of any honors, manors, lands, tenements, or hereditaments, within the West Riding of the county of York, it is directed that a memorial of such deeds, &c., be registered in a certain manner at Wakefield, and that the registrar shall indorse a certificate of such registry on every such deed, &c.; and the nineteenth section enacts, "that if any person or persons shall at any time forge or counterfeit any such memorial or certificate as are hereinbefore mentioned and directed, and be thereof lawfully convicted, such person or persons shall incur and be liable to such pains and penalties, as in and by the 5 Eliz., c. 14, (*e*) are imposed upon persons for forging or publishing of false deeds, charters, or writings sealed, court rolls, or wills, whereby the freehold or inheritance of any person or persons of, in or to any lands, tenements, or hereditaments, shall or may be molested, troubled, or charged." The 5 & 6 Anne, c. 18, after directing that all *bargains and sales* of any manors, lands, &c., within the West Riding of the county of York, shall be registered at Wakefield, and indorsed by the registrar; that the inrolment of every such deed shall be deemed a memorial pursuant to the 2 & 3 Anne, c. 4; and that no judgment, statute, &c., shall bind any manors, lands, &c., but only from the time a memorial thereof shall be registered in the office; enacts, by sec. 8, "that if any person or persons shall at any time forge or counterfeit any entry of the acknowledgment of any bargainer in any such bargain and sale as aforesaid, or any such memorial, certificate, or indorsement, as are herein mentioned or directed, and be thereof lawfully convicted," such person or persons shall incur the pains and penalties of the same statute 5 Eliz., c. 14. (*e*) The provisions of the 2 & 3 Anne, and 5 & 6 Anne, were extended by the 8 Geo. 2, c. 6, s. 31, to the North Riding of the county of York. And the 7 Anne, c. 20, which was passed for the public registering of deeds, conveyances, wills, and other incumbrances affecting any honors, manors, lands, &c., within the county of Middlesex, after directing as to the memorials, certificates, &c., enacts, (s. 15) "that if any person or persons shall at any time forge or counterfeit any entry of the acknowledgment of any such memorial, certificate, or indorsement, as is herein mentioned or directed, and be thereof lawfully convicted," such person or persons shall incur the pains and penalties of the same statute, 5 Eliz., c. 14. (*e*)

(*d*) The 1 Vict. c. 84, repeals the punishment of death imposed by this section, and the present punishment is provided by the 1 Vict. c. 84, ss. 1 & 3, *ante*, p. 413. Neither the 2 & 3 Wm. 4, c. 59, or the 1 Vict. c. 84, contains any provision for the punishment of accessories after the fact, they are therefore punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

(*e*) The 1 Wm 4, c. 66, s. 23, recites and repeals the 5 Eliz. c. 14, and the punishment of any offence subjected by any act to the same pains and penalties as are imposed by the said act of Elizabeth (under the 1 Wm. 4, c. 66, ss. 23 & 26, *ante*, p. 409, and the 1 Vict. c. 90, s. 5, *ante*, p. 413) is transportation for any term not exceeding fourteen nor less than seven years, or imprisonment for any term not exceeding three nor less than one year, with or without hard labour, in the common gaol or house of correction, and the offender may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet. As to principals in the second degree and accessories, see *ante*, p. 410.

certificates, &c., relating to the *slave trade.*

feit any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt, (such receipts being required by this act,) or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate: then and in every such case the person or persons so offending, and their procurers, counsellors, aiders and abettors, shall be and are hereby declared to be felons, and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the court before whom such offender or offenders shall be tried and convicted." (*r*)

5 & 6 Wm. 4, c. 45, s. 12. Forging receipts, certificates, &c., under the acts for abolishing slavery.

The 5 & 6 Wm. 4, c. 45, entitled, "An act to carry into further execution the provisions of an act passed in the third and fourth years of his present Majesty, for compensation to owners of slaves upon the abolition of slavery," by sec. 12 enacts, that "if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting, any receipt or receipts for the whole of or any part or parts of the contributions towards the said sum of fifteen millions, either with or without the name or names of any person or persons being inserted therein as the contributor or contributors thereto, payer or payers thereof, or of any part or parts thereof, or any certificate or other instrument to be issued by the commissioners for the reduction of the national debt, or shall alter any number, figure, or word therein, or utter or publish as true any such false, forged, counterfeited, or altered receipt or receipts, certificate or certificates, instrument or instruments, with intent to defraud the governor and company of the Bank of England, or the commissioners for the reduction of the national debt, or any body politic or corporate, or any person or persons whatsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or publishing as aforesaid, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as a felon without benefit of clergy." (*s*)

Forging, &c. *Quarantine* certificates, 6 Geo. 4, c. 78, s. 25.

The 6 Geo. 4, c. 78, s. 25, enacts, "that if any person shall knowingly or wilfully forge or counterfeit, interline, erase or alter, or procure to be forged or counterfeited, interlined, erased or altered, any certificate directed or required to be granted by any order of his Majesty, his heirs or successors, in council, now in force or hereafter to be made, touching quarantine, or shall publish any such forged

(*r*) This provision seems incidentally repealed by the 3 & 4 Wm. 4, c. 73, which abolishes slavery in the British colonies.

(*s*) The present punishment for these offences is regulated by the 1 Vict. c. 84, ss. 1 & 3, *ante*, p. 413; neither the 5 & 6 Wm. 4, c. 45, nor the 1 Vict c. 84, makes any provision for the punishment of accessories after the fact; they are therefore punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448.

or counterfeited, interlined, erased, or altered certificate, knowing the same to be forged or counterfeited, interlined, erased or altered, or shall knowingly and wilfully utter and publish any such certificate, with intent to obtain the effect of a true certificate to be given thereto, knowing the contents of such certificate to be false, he or she shall be guilty of felony." (*t*)

Forging documents relating to the monies, &c., of suitors in chancery, 12 Geo. 1, c. 32, s. 9.

The 12 Geo. 1, c. 32, which was passed for the better securing the monies and effects of the suitors of the Court of Chancery, enacts by sec. 9, "that if any person or persons shall forge or counterfeit, or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting the name or hand of the said accountant-general, the said registrar, the said clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, to any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing whatsoever, for or in order to the receiving or obtaining any the money or effects of any of the suitors of the said court of Chancery, or shall forge or counterfeit, or procure to be forged or counterfeited, or wilfully act or assist in forging or counterfeiting any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing in form of a certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, made by such accountant-general, registrar, clerk of the report-office, or any of the cashiers of the said governor and company of the Bank of England, or shall utter or publish any such, knowing the same to be forged or counterfeited, with intention to defraud any person whatsoever;" then every such person so offending shall be adjudged to be guilty of felony without benefit of clergy. (*u*)

Gibson's case. Forging a writing, purporting to be *an office copy of a report of the accountant-general*, of money being paid into the bank; and also *an office-copy of a*

In a case upon this statute the prisoner was indicted for forging a writing, purporting to be *an office-copy of a report of the accomptant general* of money being paid into the Bank pursuant to an order of Chancery, and also *an office-copy of a certificate of one of the cashiers of the Bank*, of the payment of the money into the Bank. The second count was for publishing the same, knowing them to be forged, with intent to defraud, &c. And the third and fourth counts were, the one for forging, the other for publishing a writing in form of a writing purporting to be *an office-copy of the certificate of the accomptant-general*, and *an office-copy of the receipt of the cashier of the*

(*t*) As no punishment is expressly pointed out by the act either for principals or accessories, they are all punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner pointed out in note (*u*), *ante*, p. 448.

(*u*) Mr. Lonsdale (St. Cr. L. 68,) observes that the language in which these instruments are described appears to be sufficiently comprehensive to include "warrants or orders for the payment of money" within the 1 Wm. 4, c. 66, s. 4, and to that extent the forgery of those instruments (the same having been a capital offence at the time of the passing of the last-mentioned act) is punishable under the 1 Vict. c. 84, ss. 2 & 3 (*ante*, p. 413). It is nowise material, however, as regards the extent of the punishment, whether such forgery be punishable under the last-mentioned act, or under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, (which it is at all events, as having been an offence punishable with death at the time of the passing of the 1 Wm. 4, c. 66, and not made so punishable by that act) the punishment being the same in both cases. With respect to the forgery of the above-mentioned instruments generally, (that offence not having been made punishable with death by the 1 Wm. 4, c. 66, although previously so punishable, and the 12 Geo. 1, c. 32, s. 9, not having been repealed by the 1 Wm. 4, c. 66) persons convicted thereof are liable under the 1 Wm. 4, c. 66, ss. 1 & 26, and the 1 Vict. c. 90, s. 5, to the punishment pointed out in note (*h*), *ante*, p 415 As to the punishment of principals in the second degree and accessories see *ante*, p. 410.

certificate of one of the cashiers of the bank, was within the 12 Geo. 1, c. 32, s. 9.

Bank. There were other counts in the indictment, of which the defendant was acquitted. The certificate and receipt were set out verbatim in all the counts, and the offence was laid to be done with intent to defraud William Hunt. Upon the trial a special verdict was found, which was afterwards argued before Lord Mansfield and nine of the other Judges. After the argument, Lord Mansfield observed, that the verdict left but one question to consider, namely, Whether the offence was within the 12 Geo. 1, c. 32, s. 9, and said that if they had any doubts, the Judges would appoint it to be argued again the next term; and therefore their Lordships deferred giving their opinion. But, in a subsequent term, eleven of the Judges met at Serjeants' Inn; and they were of opinion that *the indictment and special verdict were sufficient*, and needed no amendment; and that the case was within the statute. (*v*)

1 Wm. 4, c. 66, s. 20. Inserting any false entry in any register of baptisms, marriages, or burials; forging or altering any such entry, &c.

The 1 Wm. 4, c. 66, which partially repeals the 4 Geo. 4. c. 76, (*w*) by sec. 20 enacts, "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial; or shall forge or alter in any such register any entry of any matter relating to any baptism, marriage or burial; or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered, or shall utter any copy of such entry, knowing such to be false, forged, or altered, or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register or any part thereof: or shall forge, or alter, or shall utter, knowing the same to be forged or altered, any license of marriage: every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years." (*x*)

Sec. 21.

Sec. 21 provides and enacts, "that no rector, vicar, curate, or

(*v*) Gibson's case, O. B. 1766, Hil. T. 1768, 1 Leach, 61. 2 East, P. C. c. 19, s. 22, p. 899, in which last authority the special verdict is fully stated, and the arguments of counsel given at considerable length, for the reason that the particular grounds on which the case was decided are not declared in the note. The prisoner was executed, 1 Leach, 63.

(*w*) The 1 Wm. 4, c. 66, repeals so much of the 4 Geo. 4, c. 76, "as relates to any person who shall knowingly and wilfully insert in the register book any false entry of any matter relating to any marriage, or shall falsely make, alter, forge, or counterfeit any such entry in the register, or any license of marriage, or shall utter or publish as true any false, altered, forgered [sic in the statute], or counterfeited register of marriage, or a copy thereof, or any false, altered, forged, or counterfeited license of marriage, knowing such register or license of marriage respectively to be false, altered, forged, or counterfeited, or shall wilfully destroy any register book of marriages or any part thereof, or shall cause or procure, or assist in the commission of any of the said several offences."

(*x*) As to the principals in the second degree and accessories, and hard labour and solitary confinement see *ante*, p. 410. Mr. Lonsdale (St. Cr. L. 105) observes, that the above enactment appears to be incidentally repealed by sec. 43 of the 6 & 7 Wm. 4, c. 86 (*post*, p. 487), so far as relates to the falsifying or destroying marriage register books. With respect to registers of baptisms and burials it is still in force, sec. 49 of the 6 & 7 Wm. 4, c. 86, providing that nothing therein contained shall affect the registration of baptisms or burials as then by law established.

officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial respectively by him solemnized, shall be liable to any of the penalties herein mentioned if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptized, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid; provided also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid."

Rector, &c., not liable to any penalty for correcting, in the mode prescribed, accidental errors in the register.

Sec. 22, reciting that "copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declaration of the rector, vicar, curate, or officiating minister of every parish, district-parish, and chapelry in England where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which such parish, district-parish, or chapelry may be situated," enacts, "that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall utter knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year." (*y*)

Inserting in any copy of a register of baptisms, marriages, or burials, transmitted to the registrar, any false entry; or forging or verifying any copy knowing it to be false.

The 6 & 7 Wm. 4, c. 86, entitled "An act for registering births, deaths, and marriages, in England," by sec. 43 enacts, "that every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such register-book, or any part or certified copy of any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register-book or certified copy thereof, or shall wilfully insert or cause to be inserted in any register-book or certified copy thereof any false entry of any birth, death, or marriage, or shall wilfully give any false certificate,

Forging registers kept under the 6 & 7 Wm. 4, c. 86, the act for registering births, deaths, and marriages.

(*y*) Mr. Lonsdale (St. Cr. L. 184,) makes similar observations upon this section to those mentioned in note (*x*), *ante*, p. 486.

or shall certify any writing to be a copy or extract of any register book, knowing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony." (z)

6 & 7 Wm. 4, c. 86, s. 44. Accidental errors may be corrected.

By sec. 44, "no person charged with the duty of registering any birth, death, or marriage, who shall discover any error to have been committed in the form or substance of any such entry, shall be therefore liable to any of the penalties aforesaid if within one calendar month next after the discovery of such error, in the presence of the parents of the child whose birth may have been so registered, or of the parties married, or of two persons attending upon any person in his or her last illness whose death may have been so registered, or in case of the death or absence of the respective parties aforesaid, then in the presence of the superintendent registrar, and of two other credible witnesses who shall respectively attest the same, he shall correct the erroneous entry, according to the truth of the case, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereunto the day of the month and year when such correction shall be made; provided also, that in the case of a marriage register he shall make the like marginal entry, attested in like manner in the duplicate marriage register-book to be made by him as aforesaid, and in every case shall make the like alteration in the certified copy of the register-book to be made by him as aforesaid, or in case such certified copy shall have been already made, provided he shall make and deliver in like manner a separate certified copy of the original erroneous entry, and of the marginal correction therein made."

6 & 7 Wm. 4, c. 85, s. 38. Signing false notices and certificates for marriage.

The 6 & 7 Wm. 4, c. 85, entitled, "An act for marriages in England," by sec. 38, enacts, that "every person who shall knowingly and wilfully make any false declaration or sign any false notice or certificate required by this act, for the purpose of procuring any marriage, and every person who shall forbid the issue of any superintendent registrar's certificate by falsely representing himself or herself to be a person whose consent to such marriage is required by law, knowing such representation to be false, shall suffer the penalties of perjury." (a)

Forging registers deposited under the 3 & 4 Vict. c. 92.

The 3 & 4 Vict. c. 92, entitled, "An act for enabling courts of justice to admit non-parochial registers as evidence of births, or baptisms, deaths, or burials, or marriages," by sec. 8, enacts, that "every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming, or dedication, death, or burial, or marriage, which shall be deposited with the registrar-general by virtue of this act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records any false entry of any birth or baptism, naming, or dedication, death, or burial, or marriage, or shall wilfully give any

(z) As no punishment is expressly specified for this offence it is punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (u), *ante*, p. 448, and the principals in the second degree and accessories are in this instance punishable in the same manner as the principals in the first degree.

(a) For this punishment see the Chapter on *Perjury*, *post*.

false certificate, or shall certify any writing to be an extract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony." (*b*)

The statutes authorizing government to raise money by way of annuities, as the 29 Geo. 3, c. 41, the 48 Geo. 3, c. 142, and the 49 Geo. 3, c. 64, usually contain clauses making it a capital offence to forge, &c., any register, certificate, affidavit, &c., therein mentioned, or to personate any true nominee.

10 Geo. 4, c. 24, s. 41. Forging registers, certificates, transfers of annuities, &c., granted by the commissioners for the reduction of the national debt.

The 10 Geo. 4, c. 24, entitled, "An act to enable the commissioners for the reduction of the national debt to grant life annuities, and annuities for terms of years," by sec. 41, enacts, that "if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any register or registers of the birth, or baptism, or death, or burial, of any person or persons to be appointed a nominee or nominees under the provisions of this act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this act, or any certificate of any justice of the peace or magistrate, or of any officer acting under the said commissioners for the reduction of the national debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister, or consul, or chief magistrate of any province, town, or place, or other person authorized by this act to grant any certificate of the life or death of any nominee; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or certificates of any officer of the commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or the name or names of any person or persons in or to any transfer of any bank annuities or long annuities, or in or to any certificate or other instrument for the payment of money for the purchase of any annuity under the provisions of this act, or in or to any transfer or acceptance of any such annuity in the books of the governor and company of the Bank of England, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any bank annuities or long annuities, or any life annuity, or any annuity for years of whatsoever kind, under the provisions of this act, or authorizing or purporting to authorize the receipt of any life annuity, or any annuity for years of whatsoever kind, granted under this act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully

(*b*) As this is a felony for which the 3 & 4 Vict. c. 92, provides no express punishment, the principals in the first degree are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448; and the principals in the second degree and the accessories are in this instance punishable in the same manner as the principals in the first degree.

not to be within the 2 Geo. 2, c. 25.

"*Pontefract Bank, 1st April,* 1807.

"I promise to pay the bearer one guinea on demand here in cash or Bank of England note.

"No. Ce. 591.

"No. Ce. 591. "For Perfect, Seaton, & Co.
Entd. J. U. "JOHN SEATON."
ONE GUINEA."

with intent to defraud John Garside. There were two other similar counts, charging the intent to be to defraud John Seaton, John Fox Seaton, and Richard Seaton, the bankers. The jury found the prisoner guilty of uttering the note, knowing it to be forged; but the learned Judge respited the sentence, in order to take the opinion of the twelve Judges on the question, whether this was a note for the payment of *money* within the repealed statute 2 Geo. 2, c. 25, the guinea being by the terms of the note to be paid in cash or Bank of England note at the option of the payer. And it is understood that the Judges were of opinion that the conviction was wrong. (*r*)

Chisholm's case, A bill drawn upon the commissioners of the navy holden to be a bill of exchange within the 2 Geo. 2, c. 25.

In the following case a point was made whether the instrument in question could be considered as *a bill of exchange* within the 2 Geo. 2, c. 25 (now repealed). The prisoner was convicted for forging a certain bill of exchange in the following form:—

"3rd Rate, Robert Gore.

"Entered 13*th* day of *May*, 1814.

	£	s.	d.
"Full pay from 13th day of May, 1814, to the 4th day of August, 1814,	25	4	0
"Amount of deductions,	2	17	3
"Net Pay	£22	6	9

"Gentlemen, 8*th* day of *August*, 1814.
Ten days after sight,

"Please to pay to Mrs. Elizth. Coall, or order, the sum of twenty-two pounds six shillings and ninepence, being the net personal pay due to me, as actg. Lieutenant of his Majesty's ship Zealous, between thirteenth day of May, 1814, and fourth day of August, 1814, for value received.

"ROBT. GORE."

"Approved,

"T. BOYS, Captain of H. M. S. Zealous,

"To the Commissioners of his Majesty's Navy,
London."

with intent to defraud Elizabeth Coall, widow, against the statute, &c. The second count of the indictment was for uttering, &c., with the like intention: and the third and fourth counts were similar,

(*r*) Wilcock's case, *cor.* Le Blanc, J., Yorkshire Lent Ass. 1808, MS. And see Harrison's case, 1 Leach, 180. 2 East, P. C. c. 19, s. 36, p. 926, *post*, p. 505, where an objection that certain counts of the indictment were not within the 2 Geo. 2, c. 25, and 31 Geo. 2, c. 22, s. 78, because those statutes were confined to the forgery of receipts for *money* or *goods*, whereas the counts in question charged the forgery of a receipt for *bank notes*, which were neither money nor goods, was allowed.

only laying the intention to be to defraud his Majesty. There were four other counts framed upon the 35 Geo. 3, c. 94, ss. 3 & 34, (*s*) but the counsel for the prosecution had admitted that those counts could not be supported; and they contended that the instrument was a bill of exchange within the 2 Geo. 2, c. 25. It was urged, on behalf of the prisoner, that it appeared clearly that the instrument was intended to be a bill under the 35 Geo. 3, c. 94, s. 3; that it was not drawn to be presented for acceptance or payment by the commissioners of the navy as a bill of exchange; but in order to procure an assignment of it according to the fifteenth section of that statute: that it was not a bill of exchange, because it was not drawn on any persons bound to accept or pay it; and that the commissioners of the navy were removable at pleasure, and might be changed between the drawing and presenting of the bill. On the other hand it was contended that the intention with which this instrument was made was not material, and that it was not necessary to constitute a bill of exchange for this purpose, that the parties on whom it was drawn should be liable to accept, or even be existing persons; and that it was enough if the instrument purported to be drawn on a person or persons to whom it might be presented. The learned Judge respited the sentence, in order that the question might be submitted to the consideration of the Judges, whether this instrument was properly described as a bill of exchange. And the Judges were of opinion that the conviction was right; that the instrument set forth in the case was in form a bill of exchange, and that the 35 Geo. 3, c. 94, did not prevent its being so considered. (*t*)

Maddock's case. As to the question whether a false assertion in an indorsement, that the indorser has *a procuration*, without any other circumstance of falsehood or misrepresentation, will make such an indorsement a forgery within the statute.

One of the questions raised in a case which occurred about the same time appears to have been, whether a false assertion in an indorsement that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation would make such an indorsement a forgery within the statute. The indictment against the prisoner stated in the first count that he had in his custody a bank bill of exchange (the tenor of which was set out) dated 1st October, 1814, for payment of 36*l.* 19*s.* 0*d.* at seven days' sight to Messrs. S. Brown and Co., or order, accepted on said 1st October, the date of the bill. It also stated that there were two indorsements upon the bill; the first by the said Samuel Brown and Co. to Joseph Seymour or order, and the other by the said Joseph Seymour to Robert Falcon, or order; and charged that the prisoner, having this bill so indorsed in his custody, forged another indorsement upon it as follows :—

"P. Pro^{n}. For Robert Falcon, GEORGE MADDOCKS,"

with intent to defraud the bank, against the statute, &c. The second count charged the prisoner with disposing of and putting away the forged instrument; and there were many other counts all charging the forgery to be of an indorsement. It appeared upon the evidence that the prisoner was in the situation of a clerk and servant to the prosecutor, Mr. Robert Falcon, who was an attorney, having

(*s*) Repealed by the 11 Geo. 4, c. 20.
(*t*) Chisholm's case, *cor.* Dampier, J., Exeter Spr. Ass. 1815, MS., and Russ. & Ry. 297.

chambers in the Temple, that he was left in charge of the chambers when the prosecutor went out of town, with instructions to receive any money, and make advances in the way of business, and to open any letters, and do what was necessary in case a writ or any thing of that sort was wanted; but that he had no authority from the prosecutor to indorse any bill for him by procuration. During the absence of the prosecutor, Mr. Seymour, then the holder of the bill, indorsed it to the prosecutor, and sent it in a letter to his chambers. The prisoner opened the letter, and a day or two afterwards took the bill to the bank, and received the money, having first made the indorsement charged by the indictment to be forged. At the time he received the money he wrote a receipt immediately under the forged indorsement in the words: "Received for Robert Falcon, 4, Elm Court Temple, 5 January, 1815, Geo. Maddocks." On the following day, the 6th January, the prisoner wrote to the prosecutor a sort of journal of the week's occurrences, and therein mentioned the bill in question; but only stated that he had taken it for acceptance, though he had in fact received the money the day before. On the 9th January the prosecutor returned to town, but did not find the prisoner at his chambers, he having previously absconded. In his defence, the prisoner said that he received the money for his master's use, and did not intend to apply it otherwise; and he assigned as the cause of his absenting himself some unexpected distress in his circumstances. The case was left by the learned Judge to the jury to consider, whether, under the circumstances in evidence, it appeared to them that the prisoner meant only to receive the money for his master's use, and acted under a supposition that, in the situation of trust in which he was placed, he had a right to describe himself as acting by procuration; or whether he had made the indorsement and received the money for the purpose of defrauding his master or the bank. The jury were of opinion that it was for the purpose of fraud, and referred to the prisoner's letter of the 6th January, wherein he only spoke of having taken the bill for acceptance, though he had actually received the money for it the day before, and they accordingly found him guilty. But as it did not appear that the prisoner had offered to make use of the indorsement to transfer the bill to any other person, or to enable himself to receive the contents as holder or bearer, having on the contrary given the receipt in his own name for the use of his master, whose place of residence was truly described in the receipt; a doubt arose whether the indorsement was such an assignment of the bill as is meant by the word "indorsement," in the statute. And upon this doubt the sentence was respited, in order to take the opinion of the Judges, whether the prisoner ought to have been acquitted, either on the special circumstances of his conduct, or upon the more general question, whether a false assertion in an indorsement, that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation, makes such an indorsement a forgery within the statute. The case was argued at great length before the twelve Judges, but no opinion was ever delivered, the prisoner dying in Newgate previously to the subsequent sessions at the Old Bailey. (*u*)

(*u*) Maddock's case, O. B. Oct. 1815, and argued before the judges in Mich. T. 1815, MS.

It was not necessary that a promissory note should be in itself *negotiable*, in order to make it such a note as might be the subject of an indictment for forgery within the repealed statute, 2 Geo. 2, c. 25. The prisoner had been convicted on an indictment which charged him with having forged, &c., a certain promissory note for the payment of money, which was as follows :—

Box's case. A promissory note might be a valid note within the 2 Geo. 2, c. 25, and the subject of forgery, though not negotiable.

"On demand we promise to pay Mesdames Sarah Willis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same, value received, this 7th day of February, 1815.

"For Felix Calvert and Co.

"£64." "JOHN FORSTER."

It was moved, in arrest of judgment, that this was no promissory note; and the case was argued before the twelve Judges. Their opinion was afterwards delivered by Le Blanc, J., to the following effect:—"An objection was taken in arrest of judgment, and argued before all the Judges, that the instrument in question, such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment for forging or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance, that it appears to be made payable to two ladies, describing them as stewardesses of a provident society, or their successors in office; and that this society not being enrolled according to the statute, this note was not capable to enure to their successors, and was not negotiable. The Judges are of opinion that this is, as stated on the indictment, a valid promissory note within the statute of Geo. 2. It is not necessary that such a note should be in itself negotiable; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore, it is an instrument capable of being the subject of forgery, and there is no ground to arrest the judgment; and the Judges are all of opinion that the conviction is right." (*v*)

Birkett's case. Forging a bill payable to the prisoner's own order, and uttering it without indorsement as a security for a debt, held to be a complete offence.

Forging a bill payable to the prisoner's own order, and uttering it without indorsement, as a security for a debt, was holden to be a complete offence. The count in the indictment more peculiarly applicable to the facts of the case charged that the prisoner having in his possession a paper whereon was written or printed to the following tenor:—

"No. 28. £

"Preston Bank, 1804.

"Pay to the order of

value received.

"ATHERTON, GREAVES, and DENISON."

"To Joseph Denison, Esq. and Co., London."

Ent^d.

(*v*) Rex *v.* Box, 1815. 6 Taunt. 325. Russ. & Ry. 300.

did forge, &c. in and upon the said paper as follows:—"2310"—"35 : 3 : 5"—"16 August"—"Two months after date"—"Mr. John Birkett, thirty-five pounds 3 : 5"—"R.N."—and by that means did forge, &c. a bill of exchange as follows:—

"No. 28. £35 : 3 : 5.

"2310 Preston Bank, 16 August, 1804.

"Two months after date pay to the order of Mr. John Birkett thirty-five pounds 3 : 5, value received.

"ATHERTON, GREAVES, and DENISON."

"To Joseph Denison, Esq. and Co., London.

"Ent^d. R. N.,"

with intent to defraud Atherton, Greaves, &c. Other counts charged an uttering, &c.: and others an intent to defraud different persons, and amongst others, one Matthew Yates. By the evidence of the wife of Matthew Yates, the person mentioned in the indictment, it appeared that her husband resided at Liverpool and kept an inn there, to which the prisoner came on the 14th of the preceding August, with a horse, and continued boarding and lodging there until the 27th of the same month. Four or five days before the 27th, a person came to the inn and took away the horse, and the witness then directed the waiter to carry the prisoner his bill; after which the prisoner came to her and gave her the bill of exchange, filled up as stated in the indictment, saying he hoped that would satisfy her for what he had had; to which she answered, "I dare say it will;" and took it from him and kept it until the 27th, of August, when the prisoner was apprehended. Upon cross-examination, the witness said that the prisoner did not give the bill of exchange to her as payment; and that she knew she could make no use of the bill until the prisoner indorsed it; that he told her he did not wish to discount it, and would pay her in a few days without it. She further stated, that she considered herself as keeping the bill for the prisoner, and not for herself. It was further proved, that the prisoner had been a clerk in the house of Atherton and Co. from July, 1803, to July, 1804, and that it had been usual in that house to have cheques signed "Atherton, Greaves, and Denison" kept in a drawer within the proper custody of two superior clerks, but accessible to the prisoner, who was sometimes permitted to sign them. It was also proved, that the whole of the written part of the bill of exchange stated in the indictment, except the signature "Atherton, Greaves, and Denison," was in the handwriting of the prisoner. The learned Judge left the case to the jury, telling them that the use made of the instrument when filled up by the prisoner, though not indorsed, was conclusive evidence of the fraudulent intention, and proved as well the counts charging the actual forgery, as those which charged the uttering, &c., knowing it to have been forged; and the jury returned a verdict of guilty. But the learned Judge afterwards respited the sentence, doubting whether he ought not to have left the question of fraudulent intention more open to the jury; in which case they might have found that the prisoner did not mean to defraud any person, but, by paying his reckoning and taking back the bill, to make no further use of it. The case was taken into con-

sideration at a meeting of all the Judges in Easter term, 11th May, 1805, when they were of opinion that the facts stated amounted to forgery, and with a fraudulent intent; the bill having been given to the landlady to obtain credit, though as a pledge only. (*w*)

Bills of exchange defective when acceptances were forged upon them.

We have seen that where a prisoner was indicted for forging an acceptance of a bill of exchange, and it appeared that at the time when the acceptance was written, a blank was left in the bill for the drawer's name, it was held that the indictment was not supported, as the instrument, to which the forged acceptance was affixed, was not at the time of the forgery a bill of exchange, there being no drawer's name.(*x*) And where upon an indictment containing counts for forging and uttering a bill of exchange, it was proved that the prisoner wrote the acceptance on a blank stamp, and the bill was drawn two days afterwards in the absence of the prisoner; Patteson, J., doubted whether the charge of forgery could be supported, because at the time when the acceptance was written on the stamp, it was a blank paper, but said that it was not very material if the prisoner uttered the bill afterwards, knowing the acceptance to be a forgery. (*y*)

Cases as to "receipts."

We may now shortly consider the questions which have arisen as to the instruments which may be considered as *receipts* within the statutes.

Testick's case. "Received the contents above, by me, S. W., &c.," is a sufficient statement of the receipt in the indictment, without setting forth the bill of items to which it referred.

In a case where the prisoner was indicted for uttering a forged "receipt for money," in the following words, "Received the contents above, by me, Stephen Withers;" it appeared in evidence that he was employed by a person who kept a lottery-office, to carry out the prize-money, with an account of the deductions, and to pay it to the party, and bring back his receipt; and that the following account was delivered to him, with money to pay the balance—

"No. 38,811.

"Mr. Withers.	£.	s.	d.
"One-16th of a 20*l.* prize - - -	1	5	0
"Deduct for expenses, advances, and remitting money to you - - - -	0	1	0
	1	4	0"

That upon producing this account again, when he settled his accounts with his employer, the receipt stated in the indictment was at the bottom of it; and that he had not paid the money to Mr. Withers, whose handwriting had been forged. It was objected on behalf of the prisoner, that this receipt did not correspond with the indictment; for nothing was set forth but the receipt as for *the contents above;* and that, together with the bill of particulars, was one entire thing; and it being set forth, "which said false receipt, &c., is as follows," the whole ought to have been set forth, and not part only, namely, "*the contents above,*" which did not appear to be

(*w*) Rex *v.* Birkett, Russ. & Ry. 86.

(*x*) Reg. *v.* Butterwick, 2 M. & Rob. 196, Parke, B., *ante*, p. 323.

(*y*) Reg. *v.* Cooke, 8 C. & P. 582. See Reg. *v.* Hawkes, 2 Moo. C. C. R. 60, *ante*, p. 352. Reg. *v.* Kinnear, 2 M. & Rob. 117, *ante*, p. 352. Reg. *v.* Bartlett, 2 M. & Rob. 362, *ante*, p. 356. Reg. *v.* Lee, 2 M. & Rob. 281, *ante*, p. 387, and other cases, *ante*, 351, *et seq.*, as to the sufficiency of bills of exchange, &c., in point of form.

the same, nor to be a receipt for money. And it was also urged after conviction, in arrest of judgment, that it did not appear by the receipt set out in the indictment that it was a *receipt for money*, or what it was for; and that being only for *the contents above*, and nothing set forth to shew what they were, or explain the receipt, it was unintelligible. The Judges were of opinion that the indictment was sufficient, for it was, "*Received the contents above*," which shewed it to be a receipt for something, though the particulars were not expressed; and it was laid to be a forged *receipt for money*, under the hand of Stephen Withers, for 1*l.* 4*s.*; and the bill itself was only evidence of the fact, and shewed it to be a receipt *for money* as charged. (z)

Harrison's case. A forged *receipt* for bank notes was not a receipt for money or goods, within the 2 Geo. 2, c. 25. But an entry of the receipt of money or notes, made by a cashier of the Bank of England, in the bank-book of a creditor, was *an accountable receipt* for the payment of money within the 7 Geo. 2, c. 22.

It has been admitted that bank notes are not considered as *money or goods*, within the 2 Geo. 2, c. 25. But it appears to have been holden, in the same case, that an entry of the receipt of money or notes made by a cashier of the Bank of England in the bank-book of a creditor, was an *accountable receipt* for the payment of money within the repealed statute 7 Geo. 2, c. 22. The indictment against the prisoner contained a great number of counts: one set framed on the 2 Geo. 2, c. 25, and 31 Geo. 2, c. 22, s. 78, charging the prisoner with forging and uttering a certain *receipt for money*, viz. "1777, June 16, Bank notes, C. £3210," with intent respectively to defraud the Bank of England and the London Assurance Company; the other set framed on the 7 Geo. 2, c. 22, charging the prisoner with altering and uttering a certain *accountable receipt for bank notes for payment of money*, (setting it out as before,) viz. "the said sum of 210*l.*," by prefixing the figure 3 to the said figures and cypher 210*l.*, whereby the words, &c., "1777, June 16, Bank notes, C. £210," together with the figure 3, imported that J. C., a clerk of the Bank of England, had received bank notes to the amount of 3210*l.* with the like intent. Upon the evidence, it appeared that the London Assurance Company, to whom the prisoner was accomptant, kept their cash with the Bank of England; for which purpose the Bank furnished the London Assurance with a book, the title of which was "Debtor, the Bank of England with the London Assurance, Creditor." On the debtor side, the clerk of the Bank, when any money or bank note was sent to him, entered the date, and what it was that was paid in; then he signed his name, and afterwards wrote the sum, putting a bar or dash before the figures, in order to prevent another figure being prefixed or subjoined; and when the London Assurance sent for money, the cashier of the Bank *wrote off* so much from their bank-book; which bank-book was kept by the prisoner, as accomptant to the company, and sent by him to the Bank as occasion required. On the 16th June, 1777, the company paid into the Bank the sum of 210*l.*, which was received by a clerk of the name of *John Clifford*, who made an entry in the book as follows, "1777, June 16, *Bank notes*, C. £210," to which sum the prisoner prefixed the figure 3, making thereby the sum received appear to have been 3210*l.* The fact of prefixing the figure, in the manner charged in the indictment, having been brought home to the prisoner, it was first objected that the case was not within the first

(z) Testick's case, 1774. 2 East, P. C. c. 19, s. 36. p. 925.

set of counts, which were framed on the 2 Geo. 2, and 31 Geo. 2, those statutes being confined to receipts *for money or goods*, and this being a receipt for *bank notes*, which were neither money nor goods; and that the legislature had so thought, by passing the 7 Geo. 2, in which *bills, notes*, &c. are particularly mentioned. And this objection was allowed. But the prisoner was convicted on the second set of counts, framed on the 7 Geo. 2, c. 22: and two points were reserved for the consideration of the Judges; first, whether the entry made by the cashier in the bank-book could be considered as an accountable receipt for the payment of money within that statute; and, secondly, that the intent to defraud a *corporation*, (the Bank of England and the London Assurance Company being the corporations stated in the indictment,) was not within the statute; which was confined to forgeries committed with intent to defraud any *person*. It is said that the Judges were clearly of opinion on the first point that an entry in a bank-book was an *accountable receipt* within the meaning of the act. But no opinion was publicly given; and the matter became unimportant in the particular case, as the Judges decided the second point in favour of the prisoner, and he was discharged. (*a*)

Hunter's case. The mere signing certain names to an assignment for payment of a sum in a navy-bill, does not, unless connected with other facts, purport on the face of the writing to be a receipt; and it should, therefore, be averred that the navy bill, &c., together with the signatures, did purport to be and was a receipt.

In the following case the point arose as to the necessary averments in the indictment of the instrument in question purporting to be and being a receipt, where it did not necessarily purport to be such on the face of it. The indictment charged that the prisoner had in his possession a certain navy-bill, (which was set forth according to its tenor and effect,) under which navy-bill there was contained a certain order in writing for payment, called an assignment, &c., and upon which there was contained a certain indorsement, partly printed and partly written, by one Wm. Davis, chief clerk to the comptroller of his Majesty's navy, in his office, for bills and accounts, to the following tenor and effect: "The certificate within mentioned is indorsed by Edward Wilson, payable to Mr. Wm. Thornton; T. Davis:" and that the prisoner forged, &c., a certain receipt for money, to wit for the sum of 25*l.* mentioned and contained in the said paper, &c. called a navy-bill, which forged receipt was as follows; that is to say, "Wm. Thornton," "Wm. Hunter:" with intention to defraud the king, against the form of the statute, &c. A second count stated the navy-bill, the order for payment and indorsement, as in the first count; and then stated, that to the said last-mentioned navy-bill was annexed and written a certain false, forged, &c. receipt for money, to wit, for the sum of 25*l.*, in the said last-mentioned paper, called a navy-bill; which said false, forged, &c., receipt for money was as follows: that is to say, "Wm. Thornton," "Wm. Hunter;" and that the prisoner knowingly uttered the said last-

(*a*) Harrison's case, 1777. 1 Leach, 180. 2 East, P. C. c. 19, s. 36, p. 926. In the last authority the point respecting *the accountable receipt* is not reported; but it is referred to as being stated in 1 Leach; and it is observed that, in a subsequent case, (Lyon's case, 2 East, P. C. c. 19, s. 36, p. 934). Grose, J., alluded to the ground upon which this point was decided, and said, "that in Rex *v.* Harrison, the book in which the entry was made imported to be a book containing receipts for money received by the bank from their customers, and therefore shewed that the money was received from the party to whom the book belonged." Mr. East also observes, that it does not appear whether the opinion of the Judges upon this point was formed with reference to the manner in which the offence was laid in the indictment. The defect upon which the Judges decided in favour of the prisoner was removed by the 18 Geo. 3, c. 18, now repealed. And see the 1 Wm. 4, c. 66, s. 28, *ante*, p. 410.

mentioned forged, &c., receipt for money, with intent to defraud the king. Other counts, nearly similar, charged the instrument forged to be an *acquittance;* and some of the counts stated the intention to be to defraud Wm. Thornton and other persons. Upon the evidence, it appeared that Edward Wilson, who had been pilot of the Lord Mulgrave, having received from his captain a certificate of his service, sent it to Wm. Thornton, to receive his wages. That the prisoner was a clerk in the comptroller's office; and, being employed to forward the pilot's bill through the office, got into his hands the bill stated in the indictment, and carried it with the order for payment and indorsement upon it, which were necessary for receiving the money, to the cashier of the pay-office; having wafered to one side of the bill, on which was written the sum 25*l.*, under those figures, a fourpenny stamp used for receipts, on which were written the names of "Wm. Thornton," "Wm. Hunter," without any words importing that they had received the money. And it was proved that the cashier was in the habit of paying navy-bills on the owner's name being written under the sum, without any other receipt. It appeared, on producing the bill, that the name Major Woolhead was written at the bottom of it; with respect to which it was proved that it was usual to have his name to the bills, as without it they did not regularly pass through the office; but that a bill would not be stopped if his name were not put to it. There also appeared on one side of the bill the initials of Mr. Davis's name, T. D. which were not stated in the indictment. The prisoner having been convicted, judgment was respited, to take the opinion of the twelve Judges on the case; and it was argued before them that the indictment was defective upon several grounds: and amongst others, first, because it did not appear, by the tenor of the instrument as set forth therein, that it was a receipt; and secondly, because there was nothing stated in the indictment to shew that this could operate as an acquittance. And judgment was arrested, on the ground that it did not appear on the face of the indictment, nor was it shown by averment that the instrument was a receipt. Grose, J., in delivering the opinion of the Judges, said, "that it was not enough to call the signature of the two names, 'Wm. Thornton,' and 'Wm. Hunter,' *a receipt,* for they did not, standing by themselves, purport to be a *receipt;* and therefore, the indictment should have averred that the said names, 'Wm. Thornton,' and 'Wm. Hunter,' written on the said paper, imported and signified that the said *Wm. Thornton* and *Wm. Hunter* had received the sum of twenty-five pounds mentioned in the said paper writing. This is undoubtedly the law upon this subject; therefore, as the words 'Wm. Thornton, Wm. Hunter,' do not import to be a receipt, and there being nothing to explain the import of these words, or to show that they were in any way intended to signify that those persons had received the money, this indictment is clearly bad on the first count; and as the same objection applies in substance to the second count, though it is different in point of form, the majority of the Judges are of opinion that the judgment ought to be arrested." (*b*)

(*b*) Hunter's case, 1794. 2 Leach, 624. 2 East, P. C. c. 19, s. 36, p. 928; and see *ante,* p. 377. In 2 East, it is said that Buller, J., thought the second count might be supported, considering this to be as much a receipt as the writing a name was

Upon the authority of the foregoing case, it was holden that an indictment for forging the word "settled," at the bottom of a bill of parcels, must show by proper averments that it is a receipt. The indictment charged that the prisoner did forge, &c. a certain *receipt for money*, to wit, for the sum of one pound, one shilling, and sixpence; which said false, forged, and counterfeited receipt for money is as followeth, that is to say, "Settled, J. M." Other counts called it an *acquittance*. It was objected on behalf of the prisoner, that the indictment should have shown, by proper averments that this was a receipt for money, according to the determination in *Hunter's case*. (*b*) On the part of the prosecution, it was contended that it did purport to be a receipt made by a person who had a right to demand money; that the evidence proved that the right arose from the sale and delivery of goods according to the bill; and that it was sufficient if the instrument appeared upon the evidence to be of the description stated in the indictment: and *Testick's case* (*c*) was cited. And it was further contended that, as the stamp act, (25 Geo. 3, c. 55, s. 7,) had enacted that every note, memorandum, &c. signifying or denoting any debt, account, or demand being paid, *settled*, &c. should be deemed and taken to be a *receipt* within the meaning of the act, the necessity of averring such an instrument as the present to be a receipt was taken away. But the court held, on the authority of *Hunter's case*, (*b*) that the indictment was defective. (*d*)

Thompson's case. An indictment for forging the word "*Settled*," at the bottom of a bill, must shew by proper averments that it is *a receipt*. But this was overruled in the following case.

But this case has been since expressly overruled, and it has been held that a count setting out as an acquittance an invoice of goods sold, with the word "settled" at the foot, and signed with a name in full, is good without any averment of the meaning of the word "settled." A count charged the prisoner with uttering the following acquittance for money, viz:—

A count setting out a bill with the word "settled" at the bottom and signed in full is good without any explanatory averment.

"May 4, Mr. Martin.

"Bought of Laing and Son,
"Wholesale Druggists, Bristol.
"6 Quarts of settledated striking acid.
"SAM. HUGHES."

"Settled, £4: 0: 0"

and it was objected on the authority of the preceding case that this count was bad, as there was no averment as to the meaning of the word "settled." It was further urged, that if the word "settled" had any definite meaning, it meant a receipt, as was held in *Spawforth, q. t.* v. *Alexander*, (*e*) and as the legislature must be taken to have meant different things by the words "receipt" and "acquittance," the court could not say that it was an acquittance. But upon a case reserved, the Judges were unanimously of opinion that the count was good. (*f*)

an indorsement on a bill of exchange; but to this it was answered, that an indorsement was complete by writing the name on the bill without any thing more; whereas the name itself, as stated in the indictment, was no receipt, though the name coupled with the navy-bill, might together form a receipt. But then it ought to be so stated.

(*b*) *Ante*, p. 506.

(*c*) *Ante*, p. 504.

(*d*) Thompson's case, *cor.* Thomson, B., and Graham, B., O. B. 1801. 2 Leach. 910.

(*e*) 2 Esp. R. 621.

(*f*) Rex. *v.* Martin, R. & M. C. C. R. 483. 7 C. & P. 549. See this case, *ante*, p. 373, note (*z*), as to the description of a receipt under the 2 & 3 Wm. 4, c. 123, s. 3, and as to the intent to defraud, *ante*, p. 363.

An indictment for forging the following receipt, "£16. 15*s*. 6*d*. for the high constable, J. Hughes," does not require explanatory averments.

The indictment charged the prisoner with forging a certain receipt for the payment of money, in form following (that is to say):—

"6th. January, 1830.

"£16: 15: 6

"For the High Constable,

"JAMES HUGHES."

with intent to defraud J. Grundy. It was objected, that the document set out was not on the face of it necessarily "a receipt for the payment of money." The words were in themselves quite ambiguous, and might as well be construed to import that Hughes had paid money for the high constable, as that he had received it for him; neither was it to be deemed a receipt, because the prosecutor had called it by that name in the indictment. He should have gone further, and explained by reference to the other documents, or to the course of business, how the instrument, in itself ambiguous, came to have the effect of a receipt. (*g*) Alderson, B., "The cases cited are clearly distinguishable from the present. In *Hunter's case*, the forgery consisted in merely counterfeiting the signature of the party, which, of course, meant nothing without reference to other documents. In *Thompson's case*, the forgery consisted in writing the word "settled" on an account; that, also, was an expression in itself entirely ambiguous: it might mean either that the party was satisfied as to the correctness of the items, or that he had received the amount. But indeed, that case has been expressly overruled by *Rex* v. *Martin*. I think there is nothing in the objection." (*h*)

The word "paid," at the bottom of a bill imports a receipt or acquittance for money.

So where on an indictment for forging and uttering an acquittance and receipt for money, it appeared that the prosecutrix gave the prisoner the bill of a Mr. Sadler, a cheesemonger, with money to pay that bill and a variety of others, and the prisoner brought the bill back again to the prosecutrix, with the words "Paid, sadler," at the bottom of the bill, with a little *s*, and no christian name, and Sadler proved that he never signed any bills in such manner, with a little *s* and no christian name, but all his bills had his initials, "S. Sadler" to them; it was contended, that the words "Paid, sadler," did not necessarily import a receipt by Sadler, but they might be a memorandum of the prisoner of her having paid the money to him. But Lord Denman, C. J., in summing up, said: "You must be satisfied that this was a receipt for money, and I apprehend that that does not admit of any kind of doubt. The prisoner clearly produced it as a receipt; but it is said that it might be merely a memorandum of her own, denoting that she had paid the bill; but, I apprehend that where a person writes under a bill the word "paid," with the name of the tradesman, it will be difficult to say that it does not purport to be a receipt for the money." (*i*)

(*g*) Hunter's case, *ante*, note (*b*). Thompson's case, *ante*, note (*d*), and Rex *v.* Barton, *post*, p. 509, note (*l*), were cited.

(*h*) Reg. *v.* Boardman, 2 M. & Rob. 147. 2 Lew. 181.

(*i*) Reg. *v.* Houseman, 8 C. & P. 180. The report does not set out the bill. As the prosecutrix proved that she had had bills from Sadler, weekly; that his former bills were receipted by himself, and she did not think they had a small *s* on them, and

Forging or uttering a receipt at the foot of an account was not within the 2 Geo. 2, c. 25, if such receipt was signed with the initials only, and there was nothing in the indictment to explain what those initials meant, though such receipt was described as being in the handwriting of a person whose name agreed with those initials, and was stated to have been written by him as a receipt for other money, and falsely affixed at the foot of another account. An indictment for forging or uttering a receipt in the name of T. S., should show that T. S. was a person to whom the money might have been paid. (*j*) The indictment stated that a precept had been issued by Christopher Hindle, one of the high constables for the hundred of Blackburn, directed to the overseers of the poor of Clayton-le-dale, to collect 21*l.* 11*s.* 4*d.*; that a receipt for money, viz. for the sum of 21*l.* 11*s.* 4*d.*, had been forged, by falsely affixing and cementing to the said precept, at the foot thereof, a certain receipt in the handwriting of one Henry Hargreaves, of the tenor following, that is to say, "1825, Rec^d^., H. H.," which had, before then, been made and written by the said Henry Hargreaves, as a receipt for certain other money, and that the prisoner published the said forged receipt as and for a true and genuine receipt for the said sum of 21*l.* 11*s.* 4*d.*, with intent to defraud the said Henry Hargreaves. A motion was made in arrest of judgment, on the ground that there should have been some averment or innuendo to have explained what was meant by the abbreviated word "Rec^d^." and what by the initials "H. H." (*k*) The indictment appeared to Bayley, J., to be open also to another objection, viz. that it was not shown what connection Henry Hargreaves had with Hindle or with the receipt. And upon a case reserved, the Judges held the indictment bad, because there was nothing to show what the initials "H. H." meant, or what connection Hargreaves had with Hindle or with the receipt.(*l*)

An indictment for forging a receipt signed with initials only must shew what the initials mean, and what connection there is between the party whose initials they are and the receipt.

The prisoner was convicted upon an indictment, which charged that he did feloniously forge a certain receipt for money, which was as follows:—

A pay-serjeant of the artillery obtained from the paymaster a receipt for a sum of money as part of subsistence of a company for the month of May. He erased May and inserted June, and gave the receipt to a tradesman.

"Received the 22nd day of May, 1834, of Messrs. Cox and Co., Paymasters, Royal Regiment of Artillery, the sum of £13 sterling, being a part of subsistence for a detachment of Captain Bayley's company, second battalion Royal Artillery at Woolwich, for the month of June, 1834.

"R. M. POULDEN, Lieutenant Royal Artillery."

with intent to defraud R. H. Cox and others. There was another count for feloniously uttering a like forged receipt for money, knowing

Sadler never signed with a little *s*, and no Christian name; it might, perhaps, admit of some doubt whether the false writing bore such a resemblance to the genuine receipts as to constitute forgery; Clinch's case, 1 Leach, 540, *ante*, p. 350, and Rex *v.* Fitzgerald, 1 Leach, 20, *ante*, p. 351, seem, however, to favour the opinion that it would constitute forgery. C. S. G.

(*j*) These positions are taken from the marginal note in R. & M. C. C. R., but, perhaps, they are hardly deducible from the case itself. C. S. G.

(*k*) Hunter's case, *ante*, p. 506, note (*b*), Testick's case, *ante*, p. 504, note (*z*), and Thompson's case, *ante*, p. 507, note (*d*), were cited.

(*l*) Rex *v.* Barton, R. & M. C. C. R. 141. In order to avoid any such objections as were raised in this case, the better course in similar cases would be to describe the instrument as "a certain receipt for money, that is to say, a receipt for the sum of 3*l.*," which has been held to be sufficient. See *ante*, p. 373, and note (*z*), ibid. C. S. G.

who, according to the usual practice, advanced the sum to the prisoner, and sent the receipt to the agent of the regiment, who paid the amount. An indictment for forgery, describing the instrument as a receipt, was held good.

it to be forged, and several other counts, upon which no question arose. It appeared that in May, 1834, Lieutenant Poulden had the charge of a detachment of Captain Bayley's company of the second battalion royal artillery at Woolwich, of which he was also the paymaster; the prisoner was acting under him as pay-serjeant. The following is the mode by which the subsistence money is provided:—The pay-serjeant makes out for the use of the paymaster, at the beginning of every month, an abstract of the subsistence money which will be wanted for the soldiers during the ensuing month, and the paymaster gives information to Messrs. Cox and Greenwood, the agents of the regiment, accordingly. The pay-serjeant, in order to receive this money, brings to the paymaster, about once a week, a receipt, partly printed and partly filled up by himself, in the form above set forth, and upon obtaining the paymaster's signature thereto, he gets cash for it from any of the neighbouring tradesmen, who afterwards either pass it to others or send it up through their bankers to Messrs. Cox and Greenwood, who ultimately pay the amount to the bearer. In the present case the prisoner brought the instrument in question to Lieut. Poulden, on the 22nd of May, filled up as a receipt for subsistence money for the money for the month of May, which Lieut. Poulden signed, not being aware at the time that he had already signed the receipts for all the subsistence money which had been provided for the month of May. The prisoner, after obtaining it, erased the word May, and inserted instead thereof the word June, thereby making it appear to be drawn for subsistence money for the ensuing month. This had the effect of preventing an immediate discovery, as Cox and Greenwood would have suspected the issuing of a receipt for a sum beyond the subsistence money provided for the month of May, supposing all the other receipts to have then come in. The prisoner took the receipt to H. T. Failey, a grocer at Woolwich, from whom he obtained thirteen sovereigns, and it was afterwards transmitted to Cox and Greenwood, who paid the same. It was objected that the instrument was not properly described in the indictment as a receipt, that it was in its legal effect and operation, if any thing, an order for the payment of money, and ought to have been so described, and this point was reserved for the opinion of the Judges, all of whom (except Lord Lyndhurst, C. B., Park, J. A. J., and Bolland, B.) having considered this case, were unanimously of opinion that the conviction was good. (*m*)

Same point as in the preceding case.

So where the prisoner was charged with forging a certain receipt for money, *viz.*, a receipt for the sum of twenty pounds, and it appeared that the prisoner went to the house of a tradesman, and obtained 20*l.* by saying that he came from Quartermaster Serjeant Hunter, for change for an instrument in the following form:

"Received this 26th day of September, 1834, of Messrs. Cox and Co., Paymasters Royal Regiment of Artillery, the sum of £20, on account of subsistence for my detachment for the present month.
"£20. "H. PESTER, Capt. Adj. R. H. A.
(Indorsed) "SAM. RICE, Gun. R. H. A."

It also appeared that these receipts were frequently cashed by the

(*m*) Rex *v.* Hope, R. & M. C. C. R. 414.

tradesmen in Woolwich, who afterwards received the money from the army agents. Park, J. A. J., after mentioning the preceding case, and stating that he was not aware whether the question had been considered or not, was of opinion that this indictment was good. (*n*)

Altering the sum in a high constable's precept after he had signed a receipt for it at the bottom of the precept.

Altering the sum in the body of the high constable's precept for county rate after he has signed a receipt for that sum at the bottom of the precept, is a forgery of a receipt within the 1 Wm. 4, c. 66, s. 10.. The indictment charged that the prisoner did feloniously forge a certain receipt for money, that is to say,

"Herefordshire, To Wit. } "To the Churchwardens and Overseers of the Poor of the Parish of Titley, in the County of Hereford.

"By virtue of an order of her Majesty's Justices of the Peace in and for the said county, at their general quarter sessions assembled, you are hereby required, within thirty days from your receipt of this precept, or otherwise having had due notice thereof, to pay me out of the money by you collected, or to be collected for the relief of the poor of your parish, the sum of 3*l.* 15*s.* 9*d.*, being the proportion of your said parish, for and towards the general county rate, to be applied for the several purposes mentioned and set forth in the several statutes in such case made and provided, and herein fail not at your peril.

"Given under my hand at Mowley, in the said county, the 6th day of December, 1837.

"Dec. 31. Rec^d^. the above rate. J. POWELL."

"JOHN POWELL, Chief Constable of the Hundred of——."

And it was proved that Powell, the high constable, had sent the precept for the county rate, which was set forth in the indictment, with the sum of 3*l.* 5*s.* 9*d.*, stated in it as the amount, and that he afterwards received that sum from the prisoner, and then wrote, "Dec. 31. Received the above rate, J. Powell." The prisoner afterwards presented the document altered into 3*l.* 15*s.* 9*d.*, to the auditor of the Union, and obtained that sum from him. It was objected that this was not a forgery of a receipt, for that the whole receipt was contained in the words, "Dec. 31. Rec^d^. the above rate, J. Powell," which was unaltered, and that altering the precept for the rate to which the receipt referred was not a forgery of the receipt. It was answered that the alteration varied the amount for which the receipt was given, and therefore it was a forgery of the receipt: and it was held that it was clearly a forgery of the receipt. (*o*)

Lyon's case. A scrip receipt, not filled up with the subscriber's name, is not a receipt for money within the statute.

It has been holden that a *scrip receipt*, not filled up with the name of the subscriber or person from whom the money was received, is not a *receipt for money* within the statutes. The point came on for consideration upon demurrer; and after argument, Grose, J., delivered the opinion of the Judges, and said that the instrument, the tenor of which was necessarily set forth in the indictment, was not *a receipt* for money in contemplation of law within the meaning of the 2 Geo. 2, c. 25, &c. That it was the duty of the cashier

(*n*) Rex *v.* Rice, 6 C. & P. 634.

(*o*) Reg. *v.* Vaughan, 8 C. & P. 276, Gurney, B. It was also objected that there ought to have been an innuendo that "Rec^d^." meant "Received," but this objection was also overruled.

appointed by the bank to receive such subscriptions to fill up the receipts with the names of the subscribers, or persons from whom they originally received the money; and, until the blank left in the printed form was so filled up the instrument did not become an acknowledgment of payment; or, in other words, a *receipt* for money. While in such a state it was no more a receipt than if the sum professed to be received had been omitted. (*p*)

Memorandum importing a payment, but not a receipt of the money.

A memorandum importing that A. B. had paid a sum to C. D., but not importing any acknowledgment from C. D. of his having received it, was holden not to be a receipt within the statute. (*q*)

Thomas's case; holden that, where a person who was employed by the executors of a contractor with the navy-board to settle the account of the testator with government, produced forged acquittances and receipts, which were in fact fabricated vouchers, in order to exonerate the estates of the testator from an extent; it was a forging and uttering within the 2 Geo. 2, c. 25.

Where a person who was employed by the executors of a contractor with the navy board, to settle the account of the testator with government, produced certain forged *accquittances and receipts for money*, and delivered them to the navy board, in order to exonerate the estate of the testator from an extent, it was holden to be a forging and uttering, within the 2 Geo. 2, c. 25. The indictment charged the prisoner with forging and uttering, knowing, &c. a great many acquittances and receipts, (which were set forth,) with intent to defraud the king. It was objected by his counsel that the case was not within the 2 Geo. 2, c. 25, as the receipts in question purported to be receipts given to Collinridge, the contractor, by persons employed by him, for money therein stated to have been paid to them for work and materials done and provided for the business in which he was employed under the navy-board, and were produced by the prisoner as vouchers, to accompany and verify Collinridge's accounts, in order to get them passed by the navy-board; which accounts the prisoner had taken upon himself, after Collinridge's death, to get passed, in order to avoid an extent which had issued against Collinridge's estate and effects. And it was urged in support of the objection, that these workmen were solely employed by Collinridge, and not by the navy-board; and that he, and not the navy-board, was answerable to them. That, therefore, the board had nothing to do with these receipts; and it was indifferent to the board whether these sums had been paid to these several persons or not. The prisoner having been convicted, the case was submitted to the consideration of the twelve Judges, who all, (with the exception of Lawrence, J., who was absent,) held that the conviction was right, and that the receipts, as stated, were within the statute. Grose, J., in delivering their opinion, said, "The facts in the case prove that these receipts were forged; and that they purported to have been given to Collinridge by workmen for monies paid by him to them for work done *for the commissioners of the navy-board.* The persons, therefore, employed for that purpose by *him*, were employed not solely on his account, but on account of the king; and these receipts, if genuine, would have been legal vouchers for his account, and would have entitled him to a discharge from the navy-board. It is clear then, from the facts proved at the trial, and from the verdict of the jury, that these receipts are forged receipts, and that they were knowingly uttered by the prisoner with intent to defraud the king."(*r*)

Forging a receipt in order to found a claim of payment thereon against a third person, is as much within the statute as forging it to defeat a claim by the person whose name is forged.

(*p*) Lyon's case, O. B, 1793, 2 Leach, 597. 2 East, P. C. c. 19, s. 36, p. 933. And see several points as to the forgery of *scrip receipts* discussed in Reeves's case, 2 Leach 808, *et seq.*

(*q*) Rex *v.* Harvey, Russ. & Ry. 227.

(*r*) Thomas's case, 1800. 2 Leach, 377. 2 East, P. C. c. 19, s. 36, p. 934. And see Jones and Palmer's case, *ante*, p. 384.

In the foregoing case a point arose, as to the right of the prisoner to put the prosecutor to his election, on an indictment stating various forgeries. The first count of the indictment charged that the prisoner uttered, &c. a certain forged accquittance and receipt for money (setting it forth), also a certain other forged accquittance and receipt for money, (also setting it forth) and stated in like manner above twenty other receipts of different dates, for different sums, and purporting to be signed by different persons, with intent to defraud the king. And before any witnesses had been examined, the counsel for the prisoner submitted to the court, whether the prosecutor ought not, under the circumstances of this case, to elect on which of the several receipts stated in the first count of the indictment he intended to proceed, and be restrained from proceeding on more than one of them; as amidst such a variety, it would otherwise be almost impossible for the prisoner to conduct his defence. But Le Blanc, J., referred to the indictment, by which it appeared that all the receipts stated in the first count were charged to have been *uttered at one and the same time;* and as this single act of uttering the receipts would, if clearly proved, constitute only one offence of *uttering*, he refused the application. The proof was, that the several receipts stated in the indictment were uttered at the same time in one bundle, given by the prisoner to the solicitor of the navy-board. And when the case was submitted to the consideration of the twelve Judges, they were all of opinion that the application to put the prosecutor to his election was properly refused. (*p*)

As to the right of the prisoner to put the prosecutor to his election on an indictment stating various forgeries.

It is not an offence within the 1 Wm. 4, c. 66, if a party writes on the back of a bill of exchange "received for R. A.," and signs his own name. Nor is it an offence within that statute to forge an indorsement upon a warrant or order for the payment of money. The prisoner was indicted for forging and uttering, knowing it to be forged, an indorsement on an instrument which was in the form of a bill of exchange, in which one Aickman was the payee, and the indictment contained counts charging the forging and uttering of an indorsement upon an order for the payment of money, an indorsement upon a warrant for the payment of money, and a receipt on an order for the payment of money. It appeared that the prisoner took the instrument in question with the following indorsement upon it, "Received, R. Aikman," to the banking house where it was payable, and presented it for payment; but the clerk, perceiving that the name of the payee in the instrument was spelt 'Aickman' with a 'c,' but in the indorsement was spelt 'Aikman,' without any c, objected to pay it: upon which the prisoner altered the indorsement thus, "Received for R. Aickman, G. Arscott;" his own name being G. Arscott. Bolland, B.—"The offences charged in the indictment are, the forging an indorsement or an order for the payment of money, and also the uttering of the indorsement, and the forging and uttering a receipt on an order for the payment of money. On looking at the act of Parliament, the sections which apply to this case appear to be the third and the tenth. By the third section, several substantive acts of forgery are mentioned. (His Lordship read the section through.) Now, if this had been charged as a bill of exchange, instead of an order for the payment of money, there would

If a party writes on the back of a bill of exchange, "Received for R. A." and signs his own name to it, this is not forging a receipt within the 1 Wm. 4, c. 66. It is not any offence within that statute to forge an indorsement upon a warrant or order for the payment of money.

(*p*) 2 Leach, 882.

not have been any difficulty. But the section does not include in the offences enumerated, the forging of an indorsement on an order for the payment of money. The tenth section applies to the forging and uttering of receipts. But the words used are, 'any acquittance or receipt, either for money or goods, or any accountable receipt, either for money or goods, or for any note, bill, or other security for payment of money.' That section, therefore, will not apply to those counts which charge the prisoner with forging and uttering a receipt on an order for the payment of money." Littledale, J.—"There are three sets of offences charged in the indictment; the first relates to an order, the second to a warrant, and the third to a receipt. It is not necessary to consider the first question that was raised, whether the prisoner uttered the forged indorsement upon the instrument or not, as those counts of the indictment which charge the offence are not properly framed, as they do not properly describe the instrument. The act of Parliament, which consolidates the acts relating to forgery, says; (His Lordship here read section 3, and observed)—Therefore it is made a felony if any person forges or puts off any bill of exchange, or any promissory note for the payment of money, or any indorsement on either of them. If the charge had been the uttering a forged indorsement upon a bill of exchange, it would have met the facts of this case; but that is not the offence charged in the indictment. Let us then see what the act of Parliament provides with respect to warrants and orders. The legislature has made no provision for forging an indorsement on any warrant or order, but for forging the instrument itself; and I think that the act of Parliament was purposely so framed, because warrants and orders do not pass by indorsement, but bills of exchange and promissory notes do. It is very probable that the person who drew the indictment, not seeing in the instrument so many days or months after date, did not think it was a bill of exchange, and therefore charged the prisoner with uttering a forged indorsement on an order for the payment of money. Now, this is not an offence within the act of Parliament; and I think you cannot call the indorsement itself an order for the payment of money, because the word "indorsement" is used in the act, and the act meant a distinct instrument in mentioning a warrant or order. Then as to the tenth section, the question is, whether this is forging a receipt for the payment of money? The words are —"Received for R. Aickman, G. Arscott." I take it, that to forge a receipt for money, is writing the name of the person for whom it is received. But in this case, the acts done by the prisoner were, receiving for another person, and signing his own name. Under these circumstances the prisoner must be acquitted upon this indictment." (*q*)

Construction as to *warrants* or *orders* for the payment of money.

It now remains to notice the cases which relate to the instruments which may be considered as *warrants or orders for the payment of money or delivery of goods.*

The statute is not confined to commercial transactions.

It appears at one time to have been contended that the statute was confined to commercial transactions; but several cases have decided that it is not so confined. (*r*)

(*q*) Rex *v.* Arscott, 6 C. & P. 408. Littledale, J., Bolland, B., and Vaughan, J.

(*r*) Graham's case, O. B. 1778. 2 East, P. C. c. 19, s. 41, p. 945. M'Intosh's case, 1800. 2 East, P. C. c. 19, s. 39, p. 942.

It has been frequently holden, that instruments which in the commercial world have peculiar denominations, may yet be laid as warrants, or orders for the payment of money, if they fall within those terms, and are such in effect. So that a bill of exchange may be laid as an order for payment of money, (*s*) and in one of the cases, where this point was considered by the Judges, they were unanimously of opinion, that it was well laid; and, it was observed, that every bill of exchange seemed to be an order for the payment of money, though not *vice versâ*. (*t*) And in a subsequent case, the Judges all finally concurred in opinion, that a bill of exchange, or banker's draft was well laid in the indictment as an order for payment of money; on the ground that though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawees for the payment. (*u*)

Bills of exchange, &c., may be laid as warrants, or orders for the payment of money.

In another case, the prisoner was convicted of forging and uttering, knowing it to be forged, a certain order for the payment of money in the words and figures following:—

M'Intosh's case. Instrument considered as a bill of exchange, or order for payment of money.

"*Petersfield*, 6 *August*, 1799.

"Sir, Please to pay on demand to Mr. Hugh Young, or order, all my proportion of prize-money, due to me for my services on board His Majesty's ship Leander, for which this shall be your authority. Witness my hand,

"JOHN JOHNSON,
⋈
his mark.

"To Alexr. Davison, Esq.
"No. 21, *Milbank-street, Westminster.*

Signed before us,

"WALTER NOBLE, Minister.
"JOHN WILLIAMS, } Church-
"FRANCIS GIBBONS, } wardens."

In two counts it was called an order for payment of money; and in two other counts a bill of exchange; and it was stated to have

(*s*) Lockett's case, O. B. 1772. Trin. T. 1774. 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940. The instrument was in the following form:—

"London, Feb. 14, 1772.
"Messrs. Neale, James, Fordyce, and Down.
"Pay to Mr. William Hopwood or bearer, sixteen pounds ten shillings and sixpence.
"£16 10*s*. 6*d*. "R. VENNIST."

(*t*) Shepherd's case, O. B. 1781. Mich. T. 1781. 2 East, P. C. c. 19, s. 40, p. 944. 1 Leach, 226. The instrument was as follows:—

"Green-street, 31st July, 1781.
"Sirs,—Pray pay to Mr. John Atkins, or bearer, six pounds six shillings, value received, Yours, &c.
"H. TURNER."

(*u*) Willoughby's case, Warwick Lent Ass. 1783. East. T. 1783. 2 East, P. C. c. 19, s. 40, p. 944, *ante*, p. 214. The instrument was in this form:—

"POST BILL.
"Birmingham, 13 Feby. 1783.
"No. 6127."
"Sir Wm. Lemon, Bt. & Co. Bankers, London.
"Pay 5 Gas. to Mr. Rich^d. Moore, or bearer on demand, value received.
"ROBT. COALES."
"Rec^d. 5 Gas.
Ent^d. R. MOORE."

been forged and uttered, with intent to defraud John Johnson. Four other counts charged the offence to have been committed with intent to defraud Alexander Davison. One of the objections on the part of the prisoner was that this was not a bill of exchange, nor an order for payment of money within the 7 Geo. 2, c. 22, because no sum of money was mentioned, and it was not certain that any money would be due to Johnson. The point was referred to the consideration of the Judges, who held the conviction, proper. (*v*)

Ravenscroft's case. Not an order for the payment of money.

In a case in which it appeared that the prisoner drew a bill, "Please to pay the bearer on demand fifteen pounds, and account to your humble servant, Charles H. Ravenscroft," which was his own name; but the bill was not addressed to any one; and it appeared that when the instrument was uttered, the following words and signature were forged upon it, "Payable at Messrs. Masterman & Co. White Hart Court, Wm. M'Inerheny;" and it also appeared that M'Inerheny kept cash at Masterman's & Co. who were bankers; a majority of the Judges held that this was not an order for payment of money, there being no special averments in the indictment that it was intended for an order, or that Masterman and Co. were bankers. (*w*)

The prisoner drew a forged bill upon the treasurer of the navy, and made it payable to blank or order, and signed it in the name of a navy surgeon. It was holden that such a direction to pay to blank or order was not sufficient, and that to constitute an order for payment of money, there must be some payee. (*x*)

The warrant or order must purport to have been made by one having authority to command payment, &c.

It is said, that it seems to be settled, that if the *warrant or order* mentioned in the 7 Geo. 2, c. 22, do not purport on the face of it, or be shewn, by proper averments, to be made by one having authority to command the payment of the money or direct the delivery of the goods, and to be compulsory on the person having possession of the subject matter of it; but only purport to be a request to advance the money or supply the goods on the credit of the party applying, which the other may comply with, or not as he sees proper, it is not a warrant, or an order within the statute. (*y*)

Mitchell's case. A note to a shopkeeper, in the name of an overseer of the poor, holden not to be within the repealed statute.

Thus it was holden, that a note in the name of an overseer of the poor to a shopkeeper, desiring him to let the prisoner have certain goods, which he would see him paid for, was not a warrant or order for the delivery of goods within the repealed statute. Nine of the Judges, on a conference, were clearly of opinion, that the writing was not a warrant or order for the delivery of goods within the act; considering that the words *warrant or order*, as they stand in the act are synonymous, and import that the person giving such warrant or order has, or at least claims an interest in the money or goods which are the subject matter of it, and has or at least assumes to have a disposing power over them, and takes on him to transfer the property, or at least the custody of them to the person in whose favour such warrant or order is

(*v*) M'Intosh's case, 1800. 2 East, P. C. c. 19, s. 39, p. 942.

(*w*) Rex *v.* Ravenscroft, Russ. & Ry. 161

(*x*) Rex *v.* Richards, Russ. & Ry. 193, and See Rex *v.* Randall, id. 195.

(*y*) 2 East, P. C. c. 19, s. 37, p. 936. Reg. *v.* Newton, 2 Moo. C. C. R. 59, *post*, p. 525.

made. And though this case must fall within the mischief; yet, in the construction of an act so penal, the strict letter of it ought not to be departed from. (z)

Williams's case. So a note to a tradesman requesting him to let the bearer have certain goods.

So a note to a tradesman, requesting him to let the bearer have certain goods, has been holden not to be an order for the delivery of goods within the statute, it appearing that the person whose name was forged in the note, though a customer of the tradesman, was not the owner of, nor had any special interest in the goods in question, or any others in the tradesman's hands, nor had any authority to send any such order if it had been genuine. (a)

Rushworth's case. A forged order, for the purpose of obtaining a reward for the apprehension of a vagrant, holden not to be within the statute; it being deficient in the requisites prescribed by the statute which authorized it to be made.

Upon similar grounds it was ruled, by a very learned Judge, that a forged order for the purpose of obtaining a reward for the apprehension, &c. of a vagrant, was not a forgery within the statute, unless it contained the requisites prescribed by the Vagrant Act, 17 Geo. 2, c. 5, s. 5, now repealed. It appeared, that the order was deficient in the requisites described by that act, inasmuch as it did not purport to be under seal, and it was not directed to the high constable of the Riding: and it was contended, on behalf of the prisoner, that such an instrument, supposing it to have been genuine, would have been perfectly inoperative; that it was nothing more than an order by a magistrate on the county treasurer, for the payment of a sum of money, over which the magistrate had no control or dominion whatsoever, except by means of the 17 Geo. 2, c. 5. On the part of the prosecution, it was contended principally, that since orders in the form of the order in question had been generally drawn and acted upon in the Riding of the county in which this offence was committed, it was not essential, to bring the prisoner within the statute, that the order should comply with the requisites of the 17 Geo. 2, c. 5: and, that it was sufficient that it pursued the usual form, being thereby capable of being the instrument of fraud. But Bayley, J., said, "To bring the case within the statute, the order must be such as, on the face of it, imports to be made by a person who has a disposing power over the funds. In this case, the party looking at the act must have known that the order was not made by one who had a disposing power over the funds in his hands. The magistrate, as an individual, had no right to make such an order, and the treasurer had no right to consider it as an order which he was bound to obey. The magistrate, in his character of a justice of the peace, had no authority to make such an order; if he had any it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it." (b)

(z) Mitchell's case, Fost. 119. 2 East, P. C. c. 19, s. 37, p. 936.

(a) Williams's case, 1775. 1 Leach, 114. 2 East, P. C. c. 19, s. 37, p. 937. The point was submitted to the consideration of the Judges, who all (De Grey, C. J., and Willes, J., being absent) agreed that the case was not within the statute, feeling themselves bound by the authority of Mitchell's case, note (z): but most of them said they should have doubted the propriety of that determination, if it had been *res integra*; but as it had been so long acquiesced in they thought it could not be departed from. And accordingly in a subsequent case, a note in the following form, "Messrs. Songer, please to send 10*l.* by the bearer, as I am so ill, I cannot wait on you, Eliz. Wery;" was holden not to be an order within the statute. Ellor's case, O. B. 1784. 2 East, P. C. c. 19, s. 37, p. 938. 1 Leach, 323. The prisoner was, therefore, acquitted of the felony; but detained, and at a subsequent sessions convicted of the misdemeanor. 1 Leach, 323.

(b) Rushworth's case, *cor.* Bayley, J., York. Sum. Ass. 1816. Russ & Ry. 317. The prisoner was accordingly ac-

The same prisoner was tried and convicted at the same assizes for *presenting* the same order to the treasurer of the county pretending it was genuine, and obtaining from the said treasurer under such order the sum of 4*l.* 10*s.* 6*d.* The indictment after charging that the prisoner, with intent to cheat, &c., the treasurer, presented the order, and that he knowingly, &c. pretended that it was a genuine order, proceeded, "And so the jurors, &c. say, that the prisoner on the day and year, &c. did obtain the said sum of 4*l.* 10*s.* 6*d.*;" but the intent to cheat and defraud the said treasurer was not stated in this part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly. And upon a case reserved the Judges held the indictment bad. (*c*)

Froud's case. Order upon the treasurer of a county.

By the 48 Geo. 3, c. 75, a justice of the peace may order the treasurer of the county to pay every churchwarden, overseer, headborough, or constable, the expenses he has incurred in burying any dead body that has been cast on shore. A justice's order was forged, stating that a dead body had been cast on shore in the parish of A., that L. S. had made oath before the justice that he had laid out 3*l.* 5*s.* in the burying such body and requiring the treasurer to pay him that sum. The indictment was for forging and uttering, &c. this order; and was founded on the 7 Geo. 2, c. 22, and the prisoner's counsel objected that the order in question, was not properly a warrant or order for the payment of money within that statute. He contended that it was not in its purport a cumpulsory or even a valid order within the 48 Geo. 3, c. 75, as it did not appear on the face of it that the person who was stated to have laid out the money, and to whom repayment thereof was ordered was one of the officers of the parish or place to whom, by that statute, a justice of the peace has authority to order a re-payment. And he contended also that the order must be compulsory, which this was not, because it did not state all that was sufficient to entitle the person to the payment of the money: and further that the instrument also purported to be an order to pay to the person at whose expense the corpse was buried, and not to the officer of the parish or place who had repaid him. The learned Judge thought that the order, though it might not be compulsory, was not in itself a nullity, nor made void by the statute, but was still an order for the payment of money, and protected by the 7 Geo. 2, c. 22. But the prisoner being convicted, a case was reserved for the consideration of the Judges.

quitted upon that and another similar indictment. In Graham's case, O. B Oct. 1778. 2 East, P. C. c. 19, s. 41, p. 945, *ante*, p. 514, note (*r*), the prisoner was indicted for a similar offence, and an objection taken on his behalf was, that the 18th sec. of the 17 Geo. 2, c. 5, expressly subjected the party forging such an order to a penalty of 50*l.*, which must be considered as a repeal of the 7 Geo. 2, c. 22, as to orders of this description. And it is observed in 2 East, (*ubi supra*) that this objection seems to have been entitled to a different consideration from what it is stated to have received; as the prisoner was, notwithstanding, convicted, and received judgment. And a *qu.* is made as to what became of the case. It should, however, be observed, that this 18th sec. of the 17 Geo. 2, c. 5, enacted, that "in case any such petty constable or other officer or governor or master of any house of correction, shall counterfeit any such certificate, receipt, or note, or make or knowingly permit to be made any alteration in any such certificate, receipt, or note, he shall forfeit the sum of fifty pounds;" and that it does not appear from the report that the prisoner, Graham, was a petty constable or other officer, &c. A still better answer to the objection seems to be, that the order in question was neither a certificate, receipt, or note, within the 18th sec. of the 17 Geo. 2, c. 5.

(*c*) Rex *v.* Rushworth, *cor.* Bayley, J., York Sum. Ass. 1816, Russ. & Ry. 317.

Several of the Judges thought the conviction wrong, being of opinion that the instrument was not properly a warrant or order for the payment of money within the 7 Geo. 2, c. 22, because the justices had no authority to make such an order, but in favour of a churchwarden, overseer, &c.: but a majority of the Judges thought the conviction right, because it did not appear on the face of the order that I. S. *was not* a churchwarden, &c., and that if nothing appeared to the contrary, on the face of the order, they thought the treasurer bound to conclude that the justice had not made an order without satisfying himself that I. S. was a churchwarden, &c. (*d*)

It must not appear in the indictment that the person whose name was subscribed had no authority to make the warrant or order.

It follows from these principles that an indictment for forging a warrant or order will be bad in form, if it appears, upon the face of it, that the person whose name was subscribed to the warrant or order had no authority to make them.

Clinch's case. Holden that it ought to have appeared in the indictment that the person, whose name was subscribed to the order, had authority to make it.

An indictment which charged the prisoner with forging an order for the delivery of goods stated that the order was subscribed by one L. D., "he, the said L. D., then and there being the *servant* of one J. L. D. in his business of a silk dyer, and purporting to be a warrant or order from the said L. D. *as such servant* of the said J. L. D. for the delivery of 8lb. of raw silk." It appeared upon the evidence that L. D., whose name was forged, was, in fact, the son of J. L. D., and was apprenticed to his father, whose business of a silk dyer was principally conducted by him. Amongst other objections, on behalf of the prisoner, it was urged that to bring the offence within the statute the order must purport to be made by a person who had an authority, or at least claimed an interest in the subject matter of it, and who took upon him to transfer it to the person in whose favour the order was made. That it was not averred in the indictment that L. D., whose order it purports, and is averred to be, had any authority over, or interest in, the goods in question, or any authority to make such an order, which ought to have been expressly alleged. It states that another person was the owner, namely, the father J. L. D., to whom the son was only a servant; and it cannot be inferred from that circumstance that the son had authority over the goods; and the want of such an averment cannot be supplied by parol evidence: on the contrary, the order appears to have been made by an apprentice, who was not *sui juris*, and had no disposing power. The prisoner, having been convicted, the case was referred to the consideration of the Judges, who held the conviction bad. The learned Judge, who delivered their opinion, said, "that on the construction of the statute the forged warrant, or order for the delivery of the goods, must purport to be the order of the owner, or of some person who has, or at least claims, an interest in, or who has, or at least assumes to have a disposing power over the goods, and takes upon him to transfer the property or custody of them to the person in whose favour such order is made." And, as to the form of the indictment, he said, "that it ought to have appeared in the indictment that the person, whose name was subscribed to the order, had an authority to make it; but that this could not be collected by any legal inference from the

(*d*) Rex *v.* Froud, *cor.* Holroyd, J., Cornwall Lent Ass. 1819, and Trin. T. 1819, Russ. & Ry. 389.

words of the indictment; for L. D., the person whose name was forged, was stated to be the *servant* of the owner, which excluded every idea that he had or could claim any interest in the goods which were the subject of the order, and that it ought to have been expressly averred that he had authority to make it." (*e*)

The order must be directed to the holder or person interested in, or having possession of the goods.

In the foregoing case it was further objected, on behalf of the prisoner, that the instrument in question was not an order, but a bare request; that it was not directed to any person, and consequently was not, upon the face of it, compulsory upon the holder of the goods; and, further, that it ought to have appeared on the face of the indictment that the order was to the holder of the goods. (*f*) Upon these points the learned Judge, who delivered the opinion of the Judges, said, "that the order must be directed to the holder or person interested in or having possession of the goods. That the order set forth in the indictment was not directed to any person whatsoever, but merely expressed a desire that 8lb. of silk should be delivered to the bearer of it without any direction from whom it was to be received. And that on this ground, therefore, the Judges were of opinion that this was not a warrant or order within the statute." (*g*)

But if the order purport to be one which the party has a right to make, it will be within the act.

But it should be well observed that if the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by existed in fact, it falls within the penalty of the statute. (*h*)

Lockett's case. A forged order on a banker holden to be within the statute, though made in a fictitious name, as it purported to be made by a person who kept cash with such banker.

The prisoner was convicted of knowingly uttering a forged order for the payment of money, in these words, "Messrs. Neale, Fordyce, and Down, pay, to Wm. Hopwood or bearer 16*l.* 10*s.* 6*d.* Rt. Vennest," with intent to defraud one John Scoles. (*i*) It appeared that the prisoner applied to Scoles, who was a colourman, and agreed to purchase goods to the amount of 10*l.* 0*s.* 6*d.*, which he was to send for. He went away taking with him a little Prussian blue; and afterwards came again, pretending to be in a hurry, and presented this note, which he said was a good one; and for which Scoles gave him 6*l.* 10*s.*, being the difference. No such person as Rt. Vennest kept cash with Messrs. Neale and Co.; nor did it appear that there was any such man existing. Upon these facts it was submitted to the consideration of the Judges, whether this was an order within the statute; (*j*) and after very long consideration they at last agreed that it was a forgery. They thought it quite immaterial whether such a man as Vennest existed or not; or if he did, whether he had kept cash at the banking-house of Messrs. Neale and Co.; and that it was sufficient that the order assumed

(*e*) Clinch's case, O. B. 1791, decided by the Judges, 11th May, 1791, 2 East, P. C. c. 19, s. 37, p. 938. 1 Leach, 540. And see Rex *v.* Wilcox, Russ. & Ry. 50, *ante*, p. 374. And it seems, therefore, that if the indictment states the person in whose name the order was forged to have been servant to I. S., and that the order was for the delivery of goods to I. S., it ought to show that the servant as such had a disposing power over the goods. MS. Bayley, J.

(*f*) The form of the instrument was:—

"Please to send by the bearer, 8lb. of that whorpe hun market.

"L. DESEMOCKEX."

(*g*) Clinch's case, *ante*, note (*e*).

(*h*) 2 East, P. C. c. 19, s. 38, p. 940.

(*i*) The form of the order is given with some slight difference in another report. See *ante*, p. 515, note (*s*).

(*j*) The doubt was stated to have arisen on what was said in Mitchell's case, *ante*, p. 516.

those facts, and imported a right on the part of the drawer to direct such a transfer of his property. (*k*)

The indictment charged the prisoner with forging a certain order for the payment of money, as follows:—

"*St. Ann's Union.*

"Mr. Thomas,

"Sir,—You will please to pay the bearer, for Richard Power, three pounds for three weeks due to him, a country member, and you will much oblige your's, &c.

"J. BESWICK.

"*Feb.* 21, 1829. 2, *Brown's Buildings, Stanhope Street.*"

"To Mr. Thomas, Gray's Inn Lane."

The order charged as forged ought to import that the party making it has a disposing power over the subject of the order, or there ought to be proof that the person in whose name it is made had such power.

with intent to defraud John Thomas, the said J. Thomas, on whom the said false, forged, and counterfeited order for payment of money was made, then and there being intrusted with, and having in his hands and possession, as the landlord of a certain public-house, known by the name of the 'Crown and Barley Mow,' in Gray's Inn Lane, a certain large sum of money, to wit, the sum of thirty pounds, belonging to W. Ireland and others, members of a Friendly Society called the St. Ann's Union, meeting at the said public-house, for the purpose of enabling the said J. Thomas to pay, and that he might pay all orders for payment of money due to any of the members of the said Society, according to the rules and regulations thereof. Second count for uttering, and publishing as true, a like order for payment of money, well knowing the same to be false, forged, and counterfeited, with intent to defraud the said J. Thomas. Third same as second, with intent to defraud J. Beswick. Fourth same, with intent to defraud W. Ireland and others. J. Thomas was the landlord of the Barley Mow, Gray's Inn Lane. A Society called the "St. Ann's Friendly Society," was holden at his house, of which Mr. Beswick was the Secretary: there was usually money in Thomas's hands to pay any demands that might be made by Mr. Beswick's orders. On Saturday, 21st February, the prisoner produced a check to Thomas, at his house, and said he brought it from Mr. Beswick for three pounds, for a country member, who had broken his arm. Upon looking at it, Thomas saw it was not Mr. Beswick's handwriting, and told him so: he said he knew that; that Mr. Beswick, being an undertaker, was out of town at a funeral, and Mrs. Beswick directed her son to write it; Thomas, accordingly, gave him the three pounds. Mr. Beswick proved that the handwriting to the check was not his; and that there was no member of the name of R. Power in the society. On the 21st of February, Beswick lived at No. 2, Brown's Buildings, Stanhope Street, Clare Market. It was proved, that no authority was given to any one to write or issue the check; and that it was not written by Beswick's son. W. Ireland said he was a member of the St. Ann's Society (there were many other members), that he subscribed to the funds of it; if taken ill, a member received money from the funds of the society to support him. There were no rules or regulations put in,

(*k*) Lockett's case, O. B. 1771, Trin. T. 1774. 1 Leach, 94. 2 East, P. C. c. 19, s. 38, p. 940. S. P. in Abrahams's case, 1774. 2 East, P. C. c. 19, s. 38, p. 941. The prisoners in each case received judgment of death accordingly.

or any evidence of their having been enrolled. The Recorder suggested that, upon the authority of *Mitchell's case,* (*n*) the prisoner ought to be acquitted, as for want of the rules and regulations, of which no parol evidence could be given, there was no evidence to prove that Beswick had any disposing power over the money in the hands of Thomas. Littledale, J., and Gaselee, J., however thought the better way was to leave the case to the jury, and reserve the point suggested for the consideration of the Judges, if the prisoner should be convicted. The jury found the prisoner guilty on the counts for uttering, and upon a case reserved, all the Judges (except Gaselee, J., and Parke, J.) thought that this was not an order on the face of it; and that the conviction was therefore wrong. (*o*)

The party in whose name the instrument is drawn must have the right to command payment, or it is not an order within the 1 Wm. 4, c. 66, s. 3.

Where the forged instrument does not purport on the face of it to be an order, and the party in whose name it is drawn had not the right or power to order the payment of the money at the time when the instrument was drawn, it is not an order for payment of money within the 1 Wm. 4, c. 66, s. 3. The indictment charged the prisoner with forging an order for the payment of money, which was set out in the first count as follows:—

"*Monmouth, June* 9, 1842.

"Mr. Fisher, I should feel greatly obliged to you, if you will please to send by the bearer the sum of three pounds, as I have had a large quantity of bones this week, and the man from Coleford is coming in to-morrow with 10 cwt. weight. I have about one ton now.

"Yours,

THOMAS DAVIS."

"Mr. E. Fisher, Lanwarne,"

with intent to defraud J. E. Fisher. The instrument was described in all the succeeding counts generally as an order for the payment of money. Upon the trial, it appeared that the prisoner had written the letter and forged the signature of Davis thereto, and that Fisher, on the faith of its being genuine, had paid the 3*l.* to the bearer of the same. Davis was a waterman living at Monmouth, and was in the habit of collecting bones throughout the adjoining country, and sending them to Fisher as he collected them, generally by a waggon-load or three tons at a time. Davis did not wait till he had delivered the bones, before he got paid, but drew upon Fisher as he was collecting the bones, but at the time the letter was written Davis had overdrawn, and had no money due to him from Fisher, The jury found the prisoner guilty, but a doubt occurred to Lord C. J. Tindal, whether this could be considered an order for the payment of money within the meaning of the 1 Wm. 4, c. 66, s. 3, and his Lordship submitted that question to the consideration of the Judges, and all the Judges present agreed that this was not an order for the payment of money, the party who made the order not having any right or power to make it. (*p*)

(*n*) Foster, 119, *ante*, p. 516.

(*o*) Rex *v.* Baker, R. & M. C. C. R. 231. Park, J. A. J. was absent.

(*p*) Reg. *v.* Thomas Roberts, Monmouth Sum. Ass. 1842, and Mich. T. 1842. Alderson, B., Patteson, J., and Coleridge, J., were absent. This report is taken from the case submitted to the learned Judges, with which the editor was favoured by the Lord Chief Justice. Reg. *v.* Rogers, *ante*, p. 378, was referred to before the Judges, where an indictment for forging a warrant for the payment of money under similar circumstances was held sufficient, because the instrument would have been a voucher for the payment. Upon Reg. *v.* Rogers being cited at the trial, Tindal, C. J., said, "In that case the instrument

A charge of forging an order for the payment of money is supported by proof of a foreign letter, requesting a correspondent of the supposed writer in England to advance money, it being proved that such letters are in the course of business treated as orders. The prisoner, a German, went to Messrs. Rothschild with the following letter, purporting to come from Cologne from Messrs. Schaaffhausen, who were correspondents of Rothschild, whose house had money of S. in their hands. He presented himself as Dr. F. A. Stern.

A foreign letter requesting a correspondent to advance money may be stated to be an order, if such letters are so treated in the course of business.

"*Cologne, 23rd March,* 1838.

"Gentlemen,—I beg to introduce to you Dr. F. A. Stern, who intends stopping some time in England for scientific purposes. You would therefore much oblige me, if you could acquire him the necessary access to public buildings, such as libraries, &c. I also request you, in case he should be at any time in want of money, to pay him at his desire to the extent of £60. sterling, as he is accredited with me, and I am consequently prepared to pay such an amount against his receipt. It will in similar cases be my zealous endeavour doubly to outweigh all the kindness you may be pleased to show him, and I have the honour to remain, &c.

"A. SCHAAFFHAUSEN."

When the prisoner presented this letter, he described himself as the Dr. Stern therein mentioned, but at that time no money was paid him: but in two days he called for 30*l.* and it was paid him on the credit of the letter. He brought the following receipt with him, "For account of Mr. A. S. of Cologne, to have received of Rothschild and Sons the sum of 30*l.* Attests "Dr. F. A. Stern." He again went in two days more with another receipt for 30*l.* more, and got that money; 60*l.* altogether. It was proved that when such a paper as this letter is brought to Messrs. Rothschild from a correspondent, who has money in their hands, the person who brought it is paid whatever he claims, not exceeding the amount mentioned. If such person does not require the whole, the house write upon the letter whatever is paid, and they consider such a document exactly as they would a bill of exchange, and equally obligatory on them to pay to the extent of the fund in hand. The question was, whether the above document was a warrant or order for the payment of money, within the 1 Wm. 4, c. 66, s. 3: and, upon a case reserved, the Judges were unanimously of opinion that the facts with the paper warranted their considering this document as an order. (*p*)

An order to pay a sum in advance of an intended voyage.

An instrument containing an order to pay the prisoner or order a sum of money, being a month's advance on an intended voyage, as per agreement with the master, in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, is an order for the payment of money, within the 1 Wm. 4, c. 66, s. 3. The prisoner was indicted for uttering the following order for the payment of money:—

was charged as a warrant. The doubt I feel is whether such an order as this made upon a person when there are no funds in his hands, is an order within the statute. Suppose Fisher had said, "I will not pay the money, I will have the bones first," Davies would have had no remedy against him. A banker who had money in his hands could not say so. The question is whether this instrument is an order for the payment of money. It might be a very good warrant for the payment of it." MSS. C. S. G.

(*p*) Reg. *v.* Raake, 2 Moo. C. C. R. 66. 8 C. & P. 626.

"*Port of London, May 1st.*, 1834.
"Three days after the ship Mary Ann sails from Gravesend, please to pay to Wm. Bamfield or his order the sum of four pounds five shillings, being a month's advance in part of wages of an intended voyage to Quebec in the ship hereinbefore mentioned, as per agreement with your obedient servant.
"G. MARTIN, Master."
"To R. Ray, Esq.
"No. 48, Fore Street, City."

"On receiving this check I agree to sail in the ship Mary Ann, and to be on board within sixteen hours from the date of this check."
"May 1st."

with intent to defraud E. Child and another. The prisoner was convicted, subject to the opinion of the Judges whether the order set forth in the indictment were an order for the payment of money within the meaning of the 1 Wm. 4, c. 66, s. 3, and at a meeting of all the Judges, (except Lord Lyndhurst, C. B., Park, J. A. J., and Bolland, B.) this case was considered, and the conviction was unanimously held good. (*q*)

Where an indictment states the sum mentioned in a forged order, it is no variance that by the course of business the bank where it is payable would pay that sum together with interest. *Quære* whether the sum stated is material.

Where the sum mentioned in an order for the payment of money, is truly stated in an indictment, it is no variance that by the course of business of the bank where the order is payable, the bank would pay that sum together with the interest then due upon it. An indictment contained eight counts, of which the following only became material. The third count charged the prisoner with feloniously forging "a certain warrant and order for the payment of money, (to wit,) a warrant and order for the payment of 85*l.*" The sixth count described the instrument as "an acquittance and receipt for money, (to wit) for 85*l.*" The seventh and eighth counts were for uttering forged instruments described as in the third and sixth counts. It appeared that John Mann, in June, 1839, had deposited the sum of 85*l.* in the hands of Jonathan Backhouse and others, who constituted the Darlington Bank at Stockton, and that on that occasion he received from the bank an accountable receipt in the following form :—

"This receipt not transferable."

"No. F. 266. Darlington Bank, Stockton.
12th. 6 M. 1839.
Received of John Mann
Eighty-five Pounds
to his credit
For Jonathan Backhouse & Co.
FREDERICK BACKHOUSE."
"£85.
"Entered, F. B."

In October, 1840, the prisoner having this receipt in his possession, went to the bank, and representing himself to be John Mann therein mentioned, wrote the words "John Mann" on the face of the receipt, and delivered it to the bankers, who paid him the sum of 87*l.* 17*s.* 6*d.*, being the amount mentioned in the receipt with

(*q*) Rex *v.* Bamfield, R. & M. C. C. R. 416

interest. By the course of dealing between the bankers and their customers, interest was payable on their accountable receipts, and the bankers on having a receipt delivered back to them with the name of the party who had deposited written upon it by him, treated it as an order for the payment of the amount deposited with the interest then due, and paid such amount and interest accordingly. It was objected, that on the evidence these counts were disproved; that the document itself, independent of the evidence, had no meaning, and that the evidence showed it to be an order or warrant, not for 85*l.*, but for 87*l.* 17*s.* 6*d.* For the prosecution it was submitted, that it was not necessary to state the amount at all, and that being stated under a *videlicet*, it need not be proved precisely; and, upon a case reserved, after a verdict of guilty, upon the question whether the evidence supported the third, sixth, seventh, and eighth counts, or either of them, the Judges held the conviction right. (*r*)

A prisoner convicted or confessing an indictment for uttering a forged order ought not to have judgment passed, if it appears that the person whose name is forged had no authority to order, and the writing merely purports a request.

The prisoner was indicted for uttering a forged order for the delivery of goods, which was set forth as follows:—

"*July* 11, 1838.

"Mr. Lang, please to send one piece of lead by the bearer, 12 long 16 wide.

"GEORGE KILBY, Queenborough."

with intent to defraud, &c. The prisoner pleaded guilty; on looking into the facts, it occurred to Bosanquet, J., that they did not show any right in Kilby to make an order on Lang for the delivery of lead, and that the instrument set forth in the indictment did not import anything more than a request, which Lang might or might not comply with, as he might think fit, and he respited the sentence in order to bring the case under the consideration of the Judges, who held the conviction wrong, and ordered a fresh indictment to be preferred for forging, &c. a request for the delivery of goods, under the 1 Wm. 4, c. 66, s. 10. (*s*)

We have seen that it has been held that where an indictment describes a warrant for the payment of money, under the 2 & 3 Wm. 4, c. 123, s. 3, averments to show what the instrument is, are not necessary, but it is matter of evidence whether the instrument comes within the description given of it by the indictment. (*t*)

If the character of an instrument be such as to be both a warrant and order, it may be so described in an indictment.

We have also seen, that an instrument may be described as a warrant *and* order, if the instrument be in fact both a warrant and order; a warrant authorizing the banker to pay, and an order upon him to do so. (*u*) And in a late case, where the prisoner was indicted for stealing four post-office money orders, which were described in some counts as "warrants and orders for the payment of money," and it was objected that such description was not correct, because it was uncertain; the Judges, upon a case reserved, were all of opinion that what was meant by the indictment was, that the prisoner stole four instruments, or four valuable securities, each of which was both a warrant and order, and putting that construction upon the indict-

(*r*) Reg. *v.* Atkinson, 1 C. & Mars. 325.

(*s*) Reg. *v.* Newton, 2 Moo. C. C. R. 59.

(*t*) Reg. *v.* Rogers, 9 C. & P. 41, *ante*, p. 378.

(*u*) Rex *v.* Crowther, 5 C. & P. 316. See also Reg. *v.* Atkinson, *supra*.

ment, they were of opinion that the instrument stolen was a warrant and order. They were of opinion it was an order as well as a warrant, because assuming the post-master had paid the order, the document itself delivered up to him would be a warrant, which would be a discharge from the person to whom he had to account for the post-office money. Therefore they were of opinion that the counts of the indictment were not uncertain, meaning that these instruments had both characters. (*u*)

As to the specification of the goods in the order.

With respect to the form of the order in other respects, it appears not to be necessary that the particular goods should be therein specified, provided it be conceived in terms intelligible to the parties themselves, to whom such order is addressed.

Jones's case. Order in the following form: "Please to deliver *my work* to the bearer."

In a case where the prisoner had been convicted of forging an order for the delivery of goods to the following purport: "Sept. 23rd, 1764. Sir, please to deliver my work to the bearer,—Lydia Bell, Fleet-street, London," with intent to defraud the wardens and company of goldsmiths; and it appeared that the goods in question were articles of plate, which had been sent by Messrs. Bell, a silversmith, to Goldsmiths' Hall, to be marked; and that the form of the order was the same as was usually sent upon such occasions, except that in strictness, and by the rule of the plate office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it; the Judges affirmed the conviction upon reference to them, after a motion in arrest of judgment. But the prisoner was pardoned on condition of transportation. (*v*)

An order not available by reason of some collateral objection may yet be the subject of forgery.

The order will not be the less the subject of forgery, on account of its not being available by reason of some collateral objection, not appearing upon the face of it. Thus, where the prisoner had been convicted for forging an order for the payment of prize-money, and it appeared that the party whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable; under which circumstances his genuine order would not have been valid, by the provisions of the 32 Geo. 3, c. 34, s. 2, unless made in the manner therein prescribed; the Judges held the conviction to be proper, the order itself purporting on the face of it to be made at another place beyond the limited distance. (*w*)

Requests for the delivery of goods.

In consequence of certain forged instruments having been held not to come within the words "warrant" or "order" in the 7 Geo. 2, c. 22, now repealed, (*x*) the word "request" has been introduced into the 1 Wm. 4, c. 66, and the following cases have been since decided relative to requests for the delivery of goods.

A request for the delivery of goods need not be addressed to any particular person.

An indictment for forging and uttering a request for the delivery of goods, set out the request in each count in the words and figures following:—

"Gentlemen,

"Be so good as to let the bearer have 5½ yards of blue to pattern, and to send the drab cloth up, in the whole piece, on Monday morn-

(*u*) Reg. *v.* Gilchrist, 1 C. & Marsh. 224.

(*v*) Jones's case, 1764, 1 Leach, 53. 2 East, P. C. c. 19, s. 39, p. 941.

(*w*) M'Intosh's case, 1800, 2 East, P. C. c. 19, s. 39, p. 942. 2 Leach, 883. *Ante*, p. 353. The same case is cited for another point, *ante*, p. 515. See Reg. *v.* Pike, 2 Moo. C. C. R. 70, *ante*, 353.

(*x*) See the cases, *ante*, p. 516.

ing, by 10 o'clock; also a yard measure, as I do not know what quantity will be wanted, and you will oblige

"W. READING, Mortimer-street."

"N. B. Let the drab be good, as it is for the inspection of a gentleman."

The jury found the prisoner guilty, and, upon a case reserved upon the question, whether as the request was not addressed to any individual person by name or description, the request set out in the indictment was a request for the delivery of goods within the words and true intent of the statute, the Judges present held the conviction right. (*x*)

Same point as in the last case. An instrument merely specifying the goods may be shown to be a request by the custom of the trade.

So where the prisoner was indicted for forging a request for the delivery of goods with intent to defraud Messrs. Warner and Co., and the instrument forged was as follows:—

"Aug. 3, 1839. One 16 in. helmet scoop; one 4 quart oval kettle.

"JAS HAYWARD."

And it was proved that the prisoner had been in the employ of Hayward, an ironmonger, who had had dealings for some years with Messrs. Warner, and that once or twice, during the time the prisoner was in Hayward's employ, he had taken orders from him to Messrs. Warner. It was also proved by a person, who managed the business of Messrs. Warner, that it was the custom of their business to deliver goods on such papers as the one in question; it was constantly done every day, and being asked by the court whether he had done so as between the firm and Hayward, the witness replied, "certainly; it is the ordinary form of a request to deliver goods to Mr. Hayward, or to any body." Upon a case reserved upon the question, whether such a paper amounted in law to a request for the delivery of goods within the meaning of the statute, the Judges were of opinion that it did, although it was not addressed to any one. (*y*)

A request purporting to be signed by a customer of a tradesman is within the statute.

The prisoner was indicted for forging and uttering a certain request for the delivery of goods, which is as follows:—

"To Mr. Edwards, Southgate-street, near the Cross.

"Please to let bearer, William Gof, have spillshoul and grafting tool for me,

"EDWARD RICKETTS, of Stantway."

The prisoner went to the shop of Mr. Edwards, an ironmonger, and presented the paper to his shopman, who, knowing Mr. Ricketts of Stantway, allowed the prisoner to select a spade and grafting tool from his master's stock. It was objected that this was not a request within the meaning of the 1 Wm. 4, c. 66. In the cases of warrants and orders it had been decided that the party must have a right to dispose of, or an interest in, the property, and the requests intended to be made the subject of forgery were requests for the delivery of goods, in which the party had at least an interest; but it was held that this was a forged request for the delivery of goods within the statute. (*z*)

(*x*) Rex *v.* Carney, R. & M. C. C. R. 351. Tindal, C. J., Lord Lyndhurst, C. B., and Taunton, J., were absent.

(*y*) Reg. *v.* Pulbrook, 9 C. & P. 37.

(*z*) Reg. *v.* James, 8 C. & P. 292. Gurney, B., referring to Rex *v.* Carney. *supra*, note (*x*).

The supposed writer of a request need not have any authority over or interest in the goods, nor need the goods be specified in the request.

A forged letter requesting a tradesman to deliver goods to A. B. on his credit, and vouching for his ability to pay, may be described as a request within the 1 Wm. 4, c. 66, s. 10, though the supposed writer have no authority over or interest in the goods, and A. B. only be looked to for payment. The indictment stated that the prisoner uttered a certain forged request for the delivery of goods, which is as follows:—

"May 24, 1836.

"Sir,

"I beg to inform you that the thing is right and true. Please to let W. Thomas have such things (meaning thereby certain goods which the said W. Thomas then and there wanted) as he wants for the purpose.

"Sir, I have got the amount of seven and twenty pounds for Maria Cole in my keeping this many years.

"I am your servant,

"ANN DAVIES."

with intent, &c. A second count charged the uttering a certain forged request from one Ann Davies, for the delivery of certain goods to him the said W. Thomas, with intent, &c. The prisoner had come into the shop of the prosecutor Clare, and asked him if he knew Maria Cole of Prendergast. Being answered in the affirmative, he said she was dead, that he was her son-in-law, that she had left 50*l.* or 60*l.*, and that he wanted black. Clare asked him if he meant to pay for it; he said he had not the money, but it was very safe. Clare however refused, observing that he was a stranger to him, upon which the prisoner said, "It's very safe. It's in the hands of Mrs. Davies of Prendergast." Clare knowing her, and knowing her to be a respectable person, said, "if you will get me her order for the goods you shall have them." Upon this the prisoner went away, and in half an hour returned with the note set out in the first count in the indictment; upon the production of which he was furnished with such mourning things as he required, which were put down to his credit. The note was a forgery, and Mrs. Davies had no money of Maria Cole's in her keeping. Coleridge, J., had doubts whether the paper-writing was properly a request for the delivery of goods within the meaning of the statute, and whether the charge ought not to have been for obtaining goods under false pretences, because Ann Davies had not, nor was supposed to have, any authority over, or interest in, the goods obtained, because the note did not purport in any way to charge, nor did it charge, her credit, and because the goods were supplied on the prisoner's own credit, and he liable for them. The prisoner's counsel also suggested that no goods were specified. But upon a case reserved, the Judges present were unanimously of opinion that the instrument was correctly set out as a request, and the conviction was affirmed. (*a*)

An instrument may be a request for the delivery of goods within the statute, although it is also an undertaking to pay for them.

(*a*) Rex *v.* Thomas, 2 Moo. C. C. R. 16. 7 C. & P. 851. Lord Abinger, C. B., Williams, J., and Coleridge, J., were absent. *Qu.* whether the innuendo in the first count be not too large, there being no introductory averments. C. S. G.

The indictment charged the prisoner with forging and uttering "a certain forged request for the delivery of goods," which was as follows:—

An instrument may be a request, although it be also an undertaking to pay for goods.

"Mr. Turner,—Please to let the lad have a hat, about 9*s.*, and I will answer for the money."

"ED. BARRETT."

and it was contended that this was not a request for the delivery of goods, but a guarantee for the payment of the price; and, if it were the subject of forgery at all, it should have been charged to be an undertaking for the payment of money; but Gurney, B., held that this instrument was not the less a request for the delivery of goods, because it might also be an undertaking for the payment of money. (*b*)

A request for the payment of money is not within the 1 Wm. 4, c. 66.

The 1 Wm. 4, c. 66, makes no provision at all for forging a request for the payment of money, and such a request cannot be described as an undertaking, warrant, or order for the payment of money. Upon an indictment for forging and uttering an instrument, described in different counts as an order for the payment of money, a warrant for the payment of money, and an undertaking for the payment of money, it appeared that the prisoner sent one Walker to Messrs. Seager's, with a letter and the following memorandum:—

Taunton,
Fore Street, } 20 *Feb.* 1841.

"Gentlemen,

"I shall feel obliged by your paying Mr. Bennett the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same. You will please have a receipt, and add the amount to invoice of order in hand.

"I am,
"Gentlemen,
"Your most obedient servant,
"T. D. CHAPPELL."

"Messrs. Seager, Evans, & Co. distillers, &c.
"10, *Milbank, Westminster.*"

Messrs. Seager and Evans had a customer at Taunton, named T. D. Chappell, and Mr. Seager proved that, supposing he had believed the memorandum to be the genuine handwriting of Mr. Chappell, he should have paid the money, and that it was the practice of their house, and in the course of business, to pay on these requests to country customers. It was objected, that this was not an offence within the 1 Wm. 4, c. 66, as the paper was neither an undertaking, warrant, or order for the payment of money, but at most only amounted to a request; and forging a request for money was not provided for; and the prisoner having been convicted, the Judges

(*b*) Reg. *v.* White, 9 C. & P. 282. In Reg. *v.* Robson, 9 C. & P. 423 (in which the only point decided is mentioned, *ante*, p. 373), the instrument was in form, "Please to forward as address below, soon as possible, three mourning rings, sizes O. P. Q., good weight and well finished; three or four gold guard curbs, the last you sent me were not as I like them; you may send one or two ladies' gold watches, fashionable patterns, I want them immediately," &c.; and it was taken for granted on all hands that this was a request for the delivery of goods.

held, upon a case reserved, that the conviction could not be sustained. (*b*)

Where the indictment sets out a request it must either purport to be a request on the face of it, or there must be averments to show that it is so.

Where an indictment for forging a request for the delivery of goods, sets out such request, either the instrument must purport on the face of it to be a request, or if the words have not necessarily that effect, but are so understood in the trade, there must be an innuendo to explain them. The prisoner was indicted for uttering a certain forged request for the delivery of goods, which is as follows;

"Per bearer,
"2 $\frac{11}{16}$ Counterpanes.
"T. DAVIES,
"88, *Aldgate.* "E. TWELL."

with intent to defraud J. Lanison and others, the prisoner well knowing the said request to be forged. The prisoner, who had been in the service of Mr. Davies as porter, went on the 19th of November, 1830, to the house of Messrs. Lanison & Co., and produced to Smith, their servant, the forged instrument in question. Smith, in consequence of the prisoner producing the paper, delivered the counterpanes to him. Davies was a customer of Lanison & Co. and lived at 88, Aldgate. Smith did not then know Twell; he gave credit to the signature of Davies; Twell was in the employ of Davies, and had authority from him, in his absence, to write an order for goods in his name in this form; but Twell had no authority to employ any other person to write the same. The paper produced was not the writing of Davies or Twell, nor signed by the authority of Davies. Mr. Davies said they generally wrote their orders "Send per bearer," or "per bearer," and that such orders as these are common in their business. It was objected, that the paper produced did not purport to be a request, within the meaning of the statute: no particular person was requested, nor was it directed to any particular person. The jury found the prisoner guilty, and said that they considered the paper as a request for the delivery of the goods mentioned in it, and that such papers were in trade so considered. But upon a case reserved upon the questions, whether the instrument was upon the face of it one of those instruments, namely, a request for the delivery of goods, the knowingly uttering of which is prohibited by the 1 Wm. 4, c. 66, s. 10, and particularly whether the want of any address was a valid objection; the Judges present were unanimously of opinion that the words "per bearer" did not necessarily import "send per bearer;" they might mean "I have sent per bearer," and that there ought to have been an innuendo to explain them. They seemed to think the address not necessary. (*c*)

The indictment must be for forging a request.

Where goods are obtained by a forged request, within the 1 Wm. 4, c. 66, the indictment must be for forgery, and cannot be for obtaining them by false pretences. The prisoner was indicted for

(*b*) Reg. *v.* Thorn, 1 C. & Marsh. 206. The prisoner was afterwards convicted of a fraud.

(*c*) Rex *v.* Cullen, R. & M. C. C. R. 300. This case is also reported in 5 C. & P. 116, and it is there stated that the indictment contained a count calling the instrument a forged order, and that the Judges held that the instrument was neither an order nor a request within the 1 Wm. 4, c. 66, s. 10. See Reg. *v.* Pulbrook, *ante*, p. 527. In such a case there should at all events be one count describing the request in the manner adopted in Reg. *v.* Robson, *ante*, 373. C. S. G.

obtaining goods by means of the following false and counterfeit letter:—

"Mr. Brooks,—Please let the bearer, William Turton, have for J. Roe, four yards of Irish linen and a waistcoat.

"JOHN ROE."

"*Jan.* 6, 1833."

Taunton, J.—"This is a forged request for the delivery of goods. This case comes within the 10th sec. of the 1 Wm. 4, c. 66. It is clearly an uttering of a forged request for the delivery of goods. It is a felony, and not a misdemeanor." (*d*)

A conditional undertaking to pay money is within the 1 Wm. 4, c. 66, s. 3.

A written promise to pay a sum specified, or such other sum, not exceeding the same, as A. B. may incur by reason of a suretyship, is an undertaking to pay money within the 1 Wm. 4, c. 66, s. 3. The indictment charged the prisoner with forging an undertaking for the payment of money, in the following terms;—

"*York*, 13*th February*, 1837.

"£100. I promise to pay Mr. W. Bellerby or order, the sum of one hundred pounds, or such other sum of money, not exceeding the same, as he may incur, or be put unto, for or by reason or means of his becoming one of the sureties of Mark Milbank, Esq., sheriff-elect for the County of York, for the year ensuing, for John Reed of this city, sheriffs' officer.

"VAL. WILSON."

It was submitted for the prisoner, that this was not an undertaking for the payment of money, within the 1 Wm. 4, c. 66, s. 3, as it was not an absolute undertaking to pay any particular sum of money, but only an indemnity to an uncertain amount, not exceeding 100*l.*, and unless the officer misbehaved, which the law would not presume, it was no undertaking to pay any money at all. But upon a case reserved, the Judges present were unanimously of opinion that the instrument was an undertaking for the payment of money, within the statute. (*e*)

The jury may find that the prisoner intended to defraud one partner where the forged instrument is uttered to him in the absence of another partner.

Where a forged instrument is uttered to one of two partners in the absence of the other, the jury may find in some cases that the intent was to defraud the partner, to whom the instrument was uttered. The prisoner was indicted for uttering and forging a bill of exchange, with intent to defraud J. Leadbitter; with respect to the intent to defraud, it appeared that Leadbitter had been employed by the prisoner, then the owner of a mill, to make a mill dam, and that Leadbitter had a partner named Stansfield, who, however, took no active part in the business, although he was known to be a partner by the prisoner. Leadbitter, who had superintended the work, applied to the prisoner for payment, and the prisoner paid Leadbitter money on account; and afterwards, instead of making a further money payment, gave him the bill in question: Stansfield was not present when the bill was so given. Leadbitter indorsed the bill in his own name only, and afterwards delivered it to Stansfield, asking him if he could make any use of it; Stansfield afterwards paid it away, indorsing it also

(*d*) Rex *v.* Evans, 5 C. & P. 553. See Rex *v.* Carter, 7 C. & P. 134, *ante*, p. 366.

(*e*) Reg. *v.* Reed, 2 Moo. C. C. R. 62, 8 C. & P. 624.

with his own name. It was submitted that Leadbitter and Stansfield being partners, and the prisoner knowing that they were so, the intent of the prisoner must be taken to be the legal consequence of his own act, which was the defrauding the two partners, and that there was therefore a variance between the intent laid and the intent proved. It was answered, that the intent of the prisoner was a question for the jury, and on the facts proved, the jury might infer that the prisoner intended to defraud Leadbitter alone, with whom he had had dealings, and even if he did also intend to defraud both partners, he might be not the less guilty of intending to defraud the one only to whom he actually uttered the instrument. Wightman, J., left it to the jury, to say whether the prisoner intended to defraud Leadbitter alone, and they found that the prisoner did intend to defraud Leadbitter alone; and, upon a case reserved, the Judges held the conviction right. (*f*)

Many other points which have arisen upon indictments framed upon the statutes mentioned in this chapter, being of general application, have been already noticed in the chapter treating generally of the subject of forgery. (*g*)

1 Wm. 4, c. 66, s. 17. Making or having in possession any mould for manufacturing paper, with the name of any bankers appearing in the substance; manufacturing or having such paper, or causing the name to appear in the substance of any paper.

The 1 Wm. 4, c. 66, s. 31, repeals the 41 Geo. 3, c. 57, and so much of the 43 Geo. 3, c. 139, "as in anywise relates to any foreign bill of exchange, or foreign promissory notes, undertaking or order for the payment of money," and by sec. 17, enacts, "that if any person shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the Bank of England) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or if any person shall without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers shall appear visible; or if any person shall, without such authority, to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers to appear visible in the substance of the paper upon which the same shall be written or printed; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*h*)

(*f*) Reg. *v.* Hanson, 1 C. & Marsh. 334. This case was not published till chap. 32, s. 3, had been printed, or it would have been inserted in that section. C. S. G.

(*g*) *Ante*, p. 319, *et seq.*

(*h*) See the general provisions of this act, *ante*, p. 408, *et seq.* As to principals in the second degree, accessories, hard labour, and solitary confinement, see *ante*, p. 410.

By sec. 18, "if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate, or company carrying on the business of bankers, (other than and except the Bank of England,) without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or company carrying on the business of bankers, without such authority, to be proved as aforesaid; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling, or apparently intended to resemble, such subscription, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble, any such subscription, shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*i*)

1 Wm. 4, c. 66, s. 18. Engraving on any plate, &c., any bill of exchange or promissory note of any bankers, or any words resembling the subscription subjoined thereto, or using any such plate; or uttering or having any paper upon which any part of any such bill or note shall be printed; transportation for 14 years, &c.

The prisoner was convicted at the Central Criminal Court, upon an indictment founded on the 1 Wm. 4, c. 66, s. 18, which charged that he feloniously knowingly and without lawful excuse, had in his custody and possession a certain copper plate, upon which was engraved part of a certain promissory note for the payment of money, purporting to be a part of a promissory note of a certain company of persons carrying on the business of bankers in a certain country under the dominion of her Majesty, that is to say, in the province of Upper Canada in North America, under the name and style of the president, directors, and company of the Bank of Upper Canada, the said company of persons being other than the Bank of England, which said part of a promissory note is as follows:—

Having in possession the plates of bankers in Upper Canada, is within the preceding section.

"Ten 10 X No. "Ten X C Ten.

"Chartered by Act of Parliament.

"The president, directors, and company of the Bank of Upper Canada promise to pay ten dollars on demand to the bearer for value received.

"Cashier. "President.

"Ten "X

"Toronto 18." "Ten"

(*i*) See the last note.

The second and third counts were in the same terms, except that the second described the note as a promissory note for the payment of money of a certain body "corporate," and the third as a promissory note for the payment of money of W. Proudfoot and others. The prisoner within the jurisdiction of the court, procured a copper plate to be engraved with the words and figures set out in the indictment, which are part of the form of the promissory notes, used and circulated by the Bank of Upper Canada; the plate so engraved was received by the prisoner under circumstances pregnant with suspicion that it was obtained by him for a fraudulent purpose. W. Proudfoot was the president, and T. G. Ridout the cashier of the Upper Canada Bank, the notes of which are usually signed by those persons, and the prisoner had endeavoured to obtain from another engraver a facsimile of their signatures, which he had cut off from the Toronto note produced by him to the first engraver. It was contended that sec. 18, of the 1 Wm. 4, c. 66, upon which alone the indictment could be supported, did not extend to notes of companies carrying on business within her Majesty's dominions out of England, though the offence were committed within the jurisdiction of the Central Criminal Court; but after full argument upon a case reserved, the Judges were all of opinion that the offence charged was within the statute, except Parke, B., Alderson, B., and Coleridge, J., who entertained some doubt, and the conviction was affirmed. (*j*)

Upon an indictment on the 41 Geo. 3, c. 57, s. 2, (now repealed) which charged the prisoner with having in his custody a plate on which was engraved part of a promissory note, purporting to be the promissory note of a body corporate called the *British Linen Company*, it was objected that it was not an offence within this statute, to have in custody a plate for making notes, &c., in the name of such company, though it appeared that they carried on business as bankers, because they were incorporated for a purpose entirely different, viz., that of carrying on a linen company; and it was also objected, that the indictment was bad, as it omitted to aver that the company carried on the business of bankers, which the act required. The objections having been reserved for the consideration of the Judges, they seemed to be of opinion that the first objection was fatal; and were all of opinion that the indictment was bad, for the reason stated in the second, and that judgment should be arrested. (*k*)

1 Wm. 4, c. 66, s. 19. Engraving plates, &c., for foreign bills or notes; using or having such plates, or uttering any paper on which any part of such foreign bill or note may be printed, transportation for 14 years, &c.

The 1 Wm. 4, c. 66, s. 19, enacts, "that if any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order, of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or

(*j*) Reg *v.* Hannon, 2 Moo. C. C. R. 77. 9 C. & P. 11.

(*k*) Rex *v.* Catapodi, January, 1804, Russ. & Ry. 65.

of any person or company of persons resident in any country, not under the dominion of his Majesty, without the authority of such foreign prince or state, minister, or officer, body corporate or body of the like nature, person or company of persons, the proof of which authority shall lie on the party accused; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession, any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year." (*l*)

On an indictment against several prisoners for using plates, the jury must select one particular time when the prisoners were either present or assisted at one act of using the plates. If an indictment contain counts for engraving, and counts for using plates, the prosecutor must elect on which he will proceed.

Where prisoners are jointly indicted for feloniously using plates containing impressions of forged notes, the jury must select some one particular time after all the prisoners have become connected, and must be satisfied that at such time they were all either present together at one act of using, or assisted in such one act; and it is not sufficient to shew that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. The indictment charged Balls, Moses and Harris, in some of the counts, with engraving on a certain plate, in the Polish language, a certain note for the payment of money; in other counts with feloniously using the plates, on which the notes were engraved. At the close of the case for the prosecution, Littledale, J., required the counsel for the prosecution to elect, whether they would go on the counts for engraving, or the counts for using the plates, as they were quite distinct offences; and the counsel for the crown, admitting that there was no evidence of a joint engraving, relied on the counts for using the plates. It was then objected for the prisoners that there was not any evidence of a joint using of the plates. It was answered that there was evidence to go to the jury, as it was clear that Balls had the plate at one time and Moses at another, and that Harris was active in bringing the parties together, so that Flaum might have the impression. Any act traced to one was traced to all; and the question was, whether the notes were not struck off with the joint consent of all the parties. Littledale, J., in summing up, said, "In a case of felony, you can only go upon one act committed. There is very great difficulty in this case for you to know which act the prosecutor relies on, all these things being done at different times. The prosecutor does not fix on any particular day; if you find that at any one time, all three did concur in using the plates, then you may find them guilty. There are four different times at which

(*l*) See the general provisions of this act, *ante*, p. 408, *et seq.* As to the principals in the second degree, accessories, hard labour, and solitary confinement, see *ante*, p. 410.

notes were taken. As to what has been said about these parties being general dealers, it is not sufficient; they are not indicted one for doing the act, and the others as accessories before the fact, but are all charged as principal felons. There may be cases in which acts done at different times may be evidence of a joint using, as, for instance, if one were to find the plate, and one the paper, and one to do the work, I should say it was a joint using, but there is no evidence of that sort here. There is no evidence that by common concert these parties did such things. If one struck off the impressions, and the others wished him to do it, and shared in the profits, that would not make them principal felons. As this is an indictment against all three, you must be satisfied that they were all three present at one time, or assisting in some way at that time, either by watching at the door or something of that sort. Having the notes in possession is not sufficient evidence of having used the plate; as in the case of forgery, uttering is not sufficient evidence of having forged. Balls, it seems, had the plate a year before, but that is no evidence under this indictment, as the using under it must be since August, 1835, as Harris and Moses do not come on the stage till that time. The only evidence against Harris is the negotiations he entered into with Saltzman and others respecting this note; there is no proof of his having the plate in his possession. Moses had it in his possession, and he is proved to have said before that he had the plate, and could print as many as he liked; this may be something like evidence of a using, on his part, of the plate. It does not seem to me that there is any evidence to prove a joint using at any one time, which, in my opinion, is necessary to prove this indictment: you may find two of them guilty, or one of them guilty, or all three of them guilty." (*m*)

Upon an indictment against several for engraving plates, a joint employment of the engraver must be proved, but it is not necessary that all the prisoners should be present when the order is given. *Semble*, that if persons cause plates to be engraved, they are within the 1 Wm. 4, c. 66, s. 19, whether they know the

Upon an indictment against several for engraving plates, under the 1 Wm. 4, c. 66, s. 19, the jury must be satisfied that they jointly employed the engraver, but it is not necessary that they should all be present when the order was given: it is sufficient if one first communicated with the others, and all concurred in the employment of the engraver. Mazeau, Ramuz, and Rault, were indicted for feloniously engraving and making upon two plates two parts of a promissory note for 25 rubles, of Nicholas, Emperor of Russia, and it appeared that Ramuz and Mazeau had for some time been acquainted with an engraver, of the name of Salt, and that on the 9th of August, 1840, Mazeau went to Salt and showed him two Russian notes, and had some conversation with him about engraving some plates, and some days after Mazeau came again, accompanied by Ramuz, and both told Salt that he was to go on with the engraving, and both gave him some money, and they both came together to him frequently during the progress of the work. The evidence against Rault was, that when Salt took the print, Mazeau told him that the man they were executing the order for was present in their

(*m*) Rex *v.* Harris, Balls and Moses 7 C. & P. 416, *cor.* Littledale, J., and Gaselee, J. The facts proved on the trial are not stated in the report, and although there is a reference to Rex *v.* Balls, 7 C. & P. 426, for the principal facts of the case, the statement there does not contain any of the most important facts alluded to by the learned Judge in his summing up. For other points decided in other cases against the same prisoners, see Rex *v.* Warshaner, R. & M. C. C. R. 466, *ante*, p. 373. Rex *v.* Harris, Moses and Balls, *ante*, p. 375. Rex *v.* Balls, R. & M. C. C. R. 470, *ante*, p. 405, 406.

house in the parlour; in consequence of this, Salt watched outside the door after he left, and saw Rault come out of the house. Salt had also seen Rault several times during the progress of the engraving: he had seen him in conversation with Mazeau and Ramuz. Mrs. Salt, who knew the three prisoners, had seen two of them a great many times, but one not so often as the other two. She only saw the three prisoners together once, and that was on the day that they were taken into custody; they were standing talking together, close to Salt's window. On Rault's apprehension, some proofs from the plate and a Russian passport were found upon him. It was submitted for Rault, that there was not any act proved to have been done by him jointly with Mazeau and Ramuz, so as to make him guilty of the charge laid in the indictment; that there must be a joint employment of Salt by all the three prisoners; and that in order to make out such joint employment, it was necessary to show that all three were present at the time the order was given. Patteson, J.—"I quite agree that there must be a joint employment, and that all these three persons cannot be convicted on this indictment, unless the jury think that they jointly employed Mr. Salt. But I do not go along with the learned counsel, in saying that they must all three be present at the time when the order was given to Mr. Salt. I am of opinion, that if it be shown that two of them gave the order on behalf of themselves and another person, that other person being the other prisoner, he may be connected by some evidence with the employment. Whether there is such evidence in the case is a question for the jury; I cannot withdraw the case from their consideration." And in summing up, the very learned Judge said, "You cannot find all guilty, unless you are of opinion that they jointly employed Salt to make the engraving. If you are satisfied that Rault first communicated with the other two, and then that they all concurred in employing Salt, the three prisoners may be found guilty; but you cannot find Rault guilty if you think he employed the other two to get the plate engraved by any person, and they afterwards, of their own accord, employed Salt. You may acquit all or any one of the prisoners, if you are satisfied that they did not employ Salt. It is clear, under the words of the act of Parliament, and taking the evidence to be true, if Ramuz and Mazeau knew the nature of the instrument, that the case is brought home to them; and I am inclined to think, that if by Salt they engraved the plate, although they did not know the nature of the instrument, they are within the act; but I am not confident of that, and shall ask you to say, whether you think they knew the nature of the instrument which they employed Salt to engrave. With respect to the guilt of Rault upon this indictment, the evidence is certainly not so cogent. He is not brought forward until a very late period, long after the order had been given by the other two prisoners, when he is seen coming out of their house, and he is subsequently seen in their company. When he is apprehended, he gives his address in Portland Street, and at that address, in the room he occupied, the first proof of the plate is found, and other proofs are also found upon him. These circumstances, however, do not clearly lead to the inference that you must arrive at, before you can pronounce him guilty on this indictment: for, to make him answerable for the offence now charged, you must be satisfied that he was a party con-

nature of the instrument or not.

cerned in giving the order originally to Salt. For that purpose, it seems to me, the evidence is but slight; but should you think that he did originally instruct the other prisoners, and that by his authority they went and employed Salt, they may all be convicted. If you do not think that, Rault must be acquitted. You will therefore say, whether Ramuz and Mazeau knew what the contents of the plate were, and what the nature of the instrument was; and you will also say whether Rault was a party concerned in giving the original instructions to Salt." (*n*)

(*n*) Reg. *v.* Mazeau, 9 C. & P. 676. The jury found Mazeau and Ramuz guilty, and that they knew the nature of the instrument. With the greatest deference to the very learned Judge, it is submitted that it deserved consideration, whether supposing that Rault gave the order to Mazeau and Ramuz, and they in his absence gave it to Salt, who was an innocent agent, Rault was more than an accessory before the fact. If Rault had given the order to Ramuz and Mazeau, and they in his absence had themselves engraved the plate, it is conceived they would have been principals, and Rault an accessory before the fact; and it is submitted that this case is not varied by the act of an innocent agent, as that act is, according to all the authorities, just the same as if it was done by the party procuring it to be done. C. S. G.

CHAPTER THE FORTIETH.

OF FALSELY PERSONATING ANOTHER.

Offence at common law.

THE bare fact of personating another, for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such. (a) And the principal cases in which it has been considered as indictable have been laid as cases of conspiracy.

In a case where the prisoner had been acquitted on an indictment preferred against him for forgery, upon its appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person, (b) he was indicted again for the misdemeanor: but it is observed that this second indictment did not turn singly on the fact of such false personating for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as the cheat. (c) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction proceeded upon that ground. (d) And in a case where a cheat was effected by one person pretending to be a merchant, and another pretending to be a broker, we have seen that judgment appeared ultimately to have been given for the crown, on the ground that it was a case of conspiracy. (e) A case however is reported, in which the indictment only charged that the defendant personated a clerk to a justice of the peace, with intent to extort money from several persons, for procuring their discharge from misdemeanors for which they stood committed; and the Court refused to quash it upon motion, and put the defendant to demur to it. (f) But it is observed, that it might probably have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; that it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices. (g) How far the *refusal* to quash the in-

(a) 2 East, P. C. c. 20, s. 6, p. 1010.

(b) *Ante*, p. 326.

(c) 2 East, P. C. c. 20, s. 6, p. 1010. The defendants were convicted upon this second indictment.

(d) Rex v. Robinson and Taylor, O. B. 1746. 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010.

(e) Reg. v. Mackarty and Fordenbourgh, *ante*, p. 281.

(f) Dupee's case, 12 Geo. 1, 2 Sess. Cas. 11. 2 East, P. C. c. 20, s. 6, p. 1010.

(g) 2 East, P. C. c. 20, s. 6, p. 1011.

dictment upon motion can be considered as an authority is questionable; as we have seen that it was the practice of the Court, as often declared, not to quash on motion indictments for offences founded in fraud or oppression, though such indictments might appear not to be sustainable, but to leave the defendants to plead. (*h*)

Of the offence by statutes.

The offence of falsely personating another for purposes of fraud is so nearly allied to forgery, and so often blended with it, that these offences have been frequently included by the legislature in the same enactments, and made felonies alike subject to the same punishment. Many of the statutes, therefore, which relate to falsely personating, with a few cases determined upon their construction, have necessarily been introduced in the preceding chapters; as those concerning the personating the proprietors of public stocks, &c. (*i*) and the personating of soldiers and seamen, and their widows, &c. in order to obtain wages, pensions, prize-money, &c. (*j*) But the general provision of the 2 Wm. 4, c. 53, entitled "an act for consolidating and amending the laws relating to the payment of army prize money," may properly be introduced in this place.

2 Wm. 4, c. 53, s. 49. Personating and falsely assuming the name, &c., of soldiers or sailors, in order to obtain prize money, pay, pension, &c., felony.

That statute, by sec. 49, enacts, that "if any person shall knowingly and willingly personate or falsely assume the name or character or procure any other person to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier or other person entitled or supposed to be entitled to any prize-money, grant, bounty money, share or other allowance of money due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in his Majesty's army or in any other military service, or shall personate or falsely assume, or act, aid, or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character of the executor or administrator, wife, widow, next of kin, relation or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order to receive or to enable any other person to receive any prize-money, grant, bounty money, share or other allowance of money due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any such officer, non-commissioned officer, soldier, or other person as aforesaid; all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, as the Court before whom such person or persons shall be convicted shall adjudge." (*k*)

11 Geo. 4,

The 11 Geo. 4, c. 20, entitled "an act to amend the laws relating

(*h*) *Ante*, p. 283, note (*i*).
(*i*) *Ante*, p. 418, *et seq.*
(*j*) *Ante*, p. 473, *et seq.*
(*k*) The 2 Wm. 4, c. 53, contains no express provision for the punishment of accessories after the fact, consequently they are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448. See the remainder of sec. 49 of the 2 Wm. 4, c. 53, *ante*, p. 473.

to the pay of the royal navy," by sec. 84, enacts that "if any person shall falsely and deceitfully personate any commission, warrant or petty officer, or seaman, or commission or non-commissioned officer of marines or marine, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, seaman or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, half pay, prize-money, bounty money, pension or any part thereof, gratuity or other allowance for money due or payable, or supposed to be due or payable, to any such officer, seaman or marine, or to the wife or widow, relation, executor, administrator, or creditor of any such deceased officer, seaman, or marine, or any allowance to any person from the said compassionate fund, with intent to defraud any person whomsoever; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years." (*l*)

c. 20, s. 84. Personating officers, &c., of the navy.

Upon some of the former statutes relating to the false personating of seamen, it was decided, that as the false personating must be done in order to receive the wages, &c. of some seamen, &c. *entitled or supposed to be entitled thereto*, there must be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might *primâ facie* at least be supposed to be entitled to receive the wages, &c. attempted to be acquired. Thus where the prisoner was indicted on the 31 Geo. 2, c. 10, (*m*) for personating and falsely assuming the name and character of Wm. Wheeler, a person supposed to be entitled to prize-money, for service done on board his Majesty's ship Terpsichore, in order to receive certain prize money, &c. one of the objections taken after conviction was, that there was no evidence that Wm. Wheeler ever served on board the Terpsichore in any capacity; or, indeed, that any such person existed: and the Judges, after a conference, held that the conviction was wrong, there being no evidence that there was any such person as Wm. Wheeler, who either was entitled, or at least *primâ facie* entitled to prize money, as a seaman on board the Terpsichore. (*n*)

The personating must be of some seaman, &c., shown to have been in existence.

In a case upon one of the former statutes, 54 Geo. 3, c. 93, s. 89, the indictment charged the prisoner with personating and falsely assuming the name and character of one Joshua Boatwright, a seaman entitled to certain prize money; and it was proved that the prisoner applied at Greenwich Hospital for prize-money in the name of Boatwright; but it appeared that he did not obtain the money, and that Boatwright was then dead. The counsel for the prisoner objected, that to personate Boatwright under these circumstances, or to assume his name and character, was not an offence within the meaning of the act, which related only to existing persons; that after the death of Boatwright he could not be entitled to prize-money, but that the personal representatives or next of kin were

Personating and assuming the name of persons who were dead, held to be within the statutes.

(*l*) See sec. 88, and the 1 Vict. c. 90, s. 5, *ante*, p. 478, note (*k*), as to principals in the second degree, accessories, hard labour, and solitary confinement.

(*m*) Repealed by the 11 Geo. 4, c. 20.

(*n*) Brown's case, 2 East, P. C. c. 20, s. 4, p. 1007. S. P. in M'Annelly's case, ibid., p. 1009.

the persons entitled, and that in fact he was not supposed to be entitled to prize-money, since it was supposed at the prize-office that he was dead, and that his next of kin was in the course of obtaining administration in order to receive it. The prisoner was found guilty, and the point being reserved for the consideration of the Judges, they were of opinion that the conviction was right, and that the statute applied, though the seaman personated was dead. (*o*) So where the prisoner personated one Cuff, who was dead, and whose prize-money had been paid to his mother, the Judges were of opinion that a conviction upon the same statute was right. (*p*)

The personating must be of some person by his correct name, who was entitled, or supposed to be entitled, to prize-money, &c., and it must be so charged in the indictment.

In a case upon the 57 Geo. 3, c. 127, s. 4, the indictment charged the prisoner with wilfully and knowingly personating, and falsely assuming the name and character of Peter M'Cann, a person entitled to prize-money for and in respect of his services performed on board of a ship of his Majesty's called the Tremendous, in order to receive such prize-money, with intent to defraud the commissioners and governors of the Greenwich Hospital; and a second count described Peter M'Cann as a person supposed to be entitled, &c., for services supposed to have been performed. Upon the evidence it appeared by the prize list and muster-book of the Tremendous, produced by the proper officer from Greenwich Hospital, that there was a person of the name of Peter M'Carn entitled to prize-money, but no person of the name of Peter M'Cann. The learned Judge, by whom the prisoner was tried, inclined to direct an acquittal upon this variance in the name, but he ultimately left the case to the jury, directing them to say whether the prisoner intended to personate Peter M'Carn. The jury found that he did so intend, and returned a verdict of guilty; upon which judgment was respited, and the point reserved for the consideration of the twelve Judges, who were of opinion that the "personating" must apply to some person who had belonged to the ship, and that the indictment must charge a personating of some such person; and as that was not the case here, they held the conviction wrong. (*q*)

Aiders and abettors.

It was held upon the same statute, 57 Geo. 3, c. 127, s. 4, that all persons present aiding and abetting another in the personating and falsely assuming the name, &c., of a seaman, were principals, and that the offence was not confined to the individual only, by whom the seaman was personated. (*r*)

It remains now to mention the statute which relates to the acknowledging of deeds, bail, &c., in the name of another.

The 21 Jac. 1, c. 26, the 4 W. & M. c. 4, s. 4, and the 27 Geo. 3, c. 43, s. 4, which formerly provided for the punishment of these offences, are repealed by the 1 Wm. 4, c. 66, s. 31.

Fraudulently acknowledging any recognizance, bail, fine, recovery, or judgment,

But that statute by sec. 11, enacts, "that if any person shall, before any Court, Judge, or other person lawfully authorized to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, *whether such recognizance or bail in either case be or be not filed*; (*s*)

(*o*) Rex *v.* Martin, East. T. 1817, Russ. & Ry. 324.

(*p*) Rex *v.* Cramp, East. T. 1817, Id. 327.

(*q*) Rex *v.* Tannet, East. T. 1818. Russ. & Ry. 351. See Reg. *v.* Pringle, *ante*, p. 477.

(*r*) Rex *v.* Potts, East. T. 1818. Russ. & Ry. 353.

(*s*) The words in italics are new.

or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, (*t*) *cognovit actionem*, or judgment, or any deed *to be* enrolled; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years." (*u*)

in the name of another; transportation for life, &c.

In the construction of the 21 Jac. 1, c. 26, s. 2 (now repealed) it was holden, that the bare personating of bail before a Judge at chambers, or the acknowledging thereof in another name, was no felony, but only a misdemeanor, unless the bail were filed. (*v*) But yet it appears in one case that the offence was considered as complete by the personating; as, though the bail-piece was filed at Westminster, the trial was had in London, the county where the bail was personated. (*w*) It seems that if bail were put in under feigned names of persons who had no existence, the offender could not be prosecuted upon this repealed statute for felony. (*x*)

(*t*) Fines and recoveries are now abolished by the 3 & 4 Wm. 4, c. 74.

(*u*) See the general provisions of this statute, *ante*, p. 408, *et seq.*, and as to principals in the second degree, accessories, and hard labour and solitary confinement, see *ante*, p. 410.

(*v*) 1 Hale, 696. Timberley's case, 2 Sid. 90. 1 Hawk. P. C. c. 47, s. 5. 2 East, P. C. c. 20, s. 4, p. 1009. The words of the 21 Jac. 1, c. 26, s. 2, were "That all and every person and persons which shall acknowledge or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds inrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same," shall be adjudged felons. The words introduced into the 1 Wm 4, c. 66, s. 11, render it unnecessary for the recognizance or bail to be filed. C. S. G.

(*w*) Beesley's case, T. Jones, 64. 1 Hawk. P. C. c. 47, s. 4. But in 2 East, P. C. c. 20, s. 5, p. 1010, it is observed that according to the report of the same case in Ventris, (1 Vent. 301.) Twisden, J., said that it must be tried in Middlesex, where the bail-piece was filed; the entry being *venit coram domino rege, &c.*

(*x*) Anon. 1 Str. 384. 1 Hawk. P. C. c. 47, s. 6. But the court in this case ordered the bail and the attorney to be set in the pillory.

CHAPTER THE FORTY-FIRST.

OF MALICIOUS INJURIES TO PROPERTY.

We now come to the consideration of those injuries to property which proceed rather from malicious or wanton motives, than from any proposed gain to the offender. Injuries of this kind were made punishable by different statutes passed from time to time, as they appeared to be required for the protection of the community; but it has lately been deemed expedient that these statutes should be repealed, and that the provisions contained in them should be amended and consolidated into one statute, and accordingly the 7 & 8 Geo. 4, c. 30, was passed into a law.

The several enactments of this statute will be mentioned in the succeeding chapters, in such arrangement as may seem most appropriate; but its general provisions may be properly stated in the first instance.

Malice against the owner of the property not necessary in offences of this kind.

7 & 8 Geo. 4, c. 30, s. 25.

The 25th section enacts, that malice against the owner of the property shall not be essential in offences of this description; an ingredient in the offences under some of the repealed statutes which had often obstructed the course of justice, and (as in the instance of maiming cattle) had screened the perpetrators of very barbarous acts from deserved punishment. (*a*) The words of this section are, "that every *punishment and forfeiture by this act imposed* on any person maliciously committing any offence, whether the same be punishable upon indictment, or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

If the natural consequence of an act be to injure a particular person, it will be intended that the person doing it so intended.

If the thing attempted to be done would, if successful, have prejudiced a particular individual, it will be intended that such prejudice was meant, without any proof of actual malice against such individual. The prisoner was indicted for setting fire to a ship which belonged to himself and others, with intent to prejudice the other part-owners, and it appeared that there was an insurance at the least to the full value of the ship; and although made before the transfer of the shares to the other part-owners, it was verbally agreed that they were to have the benefit of it, and it was therefore contended there could be no intent to prejudice them: Gaselee, J., thought it right, however, to leave the question to the jury, upon the ground that the prisoner must be understood to intend what was the natural conse-

(*a*) An alteration had been made in this respect as to the offence of maiming cattle by the 4 Geo. 4, c. 54, now repealed by the 7 & 8 Geo. 4, c. 27.

quence of the act, and that the setting fire to the ship by the person by whom and for whose benefit the insurance was originally made, and in whose name any suit must be brought to recover the amount, might vitiate the insurance; and upon a case reserved, it was contended that there was no proof of malice. The prisoner could not be intended to mean malice to his part-owners in an act which was equally injurious to himself; and unless he could be presumed to have intended injury to himself, he could not be presumed to have intended it to them; sec. 25 of the 7 & 8 Geo. 4, c. 30, did not supply the deficiency of proof of malice, but was meant to apply to malicious injuries to animals. It was answered that it was not necessary to prove express malice, where the act was of such a nature as could spring from no other than a bad motive, and was calculated to inflict injury without cause or justification. In such case the law implies malice from the act itself, and in the language of the statute it will properly be said to be maliciously done. And the Judges were of opinion that the intent to prejudice was implied by the act. (*b*)

Under the 7 & 8 Geo. 4, c. 30, malice was intended against the owner of property injured, although the jury found the prisoner intended to injure another person.

If an indictment under the 7 & 8 Geo. 4, c. 30, alleged an intent to injure the owner of the property set fire to, it was supported, although the jury found that the prisoner intended to injure another person. The prisoner was indicted for setting fire to an outhouse in the possession of Chettle, with intent to injure Chettle, and Chettle swore that there had never been any quarrel between him and the prisoner, and there was evidence that the prisoner had endeavoured to throw suspicion on one Smith; but Gaselee, J., told the jury that the law was that a person, who did an act wilfully, necessarily intended that which must be the consequence of the act, and that the consequence here was injury to the prosecutor, who was injured by the destruction of his property. The jury said they must find the prisoner guilty, with intent to injure Smith. Gaselee, J., asked them if they were content that their verdict should be, that they found no intent to injure Chettle, except so far as by law it must be so considered, to which they agreed; and upon a case reserved, in order that the opinion of the Judges might be taken on the finding of the jury, the Judges present were unanimously of opinion that the indictment was right as to the intent to injure Chettle. (*c*)

An act injurious to another done under a *bonâ fide* claim of right is not within the 7 & 8 Geo. 4, c. 30.

It must, however, be observed that an act, the necessary consequence of which is an injury to another person, may be done under such circumstances as negative malice. Thus, if an act injurious to another be done under a *bonâ fide* claim of right it will not come within the statute. If, therefore, a servant stop up the airway of a mine by his master's order, *supposing bonâ fide* that the master had a right to order it to be done, the servant is not liable to be convicted

(*b*) Rex *v.* Philp, R. & M. C. C. R. 263. See this case, *post*, p. 563, as to other points.

(*c*) Rex *v.* Newill, R. & M. C. C. R. 458. In his luminous charge to the Bristol grand jury in 1832, Lord C. J. Tindal observed, that "where a statute directs that to complete an offence it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him." 5 C. & P. 266, note.

p. 791. infra

under the 7 & 8 Geo. 4, c. 30, s. 6, of maliciously obstructing the airway. The prisoners were indicted for feloniously and maliciously obstructing an airway belonging to a mine of one Phelps, by building a wall across the airway; the prisoners were in the employ of Protheroe, between whom and Phelps there was a dispute respecting two mines in their respective occupations, lying close together. Protheroe, professedly with the view of exerting his supposed right against Phelps, directed the prisoners to effect the obstruction charged in the indictment, and the prisoners accordingly made such obstruction. (*d*) The effect of the obstruction would be to drive back the choke damp into Phelps's mine, and prevent the working. Lord Abinger, C. B. "If a master, having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable in an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant, *bonâ fide*, did these acts, I think they do not amount to an offence within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting *bonâ fide*, I am of opinion that that is not a felony in them, even if in so doing they obstruct the airway of a mine. What I feel is this, that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged." (*e*)

And this decision was confirmed in an action brought by one of the prisoners against Phelps, for a malicious prosecution, in which it was contended that the proviso in sec. 24 of the 7 & 8 Geo. 4, c. 30, (which authorizes justices summarily to convict in cases of malicious injuries to real or personal property) that "nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of," raised a strong inference that the legislature did not intend to except from the operation of sec. 6, acts done in the supposed exercise of a right, as there was no such proviso in sec. 6. But the Court of Queen's Bench were of a contrary opinion, and Lord Denman, C. J., observed, "as to the 7 & 8 Geo. 4, c. 30, s. 24, I think it makes strongly against the argument of the defendant's counsel. That section gives a power to convict summarily for malicious mischief; and it contains a proviso that, where there is a *bonâ fide* acting under a supposed right, the party acting shall not be liable to conviction even for the trespass. Now why was there no such provision in the case of felony? for this plain reason, that the principles of the common law prevent the act from being felonious where there is no malice in the intention." (*f*)

Sec. 26. With respect to principals in the second degree and accessories,

(*d*) This statement is taken from the report of James *v.* Phelps, 11 Ad. & E. 483.

(*e*) Reg. *v.* James, 8 C. & P. 131. Lord Abinger, C. B., directed the prisoners to be acquitted.

(*f*) James *v.* Phelps, *ubi supra.*

the 26th section enacts, "that in the case of *every felony punishable under this act*, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender."

Principals in the second degree and accessories.

By sec. 27, "where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet. (*g*)

Sec. 27. Punishment of hard labour and solitary confinement may be inflicted.

And with respect to the apprehension of offenders, the 28th section enacts, "that any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

Sec. 28. Apprehension of persons found committing any offences may be without a warrant.

Offences amounting to felony or misdemeanor, punishable under this act, and committed within the Admiralty jurisdiction are, (by sec. 43,) to be dealt with, tried, &c., in the same manner as any other felony or misdemeanor committed within that jurisdiction.

Trial of offences committed within the admiralty jurisdiction.

The statute contains various regulations as to the summary proceedings by conviction before magistrates, which are authorized by its provisions for the punishment of minor offences. It limits the time for the prosecution of offences punishable on summary conviction, gives the mode of compelling the appearance of offenders, makes abettors in such offences punishable as principal offenders, gives a form of conviction, allows an appeal in certain cases, and contains provisions as to the application of the forfeitures and penalties, and as to several other matters.

Summary proceedings authorized by the statute.

The general provisions of the 7 Geo. 4, c. 64, as to offences committed on the boundaries of counties, or begun in one county and completed in another, or committed during a journey or voyage, and the provisions as to the statement of property, and as to the trial, &c., of accessories, will apply to offences by malicious injury. (*h*)

General provisions of 7 Geo. 4, c. 64, applicable to malicious injuries.

(*g*) The 1 Vict. c. 90, s. 5, "enacts that after the 1st October, 1837, "it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year."

(*h*) See these provisions, *ante*, p. 120, *et seq.*

CHAPTER THE FORTY-SECOND.

OF ARSON AND THE BURNING OF BUILDINGS, MINES, SHIPS, CORN, TREES, &c.

Offence of arson at common law.

ARSON is, at common law, an offence of the degree of felony; and has been described as *the malicious and wilful burning the house of another.* (*a*) The burning a party's own house does not come within this definition: but the burning a man's own house in a town, or so near to other houses as to create danger to them, is a great misdemeanor at common law. (*b*) Barns, with corn or hay within them, have been considered as so much entitled to the protection of the law, that though distant from a house, and no part of the mansion, the burning of them is felony at common law. (*c*)

There must be an actual burning.

The burning necessary to constitute arson of a house at common law, must be an *actual burning* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into, or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be wholly consumed, or that the fire should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. (*d*)

It is not necessary that any flame should be visible.

To constitute a setting on fire, it is not necessary that any flame should be visible. Upon an indictment for setting fire to an outhouse, it appeared that the roof of the outhouse was made of pieces of wood with straw put upon them, and that smoke was seen to issue out of the bottom of the roof; there was a good deal of smoke in the straw; some handfuls of straw were pulled out, and there were sparks in the straw when on the ground, but no sparks were seen in the straw when on the roof; no flame was seen; a ball of linen was pulled out of the roof with the straw; smoke and sparks came from the ball; the ball was trod out; the ball was burnt right through on one side; the fire on the roof was extinguished by throwing some water upon it. On the following day, two half matches were found in the straw on the ground, which was pulled from the roof, but there was no appearance of burning in these. On the same day, several handfuls of straw were taken out of the roof,

(*a*) 3 Inst. 66. 1 Hale, 566. 1 Hawk, P. C. c. 39. 4 Black. Com. 220. 2 East, P. C. c 21, s. 1, p. 1015.

(*b*) 1 Hale, 568, 569. 1 Hawk. P. C. c. 39, s. 15. 4 Black. Com. 221. 2 East, P. C. c. 21, s. 7, p. 1027.

(*c*) 3 Inst. 67. Barham's case, 4 Co. 20 *a*. Sum. 86. 1 Hawk. P. C. c. 39, s. 1. 4 Black. Com. 221.

(*d*) 3 Inst. 66. Dalt. 506. 1 Hale, 568, 569. 1 Hawk. P. C. c. 39, ss. 16, 17. 2 East, P. C. c. 21, s. 4, p. 1020.

and there was burnt straw in some of these handfuls; and on the same day, on examining the straw lying on the ground down by the building, there were some burnt ashes, and the ends of some of the straws were burnt, and the ends of some of them dropped off like a powder, and the ends of some of the straws had been reduced to ashes; no part of the wood, either in the pieces on which the straw was laid, or in the posts of the building, was burnt. Upon a case reserved upon the question, whether this was a setting on fire, the Judges held the conviction right. (*e*)

So where the prisoner was indicted under the 1 Vict. c. 89, s. 3, for setting fire to a house, and it appeared that the floor near the hearth had been scorched; it was charred in a trifling way; it had been at a red heat, but not at a blaze; it was held that this was a sufficient burning. (*f*)

The burning must be malicious and wilful.

The burning must also be *malicious and wilful;* otherwise, it is only a trespass. No negligence or mischance, therefore, will amount to such burning. (*g*) And for this reason it has been holden, that if an unqualified person should, in shooting at game, happen to set fire to the thatch of a house, it will not be a burning of this description. (*h*) And so if a man unlawfully shoot at the poultry of another: (*i*) but it is observed, that in such case it should seem to be understood that the party did not intend to steal the poultry, but merely to commit a trespass; for otherwise the first intent being felonious, the party must abide all the consequences. (*j*)

The malicious and wilful burning need not correspond with the precise intent of the party.

The malicious and wilful burning effected need not correspond with the precise intent or design of the party. If A. have a malicious intent to burn the house of B., and in setting fire to it burn the house of C. also, or if the house of B. escape by some accident, and the fire take in the house of C. and burn it, this shall be said in law to be the malicious and wilful burning of the house of C., though A. did not intend to burn that house. (*k*) And accordingly it has been said, that if one man command another to burn the house of J. S., and he do so, and the fire thereof burn another house, the commander is accessory to the burning such other house. (*l*) So it has been held that if a person set fire to a stack, the fire from which is likely to communicate to a barn, and it does so, and the barn is burnt, he is in point of law indictable for setting fire to the barn. (*m*) So where

(*e*) Rex *v.* Stallion, R. & M. C. C. R. 398. See this case, *post*, p. 559.

(*f*) Reg. *v.* Parker, 9 C. & P. 45, Parke, B., and Bosanquet, J.

(*g*) 3 Inst. 67. 4 Black. Com. 222.

(*h*) 1 Hale, 569, where this is laid down contrary to the opinion of Dalt. c. 105, p. 506.

(*i*) Id. ibid.

(*j*) 2 East, P. C. c. 21, s. 3, p. 1019. *Ante*, vol. 1, p. 540.

(*k*) 1 Hale, 569. 3 Inst. 67. 1 Hawk. P. C. c. 39, s. 19. And the indictment may charge it accordingly.

(*l*) Plowd. 475. 2 East, P. C. c. 21, s. 7, p. 1031.

(*m*) Rex *v.* Cooper, 5 C. & P. 535, Parke. J. Lord C. J. Tindal, in his charge to the Bristol grand jury, 1832, 5 C. & P. 266, note, said, "Nor will it be necessary to prove that the house the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended." 5 C. & P. 266, note. See Curtis *v.* The Hundred of Godley, 3 B. & C. 248. But in Turner's case, 1 Lewin, 9, it is said that Parke, J., left it to the jury whether the prisoner intended by setting fire to a stack of haulm to set fire to a building close adjoining, and that the judges were of opinion this direction was right. In R. & M. C. C. R. 239, this point is not noticed.

the prisoners set fire to a summer house which was in a wood, and some of the trees overhung it, and their branches were burnt by the fire, which consumed the summer house and also burnt some of the trees, it was held that the prisoners might be convicted under the 7 & 8 Geo. 4, c. 30, s. 17, of setting fire to the wood. (*n*)

It may be effected by setting fire to the party's own house.

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house; and this, though it should appear that the primary intention of the party was only to burn his own house. If in fact other houses were burnt, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony. (*o*) Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.; and the facts of the case, as opened by the counsel for the prosecution, appeared to be that the defendant set fire to his own house, in order to defraud an insurance office, and that in consequence, several houses of other persons, adjoining to his own, were burnt down; Buller, J., said, that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony, (the misdemeanor being merged) and could not be convicted on this indictment; and, therefore, he directed an acquittal. (*p*) And in a case of a similar kind, which occurred about the same time, Grose, J., in passing sentence in the court of King's Bench, said, that if it had so happened, that any of the neighbouring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to have been done in order to cheat the insurance office,) it would clearly have amounted to a capital felony, and his life would have paid the forfeit. (*q*)

The fire must burn the house of another.

In order, however, to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. Therefore, it has been holden not to be felony in a party to burn a house, whereof he was in possession under a lease for years. (*r*)

A wife setting fire to the house of her husband.

And it has been held, that a wife who set fire to her husband's house, was not guilty of felony, within the 7 & 8 Geo. 4, c. 30, s. 2. An indictment described the prisoner as the wife of J. March, and charged her with setting fire to a certain house of the said J. March, with intent to injure him, against the statute. It appeared that March and his wife had lived separate for about two years, and previous to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death. Upon a case reserved upon the question, whether it was an offence within the 7 & 8 Geo. 4, c. 30, s. 2,

(*n*) Reg. *v.* Price, 9 C. & P. 729, Gurney, B. The summer house in this case was not a building, the burning whereof was a felony.

(*o*) 2 East, P. C. c. 21, s. 8, p. 1031. And see the case of Coke *v.* Woodburne, 6 St. Tri. (by Hargr.) 222.

(*p*) Isaac's case, *cor.* Buller, J., 1799. 2 East, P. C. c. 21, s. 8, p. 1031.

(*q*) Probert's case, B. R. Mich. T. 40 Geo. 3. 2 East, P. C. c. 21, s. 7, p. 1031.

(*r*) Holmes's case, Cro. Car. 376. W. Jones, 351.

for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned Judges thinking that to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself. (*s*)

And it was decided, that a person in possession of a copyhold dwelling-house, could not be guilty of arson, by burning it, although he had a long time before surrendered it into the hands of the lord of the manor, to the use of another person, his heirs, and assigns, for securing the payment of money borrowed: for it was considered, that while the tenant continued in possession, it was his own house. (*t*) And upon the same principle it was decided, that a tenant in possession under an agreement for a lease for three years, from a person who held under a building lease, was not guilty of arson by burning the house. (*u*)

But if a landlord, or reversioner, sets fire to his own house of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant. (*v*) And it was determined, that a widow entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was guilty of arson, by burning it while in the possession of her tenant. (*w*)

It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of *another*. As where the prisoner was a poor man, maintained by a parish, and had, some time before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent: all the Judges held that it could not be considered as *his* house; and that he was properly convicted of the arson. (*x*)

It will be presently seen that the questions as to the possession and ownership of the house in which the arson is committed, are of less importance under the statute law; as the 1 Vict. c. 89, makes the setting fire to a house, &c. *with intent to injure or defraud any person*, a felony, whether such house, &c. shall be in the possession of the person so setting fire thereto, or of others.

(*s*) Rex *v.* March, R. & M. C.C. R. 182. The 7 & 8 Geo. 4, c. 30, s. 2, contained the words, "whether the same or any of them respectively shall then be in the possession of the offender," which are also found in the 1 Vict. c. 89, s. 3. See Rex *v.* Wallis, *post*, p.566.

(*t*) Spalding's case, Bury Lent Ass. 1780. East. T. 1780. 1 Leach, 218. 2 East, P. C. c. 21, s. 6, p. 1025.

(*u*) Breeme's case, O. B. 1780, Trin. T. 1780. 1 Leach, 220. 2 East, P. C. c. 21, s. 6, p. 1026. And this and several of the preceding cases were recognised in Pedley's case, K. B. 1782. 1 Leach, 242, where Lord Mansfield said that Holmes's case, (*ante*, note (*r*),) was confirmed to be good law, though he very much lamented that the law was so settled; and the bias of his mind was in favour of Mr. J. Foster's opinion in Harris's case, Fost. 115. In a case which occurred shortly afterwards, Lord Mansfield said, that "it was certainly true that it could be no felony in the defendant to burn a house of which he was in possession." Scofield's case, K. B. Hil. T. 24 Geo. 3. Cald. 397. 2 East, P. C. c. 21, s. 7, p. 1028.

(*v*) Fost. 115. 4 Black. Com. 221.

(*w*) Harris's case, 1753. Fost. 113. 2 East, P. C. c. 21, s. 6, p. 1023.

(*x*) Gowen's case, 1786. 2 East, P. C. c. 21, s. 6, p. 1027. Rickman's case, ibid., s. 11, p. 1034.

Of what is included in the term house.

The remaining inquiry concerning arson at common law, is as to the meaning of the word *house*. And this, it may be briefly observed, extends not only to the dwelling house, but to all outhouses, which are *parcel* thereof, though not adjoining thereto, or under the same roof; (*y*) of which kind of outhouses mention has been made in a former part of this work. (*z*) It appears that the indictment need not charge the burning to be of a *mansion* house, but only of a *house*. (*a*)

Misdemeanor in burning a man's own house, when contiguous to others.

It has been already stated, that the burning a man's own house in a town, or so near to other houses as to create danger to them, though not within the definition of arson, is yet a great misdemeanor at common law. (*b*) This doctrine has been acted upon in several cases; (*c*) and, in one of the most recent, Grose, J., in pronouncing the sentence of the Court of King's Bench, said, that though by a lenient construction of the law of arson this offence was holden not to be felony, yet it was a misdemeanor of great magnitude, and deserving of the most exemplary punishment. (*d*)

Punishment for felony not punishable by any statute.

For the punishment of felonies upon which no punishment may be inflicted by statute, the general provision of the 7 & 8 Geo. 4, c. 28, s. 8, enacts, "that every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment." And by sec. 9, the Court may order hard labour, or solitary confinement as part of such imprisonment. (*e*)

1 Vict. c. 89. Setting fire to a dwelling-house, any person being therein..

We may now proceed to the enactments of the 1 Vict. c. 89. (*ee*) That statute by sec. 2 enacts, that "whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and, being convicted thereof, shall suffer death." (*f*)

Setting fire to a church or chapel, warehouse, &c.

By sec. 3, "whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, (*g*)

(*y*) 3 Inst. 67. 1 Hale, 570. 1 Hawk. P. C. c. 39, s. 1. Sum. 86. 4 Black. Com. 221. 2 East, P. C. c. 21, s. 5, p. 1020.

(*z*) *Ante*, vol. 1, p. 799, 861.

(*a*) 3 Inst. 67. Sum. 86.

(*b*) *Ante*, 548.

(*c*) Holmes's case, Cro. Car. 376. Scofield's case, Cald. 397. 2 East, P. C. c. 21, s. 6, p. 1023, and s. 7, p. 1028. It appears from these cases that where an indictment charges an act to have been done with a *felonious* intent, and the jury find a verdict of guilty; if the charge, as laid, do not amount to felony, but amounts in law to a misdemeanor, the court will pronounce judgment as for that offence.

(*d*) Probert's case, B. R. Mich. 40 Geo. 3. 2 East, P. C. c. 21, s. 7, p. 1030. The sentence pronounced was two years' imprisonment in Newgate, to stand once during that time in the pillory, and to give sureties for good behaviour for seven years from the expiration of the imprisonment.

(*e*) See note (*u*), *ante*, p. 448, for the present punishment under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and 1 Vict. c. 90, s. 5.

(*ee*) The 1 Vict. c. 89, s. 1, repeals the 7 & 8 Geo. 4, c. 30, ss. 2, 5, 9, 11, and part of ss. 17 and 26.

(*f*) This provision is entirely new, and it should be observed that the section is silent about the intent with which the act is done. In Reg. v. Jeans, Gloucester Spr. Ass. 1842, the prisoner was convicted under this section before Cresswell, J., although there was no evidence to show that he knew that any person was in the house at the time when he set fire to it. MSS. C. S. G.

(*g*) The 7 & 8 Geo. 4, c. 30, s. 2, had the words "duly registered or recorded," in this place.

or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*g*)

By sec. 4, "whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death." (*h*)

Setting fire to or destroying ships, with intent to murder, &c.

By sec. 6, "whosoever shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*i*)

Setting fire to ships with intent to destroy them.

By sec. 9, "whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*j*)

Setting fire to coal mines, &c.

By sec. 10, "whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, *tares*, straw, *haulm*, *stubble*, *furze*, *heath*, *fern*, hay, *turf*, *peat*, *coals*, *charcoal*, or wood, or *any steer of wood*, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*k*)

Setting fire to a stack of corn, grain, straw, hay, &c.

By sec. 11, "in the case of every felony punishable under this act,

Punishment

(*g*) This section is the same as the 7 & 8 Geo. 4, c. 30, s. 2, with the difference pointed out in the last note, and the change from the punishment of death to that provided by this section. It is to be regretted that this section has not provided as well as to what shall be deemed an outhouse, as for the punishment for setting fire to many buildings not now included in the statute; *e. g.* public buildings, as town halls, courts, libraries, market-houses, &c., private buildings, as cow-houses, ox-stalls, sheep-sheds, &c.; ornamental buildings, as summer houses, hot-houses, green-houses, &c., &c. C. S. G.

(*h*) This provision is entirely new.

(*i*) This section is the same as the 7 & 8 Geo. 4, c. 30, s. 9, except as to the punishment, which was death.

(*j*) This section is the same as the 7 & 8 Geo. 4, c. 30, s. 5, except as to the punishment, which was death.

(*k*) This section corresponds with the 7 & 8 Geo. 4, c. 30, s. 17, but the words printed in italics are new, and the former punishment of death is altered to that mentioned in this section.

of accessories,

every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

Hard labour with imprisonment.

Solitary confinement.

By sec. 12, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

Offences committed within the admiralty jurisdiction.

By sec. 14, "where any felony punishable under this act shall be committed within the jurisdiction of the Admiralty of England or of Ireland, the same shall be dealt with, inquired of, tried and determined in the same manner as any other felony committed within that jurisdiction."

By sec. 15, the act does not extend to Scotland.

7 & 8 Geo. 4, c. 30, s. 17. Setting fire to crops of corn, woods, &c.

The 7 & 8 Geo. 4, c. 30, s. 17, enacts, that "if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment." (*l*)

12 Geo. 3, c. 24, s. 1, wilfully setting on fire, &c., ships of war, arsenals, &c., timber, &c., or stores of war.

The 12 Geo. 3, c. 24, s. 1, enacts, "that if any person or persons shall either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet or assist in the setting on fire, or burning or otherwise destroying of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dock-yards, or building or repairing by contract in any private yards, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence," being convicted, shall be adjudged guilty of felony, without benefit of clergy. (*m*)

(*l*) See the general provisions of this statute, *ante*, p. 544, *et seq.*

(*m*) This offence is still capital, 7 & 8 Geo. 4, c. 28, ss. 6 & 7. As there is no

By the second section of this act, any person who shall commit any of the offences before-mentioned out of the realm, may be indicted and tried either in any county within the realm, or in such island or place where such offence shall have been actually committed, as his Majesty, his heirs, &c., may deem most expedient for bringing such offender to justice.

Trial in any county, place, &c.

By the articles of the navy (22 Geo. 2, c. 33, art. 25) every person who shall unlawfully burn or set fire to any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle, or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court martial.

Articles of the navy. Burning any ship, store of powder, &c., death.

The 39 Geo. 3, c. 69, a public local act, for rendering more commodious and for better regulating the port of London, enacts, (by sec. 104) "that if any person or persons whomsoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basins, cuts, or other works to be made by virtue of this act, every person so offending, in any of the said cases, shall be adjudged guilty of felony, without benefit of clergy."

39 Geo. 3, c. 69, (local act,) setting fire to works, ships, &c., in the port of London.

By sec. 25 of the 7 & 8 Geo. 4, c. 30, the punishments imposed by that act will equally apply whether the offence be committed from malice conceived against the owner of the property or otherwise. (*n*)

Malice against the owner not necessary.

It may be useful to mention some of the cases which occurred upon the statutes now repealed.

It appears to have been considered that the 9 Geo. 1, c. 22, did not alter the nature of the crime, or create any new offence, but only excluded the principal more clearly from his clergy. (*o*) The words "set fire to" in that statute did not, therefore, appear to admit of a larger construction than prevails by the rule of the common law; (*p*) by which, as we have seen, the putting fire into or towards a house, however maliciously, does not amount to arson, if either by accident or timely prevention no part of it be burned. (*q*) So that where the prisoner was indicted on that statute for setting fire to an outhouse, commonly called a paper-mill, and it appeared that she had set fire to a large quantity of paper, which was drying in a loft annexed and belonging to the mill, but no part of the mill itself was consumed, the Judges thought the case not within the statute on that ground. (*r*) The setting fire to a *parcel* of unthreshed wheat was holden not to be felony within that statute; and where the offence was so described in a warrant of commitment, the court of King's Bench bailed the defendant. (*s*)

Cases upon the statutes now repealed.

A *common gaol* was holden to be a house within the 9 Geo. 1, c. 22. The indictment against the prisoner charged him in one of the

A common gaol holden to

express provision for the punishment of accessories after the fact, they are punishable in the manner stated in note (*u*). *ante*, p. 448.

(*n*) *Ante*, p. 544. A doubt perhaps may arise whether the 7 & 8 Geo. 4, c. 30, s. 25, applies to cases within the 1 Vict. c. 89, as the words are, "every punishment and forfeiture by this act imposed." And the punishment is now imposed by the 1 Vict. c. 89. See note (*n*), *post*, p. 572. C. S. G.

(*o*) Breeme's case, 1780. 1 Leach, 220. 2 East, P. C. c. 21, s. 6, p. 1026. Clergy was previously holden to be ousted only by inference and deduction from the 4 & 5 Ph. & M. c. 4.

(*p*) 2 East, P. C. c. 21, s. 4, p. 1020.

(*q*) *Ante*, p. 548.

(*r*) Taylor's case, 1760, 1 Leach, 49. 2 East, P. C. c. 21, s. 4, p. 1020.

(*s*) Judd's case, 2 T. R. 255.

be a house within the 9 Geo. 1, c. 22, now repealed.

counts with setting fire to the house of the corporation of Liverpool; in another, with setting fire to the house of one Richard Rigby; and in a third, with setting fire to the house of one Hannah Kerby. Upon the evidence it appeared that the place where the offence was committed was a gaol belonging to the corporation of Liverpool, which was used as the place of confinement both for criminals and debtors; that the prisoner, being confined there for debt, voluntarily set fire to his box, which was a little apartment in the prison; and that the whole gaol would, in consequence, have been probably burnt to the ground, but for timely assistance. The R. Rigby mentioned in the indictment was the keeper of the gaol; and it appeared that his dwelling-house adjoined to the gaol, and was inhabited by himself and by Hannah Kerby, who was his mother-in-law, and who lived there by his permission, and kept it as a public-house. A wall separated the prison from the house; but the entrance into the prison was from the dwelling-house, by a door through the wall. This door was locked every night, and nobody inhabited the prison itself but the prisoners; some of whom were occasionally supplied with beds in the dwelling-house. The prisoner having been convicted, the case was submitted to the consideration of the Judges, who were of opinion that it was fully within the act; the dwelling-house being to be considered as a part of the prison, and the whole prison being the house of the corporation. (*t*)

A building intended for and constructed as a dwelling-house, but not completed or inhabited, and in which the owner had deposited straw and agricultural implements was not a house, outhouse or barn within the 9 Geo. 1, c. 22, s. 7.

On the trial of an action against a hundred, under the 9 Geo. 1, c. 22, s. 7, (now repealed) to recover satisfaction for the malicious burning of a house, outhouse, or barn, it appeared that the building which had been burnt, was in an unfinished state; it contained five rooms, viz., a kitchen and parlour, two rooms on the first floor, and one room over that floor; it had a stone staircase, and all the windows were fixed in and one was glazed; the owner had deposited straw and agricultural implements in the building. It was objected, first, that this building was not a house; that a house intended for a dwelling-house, but not completed, and which had never been inhabited, was not a house within the meaning of the statute. 2dly, that it was not an outhouse, because it was not parcel of a dwelling-house. 3dly, that it was not a barn in the ordinary acceptation of the term. It was not intended to be used as a barn, nor was it constructed for that purpose. On the other hand it was admitted that it was not a house or outhouse within the meaning of the statute, for it must undoubtedly be a house or outhouse, in respect of which burglary might be committed: but it was contended that the use of the building for the purpose of depositing in it hay and straw, which is the purpose for which a barn is used, made this a barn. Bayley, J., in delivering the judgment of the Court, after time taken to consider, said, "the question is whether the building, which was set fire to, comes within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling-house, but it was in an unfinished state, and never was inhabited. It was conceded in argument, that it was not a house within the meaning of the statute 9 Geo. 1, c. 22. It has been decided

(*t*) Donnavan's case, 1770, 2 Black. Rep. 682. 1 Leach, 69. 2 East, P. C. c. 21, s. 5, p. 1020. See a precedent of an indictment at common law for setting fire to a place of confinement in a borough, 2 Stark. Crim. Plead. 444.

that that statute does not alter the nature of the crime, or make any new offence, but merely excludes the principal from clergy more clearly than he was before. There cannot be any doubt that the building, in this case, was not a house, in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling-house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling-house. But it was contended that it was a barn, because it had been used for those purposes, for which a barn is used. The building had three stories, chimnies, a staircase, and windows. The plaintiff had deposited in it a quantity of straw, and agricultural implements. On consideration, we are of opinion, that this building was not a barn within the meaning of that word as it is used in this statute. It was a house applied to those purposes to which a barn might be applied. The act of the 9 Geo. 1, c. 22, though remedial in some respects, is in others capitally penal. The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offence be committed against that statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion that the building consumed by fire in this case was not a house, outhouse, or barn within the meaning of this act of Parliament: and in this opinion Lord Tenterden, with whom we have conferred upon this case, concurs." (*u*)

Cellar under a cottage separately occupied.

The first count of an indictment for arson, for setting fire to a cellar, described it as the dwelling-house of a constable; the second count described it as an outhouse parcel of a cottage. It appeared that under a cottage was a cellar, which cellar was hired by the constable of Bradford as a lock-up-house. The cellar and cottage were independent of each other in all respects. The cellar was six or seven feet below the surface of the ground. Hullock, B., was of opinion that it was neither a house nor an outhouse, and therefore improperly described in both counts. (*v*)

No statutory provision as to buildings within the curtilage.

The 7 & 8 Geo. 4, c. 29, s. 13, only determined what shall be considered a dwelling-house, for the purpose of burglary, housebreaking, and stealing in a dwelling-house; and there is no statutory provision as to what shall be considered a house in the case of arson. (*w*)

As to an "outhouse," within the repealed statute, 9 Geo. 1, c. 22.

In a case where the prisoner was indicted under the repealed statute, 9 Geo. 1, c. 22, for setting fire to a "*certain outhouse*," a point was made whether the building in question answered this description. It appeared that the prosecutor kept a public-house, and also carried on the business of a flax-dresser; and that the building set fire to by the prisoner consisted of a stable and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing his flax; and that these buildings were situated in a yard at the back of the house, about four or five yards distant from it, the yard being inclosed on all sides, in one part by the house, in another part by a wall, in a third by a railing which separated it from a field, and in

(*u*) Elsmore *v.* The Hundred of St. Briavels, 8 B. & C. 461. See also Hiles *v.* The Hundred of Shrewsbury, 3 East, 457.

(*v*) Anonymous, 1 Lew. 8.

(*w*) See M'Donald's case, 2 Lew. 46, per Alderson, B.

the remaining part by a hedge. It was objected on behalf of the prisoner, that this building was not an *outhouse* within the statute. And that the statute applied only to outhouses which in contemplation of law were not part of the dwelling-house; and it was insisted that this was part of the dwelling-house, and that the indictment should have been for arson at common law. And the prisoner having been found guilty, the point was reserved for the opinion of the Judges, who all (except Hotham, B., who was absent) agreed that the verdict was right. And it was observed, that though for some purposes this might be part of the dwelling-house, yet still it was in fact an outhouse. (*x*)

A school-room holden to be well described either as an outhouse, or part of the dwelling-house.

In a subsequent case, the prisoner, Jacob Winter, was convicted upon an indictment consisting of several counts, some of which charged him with burning "a certain outhouse" of one Thomas Rogers; and others with burning "a certain *house*" of the said Rogers; and some of the counts were at common law, others being laid against the form of the statute. It appeared, that the premises burnt consisted of a school-room, which was situated very near to the house in which Rogers lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school with a garden and other premises, together with a court which surrounded the whole, were rented by Rogers of the parish, at a yearly rent. There was a continued fence round all the premises, and nobody but Rogers and his family had a right to come within it. Upon these facts it was urged, on behalf of the prisoner, that the building burnt was not a house nor an outhouse within the statute, 9 Geo. 1, c. 22. But the point being referred to the consideration of the Judges, they were of opinion that the building was correctly described in the indictment either as an outhouse or part of the dwelling-house within the meaning of that statute. (*y*)

An open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, is an outhouse. Setting fire to the straw on the roof, held a setting fire to the outhouse within the 7 & 8 Geo. 4, c. 30, s. 2.

An indictment upon the 7 & 8 Geo. 4, c. 30, s. 2, charged the prisoner in one count with setting fire to an outhouse of W. Deans; in another with setting fire to a coach-house, and in another with setting fire to a building and erection, then used by W. Deans in carrying on the trade of a poulterer. The prosecutor was a labourer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles from the prosecutor's dwelling-house, and might be seen from it. The prosecutor used it to keep a cart in, which he used in his business of poulterer, and also to keep his cows in at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings which did not adjoin the dwelling-house or barn; the first of which from the dwelling-house was a pig-sty, and adjoining that was another pig-sty, and adjoining that was a turkey-house, and adjoining the turkey-house was the building in question. The dwelling-house

(*x*) North's case, 1795. 2 East, P. C. c. 21, s. 5, p. 1021. In the discussion before the Judges, 3 Inst. 67, was referred to, where it was laid down that to burn a stable and the like parcel of the mansion-house is felony; but that in the indictment it is sufficient to say *domum*, *viz.*, a barn, malt-house, or the like, without saying *mansionalem*. *Ante*, p. 552.

(*y*) Winter's case, *cor.* Richards, B., Reading Lent Ass. 1815, East. T. 1815 Russ. & Ry. 295.

and barn formed one side of the farm-yard, and the three other sides were formed by a fence inclosing these buildings. The building was formed by six upright posts, nearly seven feet high; three in the front, and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom, and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts; one side of the building adjoined the turkey-house, which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field, and was a rail-fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said that he should call the building in question an outhouse. The only part burnt was some of the straw on the roof. Upon a case reserved upon the questions, first, whether the building were an outhouse within the meaning of the 7 & 8 Geo. 4, c, 30, s. 2, [for there was no ground for saying that it could be called a coach-house, or a building and erection used in carrying on the trade of a poulterer]; and second, whether in case the building were an outhouse, the straw (as above described) were a part of the building; all the Judges, except Tindal, C. J., thought the erection an outhouse, and that the conviction was right. (z)

An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, was not an outhouse within the 7 & 8 Geo. 4, c. 30, s. 2.

The indictment under the 7 & 8 Geo. 4, c. 30, s. 2, charged the prisoners with setting fire to an outhouse. The place in question stood in an inclosed field, a furlong from the dwelling-house, and not in sight thereof. The supposed place had originally been divided into stalls capable of holding eight beasts, and partly open and partly thatched; but of late years it was boarded all round, the stalls taken away, and an opening left for horses and cows, or other cattle which might be in the field, to go in and out of their own accord; there were no windows nor door, and the opening was sixteen feet wide, so that even a waggon might be drawn through it under cover. The back part of the roof was supported by posts, to which the side boards were nailed, part of it internally was boarded and locked up, where several boards were locked up; there was no distinction in the roof between the inclosed and uninclosed part, and the inhabitants and owners usually called it the cow-stalls: and upon a case reserved, all the Judges, (except Lord Lyndhurst, C. B. and Taunton, J.,) met and considered this case, and Lord Tenterden, C. J., Bayley, B., Littledale, J., Vaughan, B., Parke, J., and Bolland, B., held this to be an outhouse within the statute. The other seven Judges were of a contrary opinion, and a pardon was recommended. (a)

(z) Rex v. Stallion, R. & M. C. C. R. 398. As to what part was burnt, see the case, *ante*, p. 549.

(a) Rex v. Ellison, East. T. 1832, R. & M. C. C. R. 336.

An outhouse must be a building which belongs to a dwelling-house, and is in some respects parcel of the dwelling-house.

The prisoner was charged in one count with setting fire to an outhouse; and in another with setting fire to a stable; and it appeared that the place burnt had been an oven to bake bricks, and that the prosecutor had made a door-way (with a door) into it, and had put boards and turf over the vent hole at the top. It also appeared that two poles had been fixed across it at about half its height, on which boards had been laid, so as to make a loft floor. In this place, the prosecutor kept a cow; and adjoining to it, but not under the same roof, was a lean-to, in which a person named Cope kept a horse; but this latter building was not injured by the fire. The building was about a hundred yards from any dwelling-house, and the owner of the nearest dwelling-house had no interest in it, and no dwelling-house or farm-yard of the prosecutor was near it, and there was no wall to connect it with any dwelling-house. It was contended for the prisoner, that this building was neither a stable nor an outhouse. The term outhouse had, both at common law, and under the repealed statutes, been held to apply to those buildings only which were within the curtilage, and in which till the 7 & 8 Geo. 4, c. 29, a burglary might be committed, and the rule being that where any term which has obtained a precise and definite meaning at common law, or in a statute, is used in a statute, it will be presumed to have the same meaning there; (*b*) it must be taken that the word outhouse is used in the 7 & 8 Geo. 4, c. 30, in the same sense as it had at common law and under the former statutes; and unless such a construction be put upon that word, the words "stable, coach-house," &c., were useless. Taunton, J., "I am clearly of opinion, that this is not a case within the act of Parliament. It is true, that the word 'outhouse' occurs in the act of Parliament, but I apprehend that it has been settled from ancient times that an outhouse must be that which belongs to a dwelling-house, and is in some respect parcel of such dwelling-house. This building is not parcel of any dwelling-house, and does not appear to be connected in any way, either with the premises of Mr. Sparrow, or of the prosecutor. It had been a brick-kiln, and the prosecutor kept his cow there afterwards. There is no such word as cow-house in the statute. The only word likely to be applicable in this case is the word outhouse; and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of outhouse. It is also not a stable; indeed, I do not see that it could be much more properly called a stable than it could be called a coach-house." (*c*)

(*b*) Bac. Abr. Statute (I. 4.) Moore *v.* Hussey, Hob. 97. Smith *v.* Harmon, 6 Mod. 142.

(*c*) Rex *v.* Haughton, 5 C. & P. 555, March 15, 1833. This case is entitled to the more weight, as the opinion of the learned Judge was not formed with reference to this case alone, but the same question had before been raised and discussed before him in Rex *v.* Williams, Gloucester Lent As. 1832. In that case the prisoner was indicted for setting fire to a building, which was in one count described as a barn, and in another as an outhouse, and it appeared that there was a barn, which had a sloping roof extending continuously over the barn and a cow-house adjoining to the barn, the rafters of the roof running the whole length over both buildings; but there was a wall between them, and in this wall there was a square aperture for the purpose of admitting air to the cattle; there was no internal communication between the barn and the cow-house; a part of the roof over the cow-house was burnt, but no part of the barn. The buildings were in a field, and at a distance from any house. It was objected, first, that the building burnt was not a barn, it was merely a cow-house, and the use of it as such

So where the prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to an out-house, and it appeared that the building was a kind of cart-hovel, consisting of a stubble roof, supported by uprights, and was situate by itself in a field some distance from any other buildings; Vaughan, B. was of opinion that it was improperly described as an out-house. (*d*)

A cart-hovel in a field.

Upon an indictment for setting fire to a stack of wood, it appeared that between the house of the prosecutor and the house next to it, there was an archway, which carts could go under, and that over this archway a sort of loft was made by means of a temporary floor; and that in this place the prosecutor kept wood, straw, and fuel. It further appeared, that at the time of the fire, there was in this place about an armful of straw, and a score of faggots, which were piled up one upon another. The straw was burnt and also some of the faggots, but no part of the building caught fire. Park, J. A. J., was clearly of opinion that this was not a stack of wood, within the meaning of the 7 & 8 Geo. 4, c. 30, s. 17. (*e*)

What is not a stack of wood.

An indictment under sec. 17 of the 7 & 8 Geo. 4, c. 30, for setting fire to a stack of straw, was held not to be supported by evidence of firing a stack of haulm. The prisoners were indicted for setting fire to a stack of straw, and on the trial it appeared that the stack consisted partly of cole seed straw, and partly of wheat stubble, after the reaping and carrying the straw; the greater part was of the latter. The jury said that the stubble was haulm; upon which, with the concurrence of Lord Denman, C. J., Gaselee, J., directed an acquittal. (*f*)

What is not a stack of straw.

A stack which principally consisted of wheat straw, with stubble laid on the top of it to prevent it blowing away, was held to be a stack of straw, within the 7 & 8 Geo. 4, c. 30. The indictment charged the prisoner with setting fire to a stack of straw. The stack was principally wheat straw, the greatest part; the bottom part was of wheat straw, made up after the wheat was carried, half-a-load, the stack was three loads; there was stubble at the top to keep the straw from blowing away. It is not usual to put stubble on all

What is a stack of straw.

determined what the building was. Secondly, it was not an out-house, because it was neither within the curtilage, nor had any connection with any dwelling-house; after hearing the points argued, Taunton, J., consulted Littledale, J., and then said, "it is desirable that there should be a better understanding of the term 'out-house,' and therefore I will reserve the point. I have a very decided opinion myself on both points, which, however, I will not state." The prisoner was acquitted. The case of Rex *v.* Ellison came before the Judges between this case and Rex *v.* Haughton, and either by that case or by some other means, the learned Judge had come to so decided an opinion as to the meaning of the word "out-house," that he did not reserve the point.

(*d*) Rex *v.* Parrott, 6 C. & P. 402. The prisoner was acquitted, otherwise the point would have been reserved. See Rex *v.* Woodward, R. & M. C. C. R. 323, and Rex *v.* Newill, R. & M. C. C. R. 458, where questions arose, but were not decided, as to whether certain buildings were out-houses.

(*e*) Rex *v* Aris, 6 C. & P. 348.

(*f*) Rex *v.* Tottenham, R. & M. C. C. R. 461. 7 C. & P. 237. The word "haulm," was probably introduced in sec. 10 of the 1 Vict. c. 89, in consequence of this case. See the section, *ante*, p. 553. In Rex *v.* Turner, R. & M. C. C. R. 239, a question was raised whether a stack was a stack of straw within the 7 & 8 Geo. 4, c. 30. The stack was made partly of straw, there being two or three loads of it at the bottom, and the residue of haulm, that is the aftermath of the stubble of rye or wheat, about eighteen inches long; according to one witness the straw and haulm were mixed. This question was not decided by the Judges. At the following assizes the prisoners were again indicted, and one count charged them with setting fire to a stack of straw, called haulm, and Vaughan, B., intimated that it would be unsafe to convict them on this count, and they were convicted on counts for setting fire to a barn and a wheat stack, 4 C. & P. 246.

straw stacks, but just as the farmer pleases, and upon a case reserved, the Judges present were unanimously of opinion that this was a stack of straw. (*h*)

Philp's case. A part owner of a vessel may be guilty of an offence within the 7 & 8 Geo. 4. c. 30, s. 9, if he set fire to the ship.

Several persons may hold shares in a ship jointly.

As to the form of entry in the register of vessels under the 6 Geo. 4, c. 110, s. 37.

It was an offence within the 7 & 8 Geo. 4, c. 30, s. 9, for a part-owner of a ship to set fire to it. The vendee of a share in a ship was a complete owner if an entry of a bill of sale to him, as the form 6 Geo. 4, c. 110, s. 37, requires, was made in the proper book of registry, though it did not express in terms that the bill of sale was produced, because it would be against the duty of the officer to make the entry, except on such production. The giving a date which has nothing to apply to, but the production of the bill of sale will imply it. Two or more persons may hold shares in a ship jointly. The prisoner was indicted for setting fire to a certain vessel, the property of the prisoner and of Grenfell and Eddy, with intent to prejudice Greenfell and Eddy, being part-owners of the said vessel. There were other counts only stating Grenfell and Eddy to be part-owners, and not taking notice of the interest of the prisoner. A bill of sale, dated the 7th of August, 1829, from the prisoner, who was then the sole owner, to Grenfell and Eddy, of $\frac{43}{64}$ parts of the vessel, was put in, and the following entry in the book of registry of the vessel, pursuant to the 6 Geo. 4, c. 110, s. 37:—

"*Custom House, Padstow, 11th August,* 1829.

"William Philp of Padstow in the County of Cornwall, mariner, hath sold by bill of sale, dated the 7th August, 1829, $\frac{43}{64}$ shares to N. Grenfell, of St. Just in the County of Cornwall, mine-agent, and R. Eddy, of Penzance in the same County, merchant.

"EDWARD EDWARDS, Collector,
"JOHN PHILLIPS, Comptroller."

An indorsement in the like terms was made on the certificate of registry. A subsequent entry of mortgage of the prisoner's shares, after the date of the mortgage deed added the words "now produced." It was contended for the prisoner, that the bill of sale was not valid, as the 6 Geo. 4, c. 110, s. 37, requires the entry to contain not only the date of the bill of sale, but of the production of it; Gaselee, J., and Bosanquet, J., rather thought that the date of the 11th August, 1829, in the commencement of the entry, might be considered as the date of the production, particularly as it exactly complied with the form given by the act. The jury found the prisoner guilty, and upon a case reserved upon the question, (among others) whether the ownership of Grenfell and Eddy had been sufficiently proved, it was contended first, that two persons could not be owners of $\frac{43}{64}$ths of a ship: the shares held by each not being specified under sec. 32 of the 6 Geo. 4, c. 110; secondly, that the transfer was not valid to pass the property, by reason of the omission of the date and the fact of production; thirdly, that it was no offence within the statute for an owner or part-owner to set fire to his own ship; but the Judges overruled the objections, being of opinion that two or more persons might hold shares jointly; and that the entry was sufficient, as the date had no application, unless it applied to the production of the bill of sale and entry thereof by the officer, it

(*h*) Rex *v.* Newill, 3 Burn's Just., Doy. & Wms. 999. R. & M. C. C. R. 458.

being against his duty to make the entry, but on the production of the bill of sale; and the conviction was therefore affirmed. (*i*)

Cotton-mill within 9 Geo. 3, c. 29, s. 2.

In the course of the trial of an indictment upon the 9 Geo. 3, c. 29, s. 2, now also repealed, which related to the burning of *mills*, it was objected that a *cotton* mill was not within the meaning of that statute: but the objection was over-ruled. (*j*)

Farrington's case. As to the intent to injure or defraud under the 43 Geo. 3, c. 58.

In a case in which the construction of the 43 Geo. 3, c. 58, now repealed, came under consideration, it was decided that the "intent to injure" mentioned in that statute, must be inferred where injury was the necessary consequence of the setting fire to the premises, on the ground that a man must be supposed to intend the necessary consequence of his own acts. The indictment was for setting fire to a mill, with intent to injure the occupiers thereof, and a point was reserved, whether under the 43 Geo. 3, c. 58, it was not necessary to give some evidence of an intent to injure beyond the mere act of setting fire, upon which the Judges were unanimous that the party must be taken to have intended what was the necessary consequence of his act. (*k*)

Of the indictment.

With respect to the indictment, it may be observed, that it is clearly necessary in an indictment for arson at common law to lay the offence to have been done *wilfully* and *maliciously*: (*l*) and though the words "wilful and malicious" did not occur in the statute 9 Geo. 1, c. 22, now repealed, yet they seem to have been considered as necessary in an indictment upon that statute. (*m*)

The indictment must state that the act was done *unlawfully and maliciously*.

The indictment under the 7 & 8 Geo. 4, c. 30, must have charged the offence to have been done "unlawfully and maliciously;" and stating that it was done "feloniously, voluntarily, and maliciously," was not sufficient. The first count alleged that the prisoners a certain barn "feloniously, voluntarily, and maliciously" did set fire to, &c. The second count stated that the prisoners a certain stack of straw "feloniously, voluntarily, and maliciously" did set fire to, &c. Upon reading the indictment, Parke, J. found that it did not pursue the words of the statute, as it omitted the word "unlawfully," and he referred to 2 *Hawk, P. C.*, c. 25, s. 96, where it is laid down, "that where a statute uses the word 'unlawfully' in the description of an offence, it is certain that an indictment grounded on it, must use the word *illicitè*, or some other tantamount." The indictment, therefore, seemed to the learned Judge to be bad, but he left the case to the jury, who found the prisoners guilty; and upon a case reserved, the Judges held that the indictment ought to have charged the act to have been done unlawfully, and they thought it best to order a new indictment to be preferred at the following assizes. (*n*)

(*i*) Rex *v.* Philp, R. & M. C. C. R. 263. See this case, *ante*, p. 545, as to the intent to injure.

(*j*) Anon. Lancaster Special Session, May, 1812. 2 Stark. Crim. Plead. 420.

(*k*) Rex *v.* Farrington, Mich. T. 1811, MS. Bayley, J., and Russ. & Ry. 207. The case occurred in Staffordshire, and at the Lent Assizes for that county in 1812, the opinion of the Judges was delivered by Graham, B., when sentence of death was accordingly passed upon the prisoner, but he afterwards received a pardon, on condition of his being imprisoned for a year, and kept to hard labour in the house of correction. See Rex *v.* Newill, *ante*, p. 545.

(*l*) 2 East, P. C. c. 21, s. 11, p. 1033. *Ante*, p. 548. In Cox's case, 1 Leach, 71, it was holden, upon an indictment for perjury at common law, that the words, "falsely, maliciously, wickedly, and corruptly," implied that the offence was committed wilfully.

(*m*) Minton's case, 2 East, P. C. c. 21, s. 5, p. 1033.

(*n*) Rex *v.* Turner, R. & M. C. C. R. 239. 4 C. & P. 245. 1 Lew. 9.

It was holden not to be necessary to allege the burning of a *dwelling-house:* and that the burning of a *house* only was a sufficient statement. (*o*) And where an indictment on the same repealed statute stated the burning to be of *out-houses* generally, without specifying their denomination, it was holden good. (*p*) And we have just seen that it was holden to be sufficient, in an indictment upon that statute, to state the burning of an *out-house*, if it were such in fact, though in point of law it was parcel of the dwelling-house as being within the curtilege. (*q*) Where the indictment was for setting fire to a hay-stack upon the same statute, it was decided that it was not necessary to aver that the stack was thereby burnt; that not being requisite to the completion of the offence. (*r*)

Ownership of the house.

It is material in an indictment at common law that the ownership of the house should be correctly stated so as to shew it to be the house of *another* within the principles mentioned in an early part of this chapter. (*s*) And stating that the prisoner set fire to a house at, &c., without stating whose house it was, or alleging any thing to excuse that statement will not be sufficient. An indictment charged that the prisoner feloniously set fire to a house situated in the parish of E., and it was holden to be bad. (*t*) The facts were that the house belonged to a parish, and the parish permitted a person to live in it who was merely a servant of the parish, and it was wholly unknown who were the trustees, or in whom the legal estate was vested; and it appears to have been holden by the Judges, that such house might have been laid to be the property of the overseers or of persons unknown. (*u*) In an indictment upon the 1 Vict. c. 89, s. 3, it is as we have seen, by the words of the statute, sufficient to shew the house, &c. to be in the possession of the offender, or in the possession of any other person. With respect to the nature of the possession it appears from a recent case that a house in part of which a man lives, and other parts of which he lets to lodgers, may be described as his house, though he has taken the benefit of the insolvent debtor's act, and executed an assignment including the house, if the assignee has not taken possession: or at least no objection can be made if in other counts it is stated as the house of the assignee and also of the lodger whose room was set fire to. The indictment described the house first as Fearne's, secondly as Dance's, and thirdly as the prisoner's. Fearne occupied part of it and let out the rest in lodgings; the room set fire to being let to the prisoner; five months before the fire Fearne was discharged as an insolvent debtor, and had previously executed an assignment, including this house, to Dance; Dance never took possession. A case was reserved upon the point whether the possession of the house was rightly described, and the Judges held that it was: for the whole house was properly in the possession of Fearne, the possession by his tenants being his possession; and if not, the prisoner's own room might be deemed his house. (*v*)

(*o*) 3 Inst. 67. 1 Halo. 567. Sum. 86. 1 Hawk. P. C. c. 39, s. 1. *Ante*, p. 558, note (*x*).

(*p*) Glandfield's case, 2 East, P. C. c. 21, s. 11, p. 1033, 1034.

(*q*) North's case, *ante*, p. 558.

(*r*) Rex *v.* Salmon, East. T. 1802, MS. Bayley, J., and Russ. & Ry. 26.

(*s*) *Ante*, p. 550, *et seq.*

(*t*) Rickman's case. 1789. 2 East, P. C. c. 21, s. 11, p. 1034. MS. Bayley, J.

(*u*) 2 East, P. C. ibid.

(*v*) Rex *v.* Ball, Mich. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 30.

It has been observed, that it requires great nicety in some cases to distinguish the person who may be said to occupy property *suo jure:* (*w*) and it will in some cases be advisable to state the ownership or possession differently, in different counts, in order to obviate any objection on the ground of variance. In a case where the indictment laid the whole of the premises consumed by the fire as in the sole occupation of one B. Silk, widow, it appeared that the premises burned, consisting of outhouses, were the property of the widow, but were only made use of by her son, who lived with her after his father's death, in the dwelling-house adjoining the outhouses, and took upon him the sole management of the farm, with which these outhouses were used, to the loss and profit of which he alone stood, though without any particular agreement between him and his mother, and he paid all the servants, and purchased all the stock; but the legal property, both in the dwelling-house and farm, was in the mother, and she alone repaired the dwelling-house, and the outhouses in question; and the indictment in this form was holden to be improper. And Heath, J., held, that as to the stable, pound, and hog-styes, which the son alone used, the indictment must lay them to be in his occupation; and as to the brew-house, (another of the outhouses burned,) the mother and son both occasionally paying for ingredients, the beer being used in the family, to the expenses of which the mother in part contributed, though without any particular agreement as to the proportion, that the same should be laid as in their joint occupation. The prisoner was afterwards convicted on a second indictment, drawn agreeably to this opinion, and containing two counts; the first laying the occupation in the son alone, the other laying it in the mother and son; and he was executed. (*x*)

A house may be described as in the possession of the actual occupier, though his possession is wrongful.

The prisoner, who was the wife of James Wallis, was indicted for setting fire to a certain house in the possession of the said J. Wallis, with intent to injure M. Wright. The second count charged her with the like offence with intent to injure Lord Yarborough. The prisoner's husband was a labourer of Mr. Wright, who provided him with the house in question as part of his wages. The house was Lord Yarborough's property, and was let with a large farm, and other cottages for the accommodation of labourers on the farm, by his lordship to Wright. Wright, being dissatisfied with Wallis's conduct, discharged him from his service, and told him to quit his house in a month, which time he allowed him to procure another residence. Two days after the expiration of the month, Wallis and the prisoner and his family still continuing in possession, Wright and two of his servants went in the day time, whilst the husband was out, to strip off part of the thatch, in order to force them to quit. The prisoner resisted; struck at the men with a pitchfork; knocked out the windows and doors; made a fire with the fragments on the floor of the house, and thereby set the house on fire, and burned it down. The jury found that she wilfully set the house on fire; and that the fire communicated to the house whilst Wallis continued in the actual possession of it by means of his family and furniture. The learned Judge thought the indictment should have been framed differently,

(*w*) 2 East, P. C. c. 21, s. 11, p. 1034.
(*x*) Glandfield's case, *cor.* Heath, J., Exeter Spr. Ass. 1791. 2 East, P. C. c. 21, s. 11, p. 1034.

and should have stated the house to be in the possession of Wright, Wallis having, at the time of the fire, no lawful possession, but the legal possession being in Wright: an offence committed under similar circumstances would have been capital before the passing of the 43 Geo. 3, c. 58, (*u*) and would have been a felony at common law. But upon a case reserved, the Judges present held, that as Wallis was the actual occupier, the statement was proper, and the conviction right. (*x*)

As to laying an intent to injure in an indictment for burning a barge.

It was considered in a case under the 7 & 8 Geo. 4, c. 30, s. 9, that an indictment for setting fire to a barge ought to contain an averment that it was done with intent to injure the owner. The prisoner was indicted for having wilfully and maliciously set fire to a barge, the property of H. Stevens, and there was no averment that the prisoner did it with intent to prejudice, &c. Alderson, J., was of opinion that such an averment was necessary, and upon its being submitted for the prosecution that the indictment was sufficient without it, Alderson, J. observed, that at least it would have been safer to have had it; but said that he would confer with Mr. J. Gaselee on the point, and if he agreed with him, he would reserve this case for the opinion of the Judges. Gaselee, J., on being consulted, was of opinion that the indictment was insufficient; but the prisoner was acquitted, and therefore, any further consideration of the case became unnecessary. (*y*)

An indictment under the 7 & 8 Geo. 4, c. 30, for setting fire to a stack of straw was good without laying any intent.

The prisoner was indicted in the first count for setting fire to an outhouse in the possession of Chettle, with intent thereby to injure Chettle, and to a certain stack of straw belonging to Chettle; in the second count for setting fire to an outhouse, and in the third, for setting fire to a certain stack of straw belonging to Chettle, not saying with intent to injure, &c. And upon a case reserved, the Judges present were unanimously of opinion, that as the 17th clause of the act had no words of intent, the last count was good. (*z*)

An indictment for setting fire to a stack of beans is good.

The Judges will take judicial notice that beans are "pulse," and therefore, where an indictment charged the prisoner with setting fire to a certain stack of beans, upon a case reserved, the Judges present, unanimously held that they were bound to consider beans as a species of pulse, and the conviction was affirmed. (*a*)

So a stack of barley.

So the Judges will take notice that barley is corn or grain; where therefore an indictment charged the prisoner with setting fire to a stack of barley, Patteson, J., held that it was sufficient. (*b*)

Statement of the ownership.

An indictment which alleges that the prisoners on such a day, and at such a place, "feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of R. P. W., then and there being," sufficiently states the property to belong to R. P. W., and there is no necessity for such an indictment to state that the prisoner did "then and there" set fire, &c. (*c*)

(*u*) Gowen's case, 2 East, P. C. 1027.

(*x*) Rex *v.* Wallis, R. & M. C. C. R. 344.

(*y*) Rex *v.* Smith, 4 C. & P. 569. March 15, 1831. This case occurred before Rex *v.* Newill, *infra*, and it may therefore perhaps be doubted whether the opinion expressed by the learned Judges in this case may not be considered as overruled by that case. C. S. G.

(*z*) Rex *v.* Newill, R. & M. C. C. R. 458. Another question was reserved as to the outhouse, but as a stack was burnt, and the conviction affirmed on the last count, the Judges thought it unnecessary to consider the question as to the outhouse. See this case, *ante*, p. 545, as to the person intended to be injured.

(*a*) Rex *v.* Woodward, R. & M. C. C. R. 323.

(*b*) Rex *v.* Swatkins, 4 C. & P. 548.

(*c*) Rex *v.* Swatkins, *ubi supra*.

The general provisions of the 7 Geo. 4, c. 64, as to the statement of the ownership of partners, joint-tenants, &c., and the ownership of property belonging to counties, parishes, &c., will apply to prosecutions for the offences now under consideration. (*d*)

Ownership of the property of partners, joint-tenants, &c.

In a case where the prisoners were charged with setting fire to a house, the proof adduced by the first witness of their having been present in the house, and implicated in the fact, was that a bed and blankets, which had been taken out of the house at the time it was fired, and concealed by them from that time, were afterwards found in their possession; and Buller, J., doubted at first, whether such evidence of another felony could be admitted in support of this charge. But as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this amongst other evidence. (*e*)

Evidence.

It was ruled upon an indictment for arson, that the books of an insurance company are not evidence of an insurance, unless notice had been given to produce the policy. (*f*) In a modern case of an indictment for feloniously setting fire to a house with intent to defraud an insurance company, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods, in a house described in the policy, were insured against fire, and upon which a memorandum was indorsed stating that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum. In this house so mentioned in the memorandum the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp: and upon this circumstance, an objection was taken on behalf of the prisoner, that it was essentially necessary to show, in support of the charge, that there subsisted a legal effective contract; and that, by the express provisions of the stamp acts, the memorandum in question not being stamped, could not be given in evidence, or be good or available in any manner whatever. The point being reserved for the consideration of the twelve Judges was argued before them; and the conviction was held to be wrong. (*g*)

Policy of insurance. Stamp.

The offence of setting fire to a stack of corn is not local but transitory; it is therefore no objection, upon the plea of not guilty, to an indictment, that it alleges the fire to have taken place at a different place from what it did, or at a parish which, in fact, does not exist. The indictment charged that the prisoner, at the parish of Normanton on the Would, in the county of Nottingham, set fire to a certain outhouse there situate, and to a certain stack of beans then and there being, with intent, &c. The second count stated that the prisoner at the parish aforesaid, &c., set fire to a certain outhouse there situate, &c. The third count stated that the prisoner at the parish aforesaid, set fire to a certain stack of beans, &c. The house was in Normanton on the Would, in the county of Nottingham, which is a hamlet, maintaining its own poor, and is in the

The offence of setting fire to a stack of corn is not local, and therefore a variance in the place laid in the indictment is immaterial.

(*d*) See *ante*, p. 120, *et seq.*

(*e*) Rickman's case, 1789. 2 East, P. C. c. 21, s. 11, p. 1035.

(*f*) Rex *v.* Doran, *cor.* Kenyon, C. J., 1 Esp. 127.

(*g*) Gillson's case, 1807, 2 Leach, 1007. 1 Taunt. 95. Russ. & Ry. 138. But there was considerable difference of opinion, the conviction being held wrong by six Judges only against five, who were of a contrary opinion.

parish of Plumtree; there is no such parish as Normanton on the Would, in the county of Nottingham; but there are two parishes called Normanton in the county, one called Normanton on the Sour, the other Normanton on Trent. Gaselee, J. and Littledale, J. doubted whether the prisoner could be convicted on this indictment. The objection seemed to be more particularly applicable to the charge as to the outhouse, as there was a local description given to it which should be proved as laid, and even if the words on the Would could be rejected as surplusage in mentioning the parish, still there was no such parish as Normanton singly. But they thought the objection as to the outhouse not material, if the indictment were correct as to the stack of beans; and as to that, the first question would be, whether the setting fire to that were to be considered as of a local nature as to the parish, or whether it were to be considered in the same light as common larceny, which need not to be proved in the parish alleged, provided it be in the county, and if it should be put on the same ground as common larceny in this respect, then a question would arise, whether, as it was proved negatively that there was no such parish as Normanton on the Would in the county, the indictment could be sustained. And, upon a case reserved, the Judges present unanimously held that the offence of setting fire to the stack of beans had nothing of locality in it, and that there was no such place in the county could only be taken advantage of by plea in abatement, and the conviction was affirmed. (*h*)

Principals in the second degree and accessories.

The punishment of principals in the second degree and of accessories has been already mentioned amongst the general provisions of the 1 Vict. c. 89. (*i*)

Penalty on servants firing any house or outhouse through negligence.

In conclusion of this chapter, it may be mentioned, that by the 6 Anne, c. 31, s. 3, and 14 Geo. 3, c. 78, s. 84, if any menial or other servant, through negligence or carelessness, shall fire, or cause to be fired, any dwelling-house, or outhouse, and be convicted thereof, by oath of one witness before two justices, he shall forfeit 100*l.* to the churchwardens, to be distributed amongst the sufferers by such fire; and if he shall not pay the same immediately, on demand of the churchwardens, he shall be committed by the justices to some workhouse, or common gaol, or house of correction, for eighteen months, there to be kept to hard labour.

(*h*) Rex *v.* Woodward, R. & M. C. C. R. 323. A question was also raised, but not decided in this case as to whether the building was an outhouse within the meaning of the 7 & 8 Geo. 4, c. 30. There seems no reason to doubt, although no opinion was given by the Judges on the point, that the description of the outhouse being local, was bad. See *ante*, p. 113.

(*i*) *Ante*, p. 554.

CHAPTER THE FORTY-THIRD.

OF MAIMING AND KILLING CATTLE.

It has been holden that no indictment lies at common law for unlawfully with force and arms maiming a horse. The indictment charged that the prisoner, on, &c., with force and arms at, &c. "one black gelding of the value of 30*l.*, of the goods and chattels of one William Collyer, then and there being, then and there unlawfully did maim; to the great damage of Collyer, and against the peace, &c." upon reference to the Judges after conviction, they all held that no indictable offence was stated in the indictment; that if the case were not within the Black Act, 9 Geo. 1, c. 22, now repealed, the fact itself was only a trespass; and that the words *vi et armis* did not imply force sufficient to support an indictment. (*a*)

No indictment lies at common law for unlawfully *vi et armis* maiming a horse.

The 9 Geo. 1, c. 22, (commonly called the Black Act) was for a considerable time the principal statute upon the offence of maliciously maiming and killing cattle. But the clause in that statute relating to offences of this description was repealed by the 4 Geo. 4, c. 54, by which a lesser degree of punishment was provided for such offences, and the enactment of the statute 9 Geo. 1, was made somewhat more general. The latter, however, having been repealed by the 7 & 8 Geo. 4, c. 27, the statute upon this subject at the present time is the 7 & 8 Geo. 4, c. 30.

Statutes.

This statute, by sec. 16, enacts, "that if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit) in addition to such imprisonment."

7 & 8 Geo. 4, c. 30, s. 16. Killing or maiming cattle.

The 1 Vict. c. 90, s. 2, recites this section, and that it is expedient to alter and amend the said recited act, and then repeals so much of the said act "as relates to the punishment of persons convicted of any of the offences hereinbefore specified," and enacts that "every person convicted, after the commencement of this act (1st of October, 1837,) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years."

1 Vict. c. 90, s. 2.

(*a*) Ranger's case, 1798, 2 East, P. C. c. 22, s. 16, p. 1074.

And by sec. 3, "it shall be lawful for the Court to direct such imprisonment to be with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

As to the meaning of the word "cattle," in the 9 Geo. 1, c. 22.

As this statute relates to the offence of maiming, &c. "cattle" in general, it may be proper to introduce some of the cases in which the meaning of that word in the repealed clause of the 9 Geo. 1, c. 22, became the subject of decision.

The 9 Geo. 1, c. 22, was considered as extending, and not as abridging, the offences described in the 22 & 23 Car. 2, c. 7. Where the prisoner had been convicted on an indictment framed on the 9 Geo. 1, c. 22, for killing a mare and a colt, it was moved in arrest of judgment; first, that the mare and colt were not averred in the indictment to be cattle within the meaning of the act; and, secondly, that the word *cattle* did not necessarily include *horses*, *mares*, and *colts*. In support of these objections, several statutes were cited, in which different sorts of animals were particularly specified, (*b*) and several others, in which "horses" and "horses and mares" seemed to be contradistinguished from and not included in the word "cattle." (*c*) But the Judges agreed unanimously that as the 22 & 23 Car. 2, c. 7, had made the offence of killing horses by night a single felony, the 9 Geo. 1, c. 22, was only to be considered as an extension of that act; and some precedents of capital convictions were cited upon this branch of the statute, though none of executions. It was, therefore, agreed that judgment of death should be given against the prisoner at the next assizes. (*d*) This point received a similar determination in subsequent cases.(*e*) And it is observed that it is plain that the legislature must have intended to include *horses* in the word "*cattle*," when in the statute of Car. 2, they speak of "horses, sheep, or *other cattle*;" and by the statute of George the First they exclude from clergy such as kill, &c., *any cattle*: which latter statute was evidently intended to enlarge, and not to restrain, the description of the felony. (*f*) It was subsequently decided that *pigs* were cattle within the 9 Geo. 1. Upon a conviction for poisoning pigs, the point was saved, whether pigs were cattle within the act, and the Judges held that they were. (*g*) The same decision more recently took place with respect to *asses*. The prisoner was convicted under the act of maiming and wounding two asses, and Richards, C. B., saved the point whether asses were within that act; and, upon a case reserved, the Judges (eleven being present) held that they were. (*h*)

(*b*) 3 & 4 Ed. 6, c. 19. 5 & 6 Ed. 6, c. 14, and 31 Geo. 2, c. 40, for regulating the sale of cattle.

(*c*) 12 Car. 2, c. 4, (book of rates). 22 Car. 2, c. 13. 14 Geo. 2, c. 6. 15 Geo. 2, c. 34. But see the observation in 2 East, P. C. c. 22, s. 18, p. 1075, that the argument from the statutes 14 & 15 Geo. 2, will lose much of its force from adverting to the preamble of the first of those statutes.

(*d*) Paty's case, Abingdon Sum. Ass. 1770. 2 Black. Rep. 721. 1 Leach, 72. 2 East, P. C. c. 22, s. 18, p. 1074. At the next assizes the prisoner was reprieved for transportation; and afterwards (upon a strong application from the country) he received a free pardon.

(*e*) Mott's case, O. B. 1783. 1 Leach, 73, note (*a*). Moyle's case, *cor.* Buller, J., Bodmin Sum. Ass. 1791. 2 East, P. C. c. 22, s. 18, p. 1076.

(*f*) 2 East, P. C. c. 22, s. 18, p. 1076.

(*g*) Rex *v.* Chapple, Mich. T. 1804, MS. Bayley, J., and Russ. & Ry. 77.

(*h*) Rex *v.* Whitney, Hil. T. 1824, MS. Bayley, J., and R. & M. C. C. R. 3.

It was also held upon the 9 Geo. 1, c. 22, that the repealed clause extended to such as should maim or wound any cattle, though the cattle were not destroyed, which by the 22 & 23 Car. 2, c. 7, was left a misdemeanor at most, punishable only by action to recover treble damages. It was decided, therefore, upon the 9 Geo. 1, c. 22, that the maiming or wounding need not be mortal; and that the wounding need not even be such as to cause a permanent injury. Thus, upon an indictment which charged the prisoner, in one count, with maiming, and in another with wounding a gelding; and, upon proof that he had maliciously, and with an intent to injure the prosecutor, driven a nail into the frog of the horse's foot, whereby the horse was rendered useless to the owner, and continued so at the time of the trial, but was stated to be likely to do well, and to be perfectly sound again in a short time, judgment was respited, after conviction, upon a doubt whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence was within the statute; but the Judges held the conviction right, and considered the word "wound" in the 9 Geo. 1, to be used as contradistinguished from a permanent injury, such as maiming. (*i*) The clause in the late act appears to admit of a similar construction.

As to the degree of "maiming," &c., under the 9 Geo. 1, c. 22.

The wounding need not cause a permanent injury.

The prisoner was charged in different counts with having unlawfully, feloniously, and maliciously killed, maimed, and wounded a certain mare. The two first counts charged the prisoner with having unlawfully, feloniously, and maliciously killed the mare, against the form of the statute. The first, stating the means used by the prisoner for that purpose, namely, the pouring nitrous acid into the left ear of the mare, and, also, stating as a fact, that the prisoner thereby killed the mare, and the second count, merely stating as a fact, that the prisoner killed the mare; the third count, charged the prisoner with having unlawfully, feloniously, and maliciously maimed the mare, against the form of the statute; and the fourth count charged the prisoner with having unlawfully, feloniously, and maliciously wounded the mare, against the form of the statute. On the trial it was proved, that the prisoner did pour a quantity of nitrous acid, which he had shortly before purchased, into the mare's left ear; and that he had either also poured some of it into the left eye, or, what was more probable, that some of the acid, which he had poured into the ear, had run along a furrow which it had made from her left ear upon her left temple, and so into her left eye, and that he had thereby occasioned the immediate blindness of that eye. The mare continued to live, in extreme pain, about ten days, when, in order to put her out of her misery, she was stuck with a knife, and bled to death. Two surgeons stated, that the injuries which were done to the ear (which was produced) were not wounds but ulcers, though such ulcers would have turned to wounds. Upon this state of facts, the nitrous acid not having been the proximate and immediate cause of the death of the mare, and the surgeons having deposed that the nitrous acid had not produced what they could technically call wounds, the Court recommended the jury, if they were satisfied of the guilt of the prisoner, to find their verdict against him on the third count of the indictment, and to acquit him on the other

Pouring acid into the eye of a mare and thereby blinding it, is a maiming within the statute.

(*i*) Haywood's case, 1801, 2 East, P. C. c. 22, s. 20, p. 1076, Russ. & Ry. 16.

counts: the jury having found a verdict accordingly, a case was reserved upon the question, whether the injury done to the eye of the mare in the manner and by the means above stated, was a maiming within the meaning of the 7 & 8 Geo. 4, c. 30, s. 16; and the conviction was affirmed. (*j*)

Wounds inflicted by a dog set at a sheep.

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 2, for feloniously wounding a sheep, and it appeared that he had set a dog at the sheep, and that the dog, by biting it, inflicted several severe wounds. Park, J. A. J., "This is not an offence at common law, and is only made so by statute; and I am of opinion that injuring a sheep by setting a dog to worry it, is not a maiming or wounding within the meaning of the statute." (*k*)

Burning a building with a cow in it.

If a person maliciously set fire to a building in which a cow is, and the cow is burnt to death by the fire, this is a killing within the statute. The prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 16, for maliciously killing a cow, and it appeared that the building, in which the cow was kept, had been set fire to by the prisoner, and that the cow had been burnt to death in it. Taunton, J., "If the prisoner set this place on fire while the cow was in it, and the cow was thereby burnt to death, that is a killing the cow by him within the meaning of this act of Parliament." (*l*)

***Malice* to the owner not necessary.**

Under the repealed clause of the 9 Geo. 1, c. 22, *malice* to the owner of the cattle was a necessary ingredient to constitute the offence there created, and numerous decisions took place as to the nature and proof of this malice, to which it is unnecessary to refer, as under the late statute the offence will be complete, whether it be committed from malice conceived against the owner, or "*otherwise.*" (*m*)

On the trial of an indictment under the 7 & 8 Geo. 4, c. 30, s. 16, for unlawfully and maliciously wounding cattle, it is not necessary to show personal malice against the owner of the property. It is enough that there was a mischievous motive, though not particular malice towards the owner. (*n*)

It should seem that the indictment upon the late statute ought,

(*j*) Rex *v.* Owens, R. & M. C. C. R. 205. See Rex *v.* Murrow, R. & M. C. C. R. 456, *ante*, vol. 1, p. 731.

(*k*) Rex *v.* Hughes, 2 C. & P. 420. But see Elmsly's case, 2 Lew. 126, where Alderson, J., thought a wound inflicted by the bite of a dog was a wound within the 9 Geo. 4, c. 31, but intended to reserve the point, if it became necessary. As to what injuries constitute wounds, see vol. 1, p. 729, *et seq.* C. S. G.

(*l*) Rex *v.* Haughton, 5 C. & P. 559.

(*m*) Sec. 25, *ante*, p. 544.

(*n*) Reeves Wilson's case, 1 Lew. 226. It may admit of some doubt whether this be the present state of the law, as the 7 & 8 Geo. 4, c. 30, s. 25, *ante*, p. 544, only applies to "every punishment and forfeiture by *this* act imposed," and the punishment for the offences mentioned in this section is repealed by the 1 Vict. c. 90, s. 2, and the present punishment is imposed by the 1 Vict. c. 90, ss. 2 & 3. It was clearly settled that in order to bring an offender within the 9 Geo. 4, c. 22, the malice must have been directed against the owner of the cattle, and not merely against the animal itself. 2 East, P. C. c. 32, s. 16, p. 1072. Pearce's case, ibid. 1 Leach, 527. Hean's case, 1 Leach, 527. Shepherd's case, 1 Leach, 539. Rex *v.* Austen, Russ. & Ry. 490. In all these cases, except the last, there appears to have been express malice against the animal wounded, and no malice against the owner; and in the last the malice was against a person who was not the owner. "But it does not appear to have been decided that it is necessary to give express evidence of previous malice against the owner in order to bring a case within the act; but the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it, to which the transaction itself will most probably furnish a clue." 2 East, P. C. c. 22, s. 16, p. 1074. Ranger's case, ibid., and see the cases, *ante*, p. 544, 545, 563. C. S. G.

like an indictment upon the repealed clause of the 9 Geo. 1, c. 22, to specify the kind of cattle injured, and that such statement must be supported by the evidence. In an indictment upon the 9 Geo. 1, c. 22, the prisoner was charged with maliciously killing certain cattle, viz. a mare, and he was convicted, but upon referring to the evidence, it did not appear that there was any evidence of the sex of the animal killed. A case being reserved, the first question considered was, whether the allegation that the prisoner killed certain cattle, without specifying what, would have been sufficient, because then what was stated under the videlicet might be rejected; and the Judges thought that it would not have been sufficient, and they were clear that it was essential that some evidence should have been given that the animal was a mare. (*o*)

Indictment and evidence.

If a prisoner were indicted for maliciously killing cattle by poison, other acts of administering poison would be admissible in order to show the intent. The prisoner was indicted for a misdemeanor in administering sulphuric acid to six horses, with intent maliciously to kill them, and it appeared that the prisoner mixed sulphuric acid with a quantity of corn, and that having done so, he gave each horse his feed, all the horses being in the same stable. Sulphuric acid is sometimes given to horses by grooms, under an idea that it will make their coats shine. Park, J. A. J., held that several acts of administering sulphuric acid were admissible, as they might go to show whether it was done with the intent charged in the indictment: and he left it to the jury to say, whether the prisoner had administered the poison with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of the horses; for that in the latter case they ought to acquit him. (*p*)

Other acts of administering poison are admissible to show the intent.

Every principal in the second degree, and every accessory before the fact, is punishable in the same manner as the principal in the first degree; and every accessory after the fact is liable to be imprisoned for any term not exceeding two years. (*q*)

Principals in the second degree, and accessories.

The 5 & 6 Wm. 4, c. 59, s. 2, makes any person cruelly beating or otherwise ill-treating any cattle, &c., or improperly driving the same, liable to be summarily convicted.

(*o*) Rex *v.* Chalkley, December, 1813, Russ. & Ry. 258.

(*p*) Rex *v.* Mogg, 4 C. & P. 364. The learned Judge also held that the evidence proved a joint administering of the sulphuric acid to all the horses.

(*q*) *Ante*, p. 546, where the other general provisions of the act are stated. Mr. Lonsdale observes, (St. Cr. L. 136,) that "the 7 & 8 Geo. 4, c. 30, was not repealed by the 1 Vict. c. 90, so far as relates to principals in the second degree and accessories before and after the fact to any offence affected by the latter act, nor does that act contain any provision for their punishment; they consequently continue punishable under the 26th section of the 7 & 8 Geo. 4, c. 30." But as that section only applies to felonies *punishable* under *that* act, and these felonies are now no longer punishable under that act, this may be doubted. If that section no longer applies, then there is no provision expressly made for the punishment of principals in the second degree and accessories, and they are consequently punishable in the manner stated in note (*u*), *ante*, p. 448. C. S. G.

CHAPTER THE FORTY-FOURTH.

OF INJURING AND DESTROYING TREES, SHRUBS, OR UNDERWOOD.

Offences by former statutes.

OFFENCES of the kind mentioned in the title to this chapter, were treated only as trespasses and misdemeanors by several ancient statutes: they were afterwards made offences of the degree of felony; but all the statutes upon this subject were repealed by 7 & 8 Geo. 4, c. 27, and the present law is contained in 7 & 8 Geo. 4, c. 30.

7 & 8 Geo. 4, c. 30, s. 19. Destroying or damaging trees, shrubs, &c., growing in certain situations, shall be felony, if the value exceeds one pound;

By sec. 19 of this statute, "if any person shall unlawfully and maliciously (*a*) cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, (*b*) every such offender (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment; (*c*) and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

the like to trees, growing elsewhere shall be felony, if the value exceeds five pounds.

Destroying or damaging trees, shrubs, &c., wheresoever growing, and of any value above one shilling, punishable on

By sec. 20 "if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay over and above the amount of the injury done, such sum

(*a*) See sec. 25, *ante*, p. 544.

(*b*) As to the meaning of the terms "garden," and "adjoining to," see Rex *v.* Hodges, Moo. & M. 341, *ante*, p. 68.

(*c*) The present punishment (under this section and sec. 27, and the 1 Vict. c. 90, s. 5,) is transportation for seven years or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and the offender may be ordered to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, and not exceeding three months in the space of one year, as to the Court in its discretion shall seem meet; and if a male may be ordered to be once, twice, or thrice publicly or privately whipped in addition to such imprisonment. As to the punishment of principals in the second degree and accessories, see the 7 & 8 Geo. 4, c. 30, s. 26, and 1 Vict. c. 90, s. 5, *ante*, p. 547.

of money, not exceeding five pounds, as to the Justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting Justice shall think fit; and if such second conviction shall take place before two Justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned." (*d*)

summary conviction, for first and second offence, third offence felony.

The words of this statute are much larger than the words of the 9 Geo. 1, c. 22, s. 1, which were, "unlawfully and maliciously cut down or otherwise destroy any trees." But upon this clause, it was held that cutting down apple trees was sufficient, although the trees were not thereby totally destroyed. (*e*)

In the same case it was also held that the act must be done from malice to the owner, but this is no longer necessary. (*f*)

Malice.

An indictment for damaging apple trees growing in a garden, should state the damage to be done "unlawfully and maliciously," and it is not sufficient to state that it was done "feloniously." The prisoner was indicted for damaging some apple trees growing in a garden, and the indictment alleged that the damage was done "feloniously," but did not state that it was done "unlawfully and maliciously." Bosanquet, J.—"Where the statute creating an offence uses particular words, those words must be pursued in the indictment. In this case, unless the damage was done maliciously, there was no felony committed. I think this indictment is bad." (*g*)

The indictment must state the act to be done "unlawfully and maliciously."

It should seem that there may be cases in which a party may come within sec. 19, though the tree cut be growing upon land in his occupation as tenant. In an action against a magistrate for false imprisonment, it appeared that he had committed the plaintiff under that section for maliciously cutting a tree, growing on premises in his occupation, and it was contended that the defendant had no jurisdiction, because it appeared that the plaintiff cut the tree on premises in his own occupation; but Tindal, C. J. said, "I cannot accede to the proposition that the circumstance of a party's being the occupier of the premises on which the tree is cut, necessarily takes a case out of the statute; suppose the trees excepted in a lease, the tenant would be a trespasser; and if liable in trespass, I am not prepared to say he might not be liable criminally." (*h*)

A tenant cutting trees on the demised premises.

The statute also contains provisions as to principals in the second degree, as to aceessories, and as to abettors in misdemeanors. (*i*)

Principals in second degree.

The destruction of a wood, coppice, &c. by fire has been mentioned in a former chapter. (*j*)

(*d*) See the last section, and note (*c*) to it.

(*e*) Rex *v.* Taylor, Russ & Ry. 373. The words in the 4 Geo. 4, c. 54, were the same as in the 9 Geo 1, c. 22.

(*f*) See sec. 25 of the 7 & 8 Geo. 4, c. 30, *ante*, p. 544.

(*g*) Rex *v.* Lewis, Gloucester Sum. Ass. 1830, Bosanquet, J. MSS. C. S. G. See Rex *v.* Turner, R. & M. C. C. R. 239, *ante*, p. 563.

(*h*) Mills *v*, Collett, 6 Bing. R. 85.

(*i*) *Ante*, p. 547.

(*j*) *Ante*, p. 554.

CHAPTER THE FORTY-FIFTH.

OF DESTROYING, &c. PLANTS, ROOTS, FRUITS, AND VEGETABLE PRODUCTIONS.

Destroying, &c., any fruit or vegetable production in a garden, &c., punishable on summary conviction for first offence; second offence felony.

THE 7 & 8 Geo. 4, c. 30, s. 21, enacts, "that if any person shall unlawfully and maliciously (*a*) destroy, or damage with intent to destroy, any plant, (*b*) root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned." (*c*)

Destroying, &c., vegetable productions not growing in gardens, &c.

By sec. 22, "if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, every such offender being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

(*a*) See sec. 25, *ante*, p. 544.

(*b*) As to the meaning of the terms, "plant," and "vegetable production," see Rex *v.* Hodges, Moo. & M. 341, *ante*, p. 68, and Rex *v.* Fraser, R. & M. C. C. R. 419, *ante*, vol. 1, p. 737.

(*c*) That is the punishment mentioned in sec. 19, *ante*, p. 574, and see note (*c*), ibid.

CHAPTER THE FORTY-SIXTH.

OF CUTTING AND DESTROYING HOP-BINDS.

Destroying hop-binds.

THE 7 & 8 Geo. 4, c. 30, s. 18, enacts, "that if any person shall unlawfully and maliciously (*a*) cut or otherwise destroy any hop-binds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment."

The 1 Vict. c. 90, s. 2, recites this section, and repeals so much of it "as relates to the punishment of persons convicted of any of the offences hereinbefore specified," and then enacts that "every person convicted after the commencement of this act, (1 October, 1837) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years." (*b*)

(*a*) See sec. 25, *ante*, p. 544.

(*b*) See sec. 3, *ante*, p. 570, as to hard labour and solitary confinement; and as to the punishment of principals in the second degree and accessories, see note (*q*), *ante*, p. 573.

CHAPTER THE FORTY-SEVENTH.

OF BREAKING DOWN, &c., SEA BANKS, LOCKS, AND WORKS ON RIVERS, CANALS, &c.

Destroying any sea bank, &c., or works on any river or canal.

THE 7 & 8 Geo. 4, c. 30, s. 12, enacts, "that if any person shall unlawfully and maliciously (*a*) break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so; or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank, or sea wall, or the bank or wall of any river, canal, or marsh; or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*b*)

Removing the piles of any sea bank, &c., or doing any damage to obstruct the navigation of a river or canal.

(*a*) See sec. 25, *ante*, p. 544.

(*b*) As to the punishment of principals in the second degree and accessories, see 7 & 8 Geo. 4, c. 30, s. 26, *ante*, p. 546, and as to hard labour and solitary confinement, see the 7 & 8 Geo. 4, c. 30, s. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547.

CHAPTER THE FORTY-EIGHTH.

OF DESTROYING THE DAMS OF FISH-PONDS, &C., OR MILL-PONDS, AND OF PUTTING NOXIOUS MATERIALS INTO FISH-PONDS, &C.

Breaking down the dam of a fishery, &c., or mill dam.

THE 7 & 8 Geo. 4, c. 30, s. 15, enacts, "that if any person shall unlawfully and maliciously (*a*) break down, or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein; or shall unlawfully and maliciously break down or otherwise destroy the dam of any mill-pond; every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*b*)

In a case upon the 9 Geo. 1, c. 22, the words of which were, "if any person shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed," the Judges thought that that provision applied only to cases of wanton and malicious mischief in cutting the head of a pond, and not to cases where it was used as the means of stealing the fish. (*c*)

(*a*) See sec. 25, *ante*, p. 544.

(*b*) As to abettors, see sec. 26, *ante*, p. 546, and as to hard labour and solitary confinement see sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547.

(*c*) Rex *v.* Ross, Russ. & Ry. 10. The new statute seems framed expressly so as to meet this case. C. S. G.

CHAPTER THE FORTY-NINTH.

OF DESTROYING OR INJURING BRIDGES, TURNPIKE-GATES, &c.

7 & 8 Geo. 4, c. 30, s. 13. Injury to a public bridge.

THE 7 & 8 Geo. 4, c. 30, s. 13, enacts, "that if any person shall unlawfully and maliciously (*a*) pull down or in any wise destroy any public bridge, or do any injury with intent, and so as thereby to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*b*)

Sec. 14. Destroying a turnpike-gate, toll-house, &c.

By sec. 14, "if any person shall unlawfully and maliciously (*a*) throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of Parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly." (*c*)

Destruction or damaging of bridges.

The malicious destruction or damaging of *public bridges* is said to be without doubt punishable as a misdemeanor at common law, being a nuisance to all the king's subjects. (*d*) But in a case of slight damage this might perhaps be questioned. With respect to wilful damage done to bridges, arches, walls, &c., erected by the commissioners of turnpike-roads, pecuniary penalties, recoverable by summary conviction, are imposed by 3 Geo. 4, c. 126, s. 121, and 4 Geo. 4, c. 95, s. 72.

There are, however, a great number of bridges within this kingdom which it was made felony to injure or destroy, by the enact-

(*a*) See sec. 25, *ante*, p. 544.

(*b*) As to the punishment of principals in the second degree and accessories, see sec. 26, *ante*, p. 546, and as to hard labour and solitary confinement see sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547.

(*c*) As so hard labour and solitary confinement, see sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547, and as to abettors see sec. 26, *ante*, p. 546.

(*d*) 2 East, P. C. c. 22, s. 27, p. 1081.

ments of particular statutes. In some instances the offence was made capital, as in the case of Westminster Bridge, by 9 Geo. 2, c. 29, s. 5. But the 1 Geo. 4, c. 116, repeals this provision of the Westminster Bridge act, and with respect to similar provisions in other statutes it enacts, "that such parts of all former acts relating to bridges as enact that if any person or persons shall wilfully and maliciously blow up, pull down, or destroy any bridge, or any part thereof, or attempt so to do, or unlawfully and without authority remove or take any works thereunto belonging, or in anywise direct or procure the same to be done, such offender or offenders, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, shall from and after the passing of this act be and the same are hereby repealed."

CHAPTER THE FIFTIETH.

OF DESTROYING FENCES, WALLS, STILES, OR GATES.

Destroying, &c., any fence, wall, stile, or gate.

THE 7 & 8 Geo. 4, c. 30, s. 23, enacts, "that if any person shall unlawfully and maliciously (*a*) cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet: and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or House of Correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped after the expiration of four days from the time of such conviction."

(*a*) See sec. 25, *ante*, p. 544.

CHAPTER THE FIFTY-FIRST.

OF THE DESTROYING AND DAMAGING MINES AND MINE-ENGINES.

THE offence of setting fire to any coal-mine has been mentioned in a former chapter. (*a*)

The 7 & 8 Geo. 4, c. 30, s. 6, enacts, "that if any person shall unlawfully and maliciously (*b*) cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof; or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, water-way, drain, pit, level, or shaft, of or belonging to any mine; every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment: provided always, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working." (*c*)

7 & 8 Geo 4, c. 30, s. 6. Drowning any mine or filling up any shaft, &c., with intent to destroy the mine.

By sec. 7, "if any person shall unlawfully and maliciously (*b*) pull down or destroy, or damage, with intent to destroy or to render useless, any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned."

Sec. 7. Destroying any engine, erection, &c., used in any mine.

We have seen that where one of the owners of adjoining mines asserting that an airway belongs to him, directs his workmen to stop it up, and they acting *bonâ fide*, and believing that he has a right to give such an order, do so, they are not guilty of felony for stopping up the airway, even though the master knew that he had no right to it. But if any of the workmen knew that the stopping of the air-

Claim of right.

(*a*) *Ante*, p. 553.
(*b*) See sec. 25, *ante*, p. 544.
(*c*) See sec. 26, *ante*, p. 546, as to principals in the second degree and accessories, and sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547, as to hard labour and solitary confinement.

way was a malicious act of his master, such workman would be guilty of felony. (*d*)

Wrongfully setting a steam engine in motion, whereby it is damaged.

If a steam engine be set in motion without any machinery attached to it, with intent to damage it or render it useless, the case is within the statute. Upon an indictment for maliciously damaging a steam engine with intent, as charged in one count, to destroy, as charged in another, to render it useless, it appeared that the steam engine was used to bring up coals from the shaft of one mine, and water from another, and that it was stopped and locked up in the evening, and that the prisoners in the night got into the engine house and set the engine going, and from its having no machinery attached to it, the engine worked with greater velocity, and the wheels were some of them thrown out of cog, so that the engine was damaged to the amount of 10*l.*, and would have been injured to a much greater extent, if the mischief had not been discovered and the engine stopped. Gurney, B., left it to the jury to say whether the intent of the prisoners was to destroy the engine or to render it useless; and held that if the prisoners had either of those intents the case came within the provisions of the statute.

What is an "erection." What is not part of a steam engine.

Damaging a drum moved by a steam engine is not damaging the steam engine, but damaging a scaffolding placed across the shaft of a mine, in order to work a level, is damaging an "erection" "used in conducting the business of a mine." Upon an indictment founded on the 7 & 8 Geo. 4, c. 30, s. 7, containing counts for damaging an engine employed in working a mine with intent to destroy it, and for damaging a certain erection used in the working a mine, with intent to destroy it, it appeared that a coal mine was worked by a steam engine, which caused a cylinder, called a drum, to revolve and take up the rope as the coal was drawn from the mine. At the other end of the rope was a heavy weight, called a bull, which the prisoners threw into the shaft of the mine, and by the sudden jerk caused the drum to be strained and injured. The bottom of the shaft was filled with water, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine, for the purpose of working a vein of coal that was on a level with the scaffold, and the prisoners had thrown a sort of waggon, called a corve, down the shaft, whereby the scaffold was much injured. It was objected, first, that as the drum was no part of the steam engine, the counts charging the damaging the steam engine could not be supported; secondly, that the scaffolding was not an "erection" within the meaning of the 7 & 8 Geo. 4, c. 30, s. 7, as the word "erection" being used in conjunction with the words "staith or building" must be taken to mean an erection *ejusdem generis;* and it was held that the damaging the drum did not support the counts charging the damaging the steam engine, but it was also held that the scaffolding was an erection within the meaning of the statute; the word "erection" being clearly meant to denote something different from a building. (*e*)

(*d*) Reg. *v* Norris, 9 C. & P. 241. See Rex *v.* Tacey, *post*, p. 586.

(*e*) Reg. *v.* Whittingham, 9 C. & P. 234, Patteson, J.

CHAPTER THE FIFTY-SECOND.

OF DESTROYING AND DAMAGING ARTICLES IN A COURSE OF MANUFACTURE, AND OF DESTROYING, &c. IMPLEMENTS AND MACHINERY.

7 & 8 Geo. 4, c. 30, s. 3. Destroying silk, woollen, linen, or cotton goods in the loom, &c., or any machinery belonging to those manufactures, &c.

THE 7 & 8 Geo. 4, c. 30, s. 3, enacts, "that if any person shall unlawfully and maliciously (*a*) cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*b*)

Taking away part of a frame, and thereby rendering it useless.

Upon an indictment under the 28 Geo. 3, c. 55, s. 4, (now repealed) for maliciously damaging a frame used for making stockings, it appeared that the prisoner unscrewed, unfastened, and carried away a part, called the half-jack, from two frames used for the making of stockings. The half-jack is a piece of iron, which is an essential part of the frame, and when taken out the frame is rendered useless; but it may be taken out and again replaced without injury to the frame, and is sometimes so treated when the frame is taken to pieces to be cleaned. Most of the other parts of the frame may in like manner be taken out and replaced. The frames in this case were not otherwise injured than by taking away the half-jacks. It was

(*a*) See sec. 25, *ante*, p. 544.

(*b*) See sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547, as to hard labour and solitary confinement; and sec. 26, *ante*, p. 546, as to principals in the second degree and accessories.

objected, that this removal of the half-jack was not a damaging of the frame within the statute, which it was contended, applied only to cases of breaking, bending, or straining, some part of the frame, and not to the removal of a part, though that part might be an essential part. But upon a case reserved, the Judges were unanimously of opinion that the taking out and carrying away the half-jack, was a damaging the frame within the meaning of the 28 Geo. 3, as it made the frame imperfect and inoperative. (*c*)

Looms.

The 22 Geo. 3, c. 40, s. 1, made it a capital felony to break into any house, &c., with intent to destroy "any serge or other woollen goods in the loom, or any tools employed in the making thereof," and it was held, that destroying part of a loom did not come within the meaning of that statute. (*d*)

Goods remain in a stage process or progress of manufacture though the texture be complete, if they be not brought into a condition fit for sale.

The first count charged the prisoners with maliciously damaging 100 pieces of worsted stuff, "in a certain process of manufacture," with intent to destroy the same. Other counts stated the goods to be in "a certain stage of manufacture," and others stated them to be "in the progress of manufacture." The prosecutors were dyers, and received the stuffs from the manufacturer after the texture was complete, but while they were still in an unmarketable state. The stuffs which were damaged by the prisoners were, at that time, upon rollers, immersed in liquid, and in the actual process of being dyed; and the injury was done by throwing deleterious ingredients upon the stuffs themselves, and into the liquid in which they were immersed. For the prisoners it was contended, that as the article damaged was at the time of the damage being done in a complete state, so far as the manufacturing and texture were concerned, and only required dyeing to fit it for the market, the case did not come within the words of the act. For the prosecution it was submitted, that the legislature could not have intended to withdraw the protection of the act, until the manufacture was so complete that the articles were fit for immediate sale. Coleridge, J., (after consulting with Parke, B.) said that they were both of opinion that the true construction of the act was that contended for by the prosecutor; he therefore overruled the objection, and he referred to the provision in the same section relating to goods on "the rack or tenters," as shewing that the act contemplated injuries to goods subsequent to the completion of the texture. (*e*)

An indictment for damaging warps of linen yarn, need not allege that the warps were prepared for or employed in carding, &c., or otherwise preparing goods, &c.

The indictment stated that the prisoner six warps of linen yarn of the goods of A. B. unlawfully, maliciously, and feloniously did damage by throwing the said warps of linen yarn with great force unto and upon the ground, &c. with intent to render the same useless; against the form, &c. After conviction a writ of error was brought, and the errors assigned were, that it did not appear by the count that the said warps were, at the time of the damage, goods in any stage of manufacture, or that they were prepared for being woven or manufactured into, or were employed in the weaving or manufacturing, any such goods, &c.; and it was contended that the indictment did not state any offence within the statute, because the damaging warps was made an offence only where such warps had been prepared for,

(*c*) Rex *v.* Tacey, Russ. & Ry. 452.

(*d*) Rex *v.* Hill, Russ. & Ry. 483. The new statute seems framed to meet this case.

(*e*) Rex *v.* Woodhead, 1 M. & Rob. 549.

or employed in spinning, &c., or otherwise manufacturing the goods mentioned in the previous part of the section; and that the indictment did not allege that the warps of linen were so prepared or employed. Lord Tenterden, C. J., in delivering the judgment of the Court, said, "We are of opinion, on a careful examination of the statute, that it was not necessary to allege specifically in the count that the warps therein mentioned were prepared for or employed in carding, spinning, weaving, &c., or otherwise manufacturing goods. The third section of 7 & 8 Geo. 4, c. 30, consists of three branches. The first branch enacts, that if any person shall unlawfully and maliciously damage with intent to destroy, any goods therein described, being in the loom, &c., he shall be guilty of felony. Now in an indictment for an offence against that enactment, it would be undoubtedly necessary to allege that the goods were at the time of the damage in the loom, &c., because it was not the intention of the legislature to make it an offence to destroy such goods wherever found, but to protect them only while they were in a course of manufacture. The same observation applies to the latter part of the second branch of the section, which makes it an offence to damage or break any loom prepared for or employed in manufacturing, &c.; it would not be sufficient in an indictment, framed upon that provision of the statute, to charge the mere destruction of a loom, without adding that it was one prepared or employed in some of the ways therein described, for the count then would be too general. But as to the damaging of any warp or shute of silk, woollen, or linen, the question may, on the words of the act, admit of some doubt. The whole sentence is, "If any person shall unlawfully and maliciously damage, &c. with intent to destroy, any warp or shute of silk, woollen, linen, &c., or any loom, frame, &c. prepared for or employed in carding, spinning, weaving," &c.; and the question is, if the words "prepared for or employed," &c., are to be considered as referring to all the preceding words, or to those only denoting the implements of manufacture. That must be ascertained by looking at the subject matter of the enactment and the object which the legislature had in view. That object in the first branch of the section was, the protection of goods while in the course of manufacture; in the second, the protection of the warp or shute, and of the machinery and implements, when they were prepared for or employed in the production of goods. Now as to the latter, it is necessary, with a view to the limited purpose which the legislature had in view, that the concluding words should apply to them; but not so as to the warp, because a warp is a denomination of some kind of thread prepared to be woven and used in manufacture; it is in itself something "prepared for manufacturing goods." We were referred in the argument to former acts of Parliament *in pari materiâ* which had been repealed, and it was said, that under some of those acts, the word warp was so connected with the words importing preparation for manufacture, that a similar connection must be understood here, and consequently, it was necessary that they should be so connected in an indictment on the present clause. To the party indicted that must, at all events, be immaterial, because the warp must be something already prepared for manufacture; and therefore the proof would be the same, whether the indictment contained such an allegation or not; but in the statute, 4 Geo. 4, c. 46, the word warp is used absolutely by itself, without

reference to any word denoting preparation for manufacture, and without any qualification before or after. The words which follow, "or to burn, break, &c. any loom, &c., prepared for or employed in manufacturing," constitute a distinct branch of the sentence, and after them a new sentence commences. Upon this view of the two acts of Parliament, and considering that the word warp is a well known denomination of an article which is in some way or other prepared for or employed in manufacture, we are of opinion that it was not necessary to allege specifically in this case that the warp mentioned in the indictment was so prepared or employed." (*d*)

7 & 8 Geo. 4, c. 30, s. 4. Destroying threshing machines, or machinery in any other manufacture than the foregoing.

By the 7 & 8 Geo. 4, c. 30, s. 4, "if any person shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace) every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*e*)

Destroying a threshing machine, taken to pieces in expectation of a mob.

Upon an indictment for destroying a threshing machine it appeared that the prosecutor, in expectation of a mob coming to destroy his threshing machine, had himself taken it to pieces, and that the prisoners only broke the detached parts of it; but it was held that the offence was made out, although at the time when the machine was broken, it had been taken to pieces, and was in different places, only requiring the carpenter to put the pieces together again. (*f*) So where the prisoner was indicted for destroying a threshing machine, and it appeared that it had been previously taken to pieces by the owner, by separating the arms and other parts of it, for the purpose of placing it in safety, but with a view to put it together again; and it was destroyed, whilst in this disjointed state; it was decided, that the offence was within the statute of the 7 & 8 Geo. 4, c. 30, s. 3. (*g*) So where certain side-boards were wanting to the machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually as if those boards had been made good; it was held, that it was still a threshing machine within the meaning of the statute. (*h*) So also where the owner had removed a wooden stage belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared in evidence, that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair, or

(*d*) Rex *v.* Ashton, 2 B. & Ad. 750.

(*e*) See sec. 26, *ante*, p. 546, as to principals in the second degree and accessories, and sec. 27, and the 1 Vict. c. 90, s. 5, *ante*, p. 547, as to hard labour and solitary confinement.

(*f*) Rex *v.* Mackerel, 4 C. & P. 448, Park, J. A. J., Bolland, B., and Patteson, J.

(*g*) Rex *v.* Hutchins, 2 Deac. Cr. Dig. 1517, Read. Sp. Com. Park. J. A. J., Bolland, B., and Patteson, Js.

(*h*) Rex *v.* Bartlett, 2 Deac. Cr. Dig. 1517, Salisb. Sp. Com. Vaughan, B., Parke and Alderson, Js.

table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one, within the act, notwithstanding the stage and legs were wanting. (*i*)

Destroying the water-wheel of a threshing machine.

So where on an indictment for destroying a threshing machine, it appeared that the machine was worked by water, and that the prosecutor, expecting a mob would come to break it, had had it taken to pieces, and had removed the pieces to a barn at the distance of a quarter of a mile, leaving no part of it standing but the water-wheel and its axis and a brass joint, which was joined to the axis of the water-wheel, and that this water-wheel was broken by the prisoners. The water-wheel had been put up for the sole purpose of working the threshing machine, and had never been used for anything else, except sometimes to work a chaff-cutter, which was appended to the threshing machine; it was held that the wheel was part of the threshing machine, and that the damaging it was damaging a threshing machine within the meaning of the statute, and that it made no difference that the threshing machine was sometimes worked by horses when there was a scarcity of water. (*j*)

But where the prosecutor had not only taken the machine to pieces, but had broken the wheel before the mob came to destroy it, for fear of having it set on fire and endangering his premises; and it was proved, that, without the wheel, the engine could not be worked; in this case it was held, that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing machine within the meaning of the statute. (*k*)

Persons compelled to destroy machines by a mob.

Where, on an indictment for destroying a threshing machine, it appeared that the machine was broken by a mob, Patteson, J., allowed the witnesses to be asked whether many persons had not been compelled to join the mob against their will, and whether the mob did not compel each person to give one blow to each threshing machine they broke; and also whether, at the time when the prisoner and a witness called for the prisoner joined the mob they did not agree together to run away from the mob the first opportunity. (*l*)

7 & 8 Geo. 4, c. 30, s. 8. Rioters demolishing, &c. a church, chapel, house, or certain buildings, or any machinery in any manufactory or mine.

The 7 & 8 Geo. 4, c. 30, s. 8, enacts, "that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such

(*i*) Rex *v.* Chubb, 2 Deac. Cr. Dig. 1518, Salish. Sp. Com. Vaughan, B., and Parke, J.

(*j*) Rex *v.* Fidler, 4 C. & P. 449. Park, J. A. J., Bolland, B., and Patteson, J.

(*k*) Rex *v.* West, 2 Deac. Cr. Dig. 1518, Salish. Sp. Com. Alderson, J.

(*l*) Rex *v.* Crutchley, 5 C. & P. 133.

offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." (*l*)

4 & 5 Vict. c. 56, s. 2. Present punishment.

The 4 & 5 Vict. c. 56, s. 2, recites this section, and so much of the act as "relates to principals in the second degree and accessories before the fact," and enacts, "that from and after the commencement of this act (1st October, 1841) if any person shall be convicted of any of the said offences hereinbefore last specified, whether as principal, or as principal in the second degree, or as accessory before the fact, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore recited ordered to be given or awarded against persons convicted of the said last-mentioned offences, or any of them respectively, be liable, at the discretion of the Court, to be transported beyond the seas for any term not less than seven years, or to be imprisoned for any time not exceeding three years."

Sec. 4. Hard labour, &c.

By sec. 4, "in awarding the punishment of imprisonment for any offence punishable under this act, it shall be lawful for the Court to direct such punishment to be with or without hard labour in the common gaol or House of Correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, whether the same be with or without hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet." (*m*)

Joinder of counts.

Where an indictment contained counts founded on the 8th section for riotously demolishing certain machinery, and also counts founded on the third section for destroying certain looms, and it was objected that the two sets of counts were improperly joined, as the same judgment could not be passed on both; Bayley, J., said, "I see no difficulty. I do not see that the prisoners will be under any disadvantage; but I will speak to the Judges on the subject." (*n*)

(*l*) See vol. 1, p. 270, for the cases decided upon this section.

(*m*) The 4 & 5 Vict. c. 56, contains no provision for the punishment of accessories after the fact, and as the offences mentioned in the 7 & 8 Geo. 4, c. 30, s. 8, are no longer punishable under that statute, it may be doubted whether accessories after the fact are now punishable under sec. 26, *ante*, p. 546. If they are not, then there is no express punishment provided for such accessories, and they are punishable (under the 7 & 8 Geo. 4, c. 23, ss. 8 & 9, and the 1 Vict. c. 90, s. 5) in the manner stated in note (*u*), *ante*, p. 448. C. S. G.

(*n*) Kershaw's case, 1 Lew. 218. It is not stated in the report how this case terminated.

CHAPTER THE FIFTY-THIRD.

OF DESTROYING AND DAMAGING SHIPS AND OTHER VESSELS, AND ARTICLES THEREUNTO BELONGING.

THE offence of unlawfully and maliciously *setting fire* to ships and other vessels has been mentioned in a preceding chapter. (*a*) The enactment there mentioned extends to other modes of destruction: the former statute on this subject, namely, the 7 & 8 Geo. 4, c. 30, contained several general provisions against the offences of maliciously damaging ships and other vessels, and doing certain acts tending to their immediate loss or destruction, most of which are repealed by the 1 Vict. c. 89. (*b*)

7 & 8 Geo. 4, c. 30, s. 10. Damaging a ship, otherwise than by fire.

The 7 & 8 Geo. 4, c. 30, s. 10, enacts, "that if any person shall unlawfully and maliciously (*c*) damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." (*d*)

1 Vict. c. 89, s. 4. Setting fire to ships, &c., with intent to commit murder.

The 1 Vict. c. 89, s. 4, enacts that "whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof, shall suffer death." (*e*)

Hanging out false lights to cause shipwreck.

By sec. 5, "whosover shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and being convicted thereof, shall suffer death." (*f*)

Setting fire to ships or vessels with intent to destroy the same.

By sec. 6, "whosoever shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously

(*a*) *Ante*, Chap. *On Arson*, &c., p. 553.

(*b*) The 1 Vict. c. 89, repeals the 9th and 11th sections of the 7 & 8 Geo. 4, c. 30, and so much of the same act as relates to the punishment of principals in the second degree and accessories to the offences contained in those sections.

(*c*) See sec. 25, *ante*, p. 544.

(*d*) See sec. 26, *ante*, p. 546, as to principals in the second degree and accessories, and see sec. 27, and the 1 Vict. c. 90, s. 5, as to hard labour and solitary confinement, *ante*, p. 547.

(*e*) This section is new.

(*f*) This section is the same as the beginning of the 7 & 8 Geo. 4, c. 30, s. 11, except that the word "unlawfully" is introduced before the word "exhibit."

set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*g*)

Impeding any person endeavouring to save his life from any ship wrecked, &c.

By sec. 7, "whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, (whether he shall be on board or shall have quitted the same), shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*h*)

Destroying wrecks or any articles belonging thereto.

By sec. 8, "whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years." (*i*)

12 Geo. 3, c. 24. Persons wilfully destroying ships of war, arsenals, dock-yards, &c., or any timber, &c., or stores.

The 12 Geo. 3, c. 24, relates to the king's ships of war, arsenals, &c. and enacts, "that if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning or otherwise destroying of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of His Majesty's dock-yards, or building or repairing by contract in any private yards, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dock-yards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed or deposited;" the person or persons guilty of any such offence shall be adjudged guilty of felony, and suffer death without benefit of clergy. (*j*). By the second section, persons committing these offences out of the realm, may be indicted and tried for the same either in any county within the realm, or in the place where the offence shall

(*g*) This section is the same as the 7 & 8 Geo. 4, c. 30, s. 9.

(*h*) This section is the same as the last part of the 7 & 8 Geo. 4, c. 30, s. 11.

(*i*) This section is the same as the middle part of the 7 & 8 Geo. 4, c. 30, s. 11. As to the punishment of principals in the second degree and accessories, see sec. 11, *ante*, p. 553; and as to hard labour and solitary confinement see sec. 12, *ante*, p. 554, and as to the question of malice against the owner in offences against this statute see note (*n*), *ante*, p. 572.

(*j*) See *ante*, p. 654, note (*m*).

have been actually committed, as his Majesty may deem most expedient for bringing such offender to justice. (*k*)

The 1 & 2 Geo. 4, c. 75, s. 11, enacts, "that if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark, belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or, in mitigation of such punishment, to be imprisoned for any number of years at the discretion of the Court in which the conviction shall be made." (*l*)

1 & 2 Geo. 4, c. 75, s. 11. Cutting away, defacing, &c., buoys, buoy-ropes, &c., felony, punishable by transportation, &c.

Besides the statutes which have been thus cited, there are some others of a more limited and local operation, which may be briefly noticed. The 2 Geo. 3, c. 28, which made provisions against damaging the cordage of vessels on the Thames, was repealed by the 2 & 3 Vict. c. 47, entitled "An act for further improving the police in and near the metropolis;" but sec. 27 of that act enacts, that "every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the river Thames, or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof, shall be deemed guilty of a misdemeanor." The 39 Geo. 3, c. 69 (a local act for improving the port of London), s. 4, after providing as to the burning, &c., of ships therein mentioned, enacts, "that if any person or persons shall knowingly, wilfully, or maliciously demolish, break down, cut, or destroy any of the works to be made by virtue of this act, or any ship or vessel lying in the said canal, or in any of the said docks, basins, cuts, or other works; then every such offender, being convicted thereof, shall suffer punishment by fine, imprisonment, or transportation, at the discretion of the Judge, &c., before whom such offender shall be tried and convicted." And by sec. 105, persons wilfully or maliciously cutting, &c., or in any manner destroying any rope, &c., by which any ship or vessel lying in the said canal, docks, &c., or in any place or places in the river Thames, *between London Bridge and the mouth of the river Lea*, are moored or fastened, shall forfeit not exceeding 10*l*. The 47 Geo. 3, sess. 2, c. 2, s. 57 (local act), relates to the damaging, &c., of shipping, or

Statutes of a limited and local operation, 2 & 3 Vict. c. 47, s. 27.

39 Geo. 3, c. 69.

47 Geo. 3, sess. 2, c. 2,

(*k*) Some offences of a similar nature may be inquired of and tried by courts martial by the naval articles of war, secs. 24 and 25, as given in 22 Geo. 2, c. 33. And by the 26th article, "care shall be taken in the conducting and steering of any of his Majesty's ships, that through wilfulness, negligence, or other defaults, no ship be stranded or run upon any rocks or sands, or split or hazarded, upon pain that such as shall be found guilty therein be punished by death, or such other punishment as the offence, by a court-martial, shall be judged to deserve."

(*l*) See various provisions of this act as to unlawfully receiving anchors, cables, &c., or goods obtained from ships, *ante*, p. 270. By sec. 36, the act is not to extend to Scotland or Ireland; nor (by sec. 23) to affect the Cinque Port act, 48 Geo. 3, c. 130, or the Pilot act, 48 Geo. 3, c. 104. This statute contains no express provisions for the punishment of principals in the second degree and accessories, they are therefore punishable in the manner stated in note (*n*), *ante*, p. 448.

s. 57. 1 & 2 Geo. 4, c. 76.

goods, &c., in Folkstone Harbour. The 1 & 2 Geo. 4, c. 76, relates to the jurisdiction of the Cinque Ports, and the sixth section contains an enactment making the cutting away, defacing, &c., buoys, &c., a felony punishable by transportation in words similar to the 1 & 2 Geo. 4, c. 75, s. 11. (*m*)

Words "cast away or destroy."

Upon the words "cast away or destroy" it may be mentioned that, upon the construction of those words in two statutes, 4 Geo. 1, c. 12, and 11 Geo. 1, c. 29 (now repealed) it appears to have been ruled that if a ship were only run aground or stranded upon a rock, and were afterwards got off in a condition capable of being easily refitted, she could not be said to be *cast away or destroyed*, and that the case was not therefore within either of those statutes. (*n*)

As to the meaning of the word "vessel."

A question has twice arisen, but has not been expressly decided, as to what vessels are included within the word "vessel" in the 7 & 8 Geo. 4, c. 30. In the first case the prisoner was indicted for setting fire to a barge, and Alderson, B., would have reserved the question, if the prisoner had been convicted, whether a barge was a vessel within the meaning of this statute. (*o*) In the second case the prisoner was indicted for damaging a certain vessel by beating a hole in the bottom of it. The vessel in question was a small pleasure boat, about eighteen feet long, and two men could have carried it, and it was objected that the legislature meant to apply the terms "ship or vessel" only to such vessels as were likely to be underwritten, and not to small boats; and that in the 7 & 8 Geo. 4, c. 29, s. 17, where it was meant to include boats, the words were "vessel, barge, or boat," clearly making a distinction between a vessel and a boat. Patteson, J., "That the term vessel would in common parlance include this boat is clear, but whether in this act of Parliament it was meant to include such boats is the question." "I incline to think that this boat is within the clause in the act of Parliament; but as the word vessel must have the same construction in all other acts of Parliament, it might lead to inconvenience, and therefore if necessary I will take the opinion of the Judges upon it." (*p*)

Indictment.

In the same case it was objected that the indictment was bad, because it did not allege that the damage was done "otherwise than by fire;" but it was held to be sufficient, as it was alleged to be done by beating a hole in the bottom of the boat. (*q*)

(*m*) *Ante*, p. 593, and see the 1 & 2 Geo. 4, c. 76, as to other offences committed within this jurisdiction.

(*n*) De Londo's case, 1765. 2 East, P. C. c. 22, s. 42, p. 1098.

(*o*) Rex *v.* Smith, 4 C. & P. 569. See this case, *ante*, p. 566.

(*p*) Rex *v.* Bowyer, 4 C. & P. 559. Verdict not guilty. Could a corricle be considered a vessel within this statute?

(*q*) Rex *v.* Bowyer, *supra*.

CHAPTER THE FIFTY-FOURTH.

OF WILFUL OR MALICIOUS DAMAGE TO REAL OR PERSONAL PROPERTY NOT OTHERWISE PROVIDED FOR.

Persons committing damage to any property, in any case not previously provided for, may be compelled by a justice to pay compensation not exceeding five pounds.

THE 7 & 8 Geo. 4, c. 30, s. 24, enacts, "that if any person shall wilfully or maliciously (*a*) commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered) shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, (*b*) nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act."

Application of the money awarded.

Proviso.

(*a*) See sec. 25, *ante*, p. 544.

(*b*) It is a question for the magistrates, under all the circumstances, whether the party acted under such fair and reasonable supposition that he had a right to do the act. Reg. v. Dodson, 9 Ad. & Ell. 704.

BOOK THE FIFTH.

OF OFFENCES WHICH MAY AFFECT THE PERSONS OF INDIVIDUALS OR PROPERTY.

CHAPTER THE FIRST.

OF PERJURY AND SUBORNATION OF PERJURY.

Perjury by the common law.

(5) . (6) (8)

PERJURY, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a Court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. (a) (1) (2) (3) (4) (7)

Subornation of perjury by the common law.

to perjury." i.e. to a perjury fulfilling the above definition. —

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. (b)

Inciting a witness to give *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor, especially, if the inciter being attorney on one side gets himself employed for that purpose by the other side; at least, if the evidence is given accordingly. The indictment charged that the defendant, an attorney, being retained to defend Wood against a charge of picking Lewis's pocket, deceitfully procured himself to be employed by Lewis, and persuaded Lewis to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that Lewis's evidence was not stated to have been false; but, upon a case reserved, the Judges thought it unnecessary, as the defendant's crime was the same, unless he knew it to be true, and *that* he should have proved. (c)

(a) 1 Hawk. P. C. c. 69, s. 1. 3 Inst. 164. Com. Dig. tit. *Justice of Peace*, B. 102. Bac. Ab. tit. *Perjury*.

(b) 1 Hawk. P. C. c. 69, s. 10. Bac. Ab. tit. *Perjury*, and the authorities there cited.

(c) Rex v. Edwards, East. T. 1764, MS. Bayley, J. And as to dissuading witnesses from giving evidence, see vol 1, p. 182.

The false oath must be wilful, and taken with some degree of deliberation, for if upon the whole circumstances of the case it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable. (*d*)

The false oath must be wilful, and taken with some degree of deliberation.

It has been said that no oath will amount to perjury, unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks*, *remembers*, or *believes*, cannot, in respect of such an oath, be found guilty of perjury. (*e*) But De Grey, Ld. C. J., appears to have laid down a different doctrine. (*f*) And Lord Mansfield, C. J., is stated to have said, "It is certainly true that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false." (*g*) It is further said that, upon this question being agitated in the Court of Common Pleas, all the Judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement. (*h*) But it has been holden that perjury cannot be assigned upon an assertion the correctness of which depends upon the construction of a deed. (*i*)

A man may be indicted for perjury in swearing that he *believes* a fact to be true.

The important requisites in a case of perjury appear to be these: *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (*k*)

With respect to the falsity of the oath it should be observed, that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he. (*l*)

The oath must be false.

The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest are concerned; as, before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents. But it is not material whether the Court, in which a false oath is taken, be a Court of record or not, or whether it be a Court of common law, or a Court of equity, or civil law, &c., or whether the oath be taken in the face of the Court, or out of it before persons au-

The oath must be taken in a judicial proceeding.

(*d*) 1 Hawk. P. C. c. 69, s. 2.
(*e*) 3 Inst. 166.
(*f*) Miller's case, 3 Wils. 427. 2 Black. Rep. 881.
(*g*) Pedley's case, 1 Leach, 325.
(*h*) Anon. C. P. Mich. T. 1780. 1 Hawk. P. C. c. 69, s. 7, note (*a*), p. 88, (ed. 1795.)
(*i*) Rex *v.* Crespigny, *cor.* Kenyon, C. J. 1 Esp. 280.
(*k*) By Lord Mansfield, C. J., in Rex *v.* Aylett, 1 T. R. 69.
(*l*) 1 Hawk. P. C. c. 69, s. 6. Rex *v.* Edwards, *cor.* Adams, B., Shrewsbury Lent Ass. 1764; and subsequently considered of by the Judges, MS. And see per Lawrence, J., in Rex *v.* Mawbey and others, 6 T. R. 619.

thorized to examine a matter depending in it, as, before the sheriff on a writ of inquiry, &c., or whether it be taken in relation to the merits of a cause, or in a collateral matter, as, where one who offers himself to be bail for another, swears that his substance is greater than it is. (*m*) But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, are punishable as perjury. (*n*)

Affidavit of an attorney in answer to an application against him.

In a case where perjury was assigned upon an affidavit of an attorney of the Court of King's Bench, made in answer to a charge exhibited against him in a summary way, for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in Chancery and another person at the bottom of the papers, an objection was taken in arrest of judgment that the indictment did not shew that the affidavit of the defendant was made in any legal proceeding. It was urged that the Court had no right to call on the defendant summarily to answer any complaint against him merely because he was an attorney, unless in a case touching the defendant's office as an attorney, in his conduct towards some of the suitors of the Court, or for a breach or contempt of some rule or order of the Court, or for some matter touching the proceedings or process of the Court, none of which were stated; or, if the paper found in the defendant's custody could have been the object of a summary inquiry, (not having been used or attempted so to be, nor having a proper stamp) it could only have been in the Court of Chancery, where the paper could have been used, if at all, and not in the Court of King's Bench, wherefore all the proceedings respecting it were *coram non judice*, and could not be the subject of an indictment for perjury. But this objection was afterwards abandoned. (*o*)

Oath to procure a marriage licence.

It has been doubted, whether a false oath taken in Doctors' Commons, for the purpose of obtaining a *marriage licence*, amounts to perjury. (*p*) And the same doubt was entertained in a subsequent case, where the defendant was indicted for perjury in an affidavit in Doctors' Commons, in order to obtain a licence to marry one C. Hill, spinster, to which he swore that he knew no lawful impediment, whereas in truth and in fact he knew she was the wife of another man. (*q*) And it has been lately decided that a false oath before a surrogate, taken in order to procure a marriage licence, will not support a prosecution for perjury; and, further, that if the indictment only charges the taking the false oath without stating that it was for the purpose of procuring a licence, or that a licence was procured thereby, the party cannot be punished thereupon as for a misdemeanor. The indictment stated that the prisoner, being minded to procure a marriage between himself and

(*m*) 1 Hawk. P. C. c. 69, s. 3. Bac. Abr. tit. *Perjury* (A).

(*n*) Id. ibid.

(*o*) Rex *v.* Crossley, 7 T. R. 315.

(*p*) Alexander's case, O. B. 1767. 1 Leach, 63. The point was submitted to the consideration of the twelve Judges, and several times agitated; but the result was not communicated, as the prisoner died in Newgate.

(*q*) Woodman's case, O. B. 1768. 1 Leach, 64, note (*a*). The point appears to have been submitted also in this case to the consideration of the twelve Judges; but their opinion was not publicly communicated. In 3 Chit. Crim. L. 713, a precedent is given of an information by the attorney-general for a misdemeanor in procuring a marriage with a minor, by false allegations; and in the note (*a*), it is said, "It seems doubtful whether an indictment for perjury could have been supported in this case: but it seems most probable that it might." And 1 Leach, 63, is referred to.

A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury; and the indictment had all apt allegations of an indictment for perjury. But a case being reserved upon the question whether on such an affidavit the party could be prosecuted for perjury, and if not, whether upon this indictment any offence was charged, the Judges were unanimous that upon an oath before a surrogate, perjury could not be assigned; and that as this indictment did not charge that the defendant took the oath to procure a licence, or that he did procure one, no punishment could be inflicted, and he was therefore pardoned. (*r*) It appears, however, from this case, that if the purpose of such an oath is to obtain a licence, and the licence is obtained, and marriage had, the party may be indicted as for a misdemeanor. The nature of the oath at present required to be taken before the surrogate is described in the 4 Geo. 4, c. 76, s. 14, and by section 23 of that statute, when a marriage has been effected between parties under age, contrary to the act, by means of a false oath or fraud, certain proceedings are given by which the guilty party may be made to forfeit all property accruing from the marriage.

As a suit will be abated by the death of a co-plaintiff, unless the death be suggested according to the 8 & 9 Wm. 3, c. 11, s. 6, it has been ruled that if a co-plaintiff die, after issue joined, a trial without such suggestion on the record would be *extra-judicial*, and that no perjury could be assigned upon any false evidence given at such trial. (*s*)

And it must be taken before a competent jurisdiction.

The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. (*t*) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (*u*) But a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. (*x*)

(*r*) Rex *v.* Forster, East. T. 1821, MS. Bayley, J., and Russ. & Ry. 459.

(*s*) Rex *v.* Cohen, 1 Stark. R. 511.

(*t*) Buxton *v.* Gouch, 3 Salk. 269.

(*u*) 1 Hawk. P. C. c. 69, s. 4, and the authorities there cited; and 4 Black. Com. 137, where it is said "it is much to be questioned how far any magistrate is justifiable in taking a voluntary *affidavit* in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible that by such idle oaths a man may frequently *in foro conscientiæ* incur the guilt, and at the same time evade the temporal penalties of perjury." See the 5 & 6 Wm. 4, c. 62, s. 13, *post*, p. 617.

(*x*) 1 Hawk. P. C. c. 69, s. 4. Bac. Ab. tit. *Perjury* (A).

The oath must be material to the question depending.

The oath must be material to the question depending: for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts. (*y*) And it appears to have been determined, that where a witness, being asked by a Judge whether A. brought a certain number of sheep from one town to another all together, answered, that he did so, whereas in truth A. did not bring them all together, but part at one time and part at another, yet such witness was not guilty of perjury, because the substance of the question was, whether A. did bring them at all or not, and the manner of bringing them was only a circumstance. And that, upon the same ground, where a witness, being asked whether a particular sum of money were paid for two things in controversy between the parties, answered that it was, whereas, in truth, it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was not material whether the sum were paid for one or both. And it is also said to have been resolved, that a witness who swore that a man drew his dagger, and beat and wounded J. S., whereas in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. (*z*)

But upon these decisions it is remarked, that perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct account of the circumstances which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (*a*)

If it is circumstantially material, it is sufficient.

And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (*b*) And it appears to have been holden not to be necessary that it should be

(*y*) Rex *v.* Griepe, 1 Lord Raym. 256. Bac. Ab. tit. *Perjury* (A).

(*z*) 2 Roll. 41, 42, 369. Hetl. 97. 1 Hawk. P. C. c. 69, s. 8.

(*a*) 1 Hawk. P. C. c. 69, s. 8.

(*b*) Bac. Ab. tit. *Perjury* (A). 1 Hawk. P. C. c. 69, s. 8. See Reg. *v.* Gardiner, *post*, p. 633, *et seq.*

shewn to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (c) And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (d) In a modern case, where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was holden that the notice was a material fact upon which perjury might be assigned. (e)

It need not be sufficient to prove the point in question.

Upon an indictment for perjury in an answer to a bill filed against the defendant in Chancery, stating that the defendant promised to pay Martin 1000*l.* as a marriage portion, when he was about to marry the defendant's niece; the defendant, by his answer, insisted that as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds, but as to the fact, denied that he had ever made any such promise, on which denial perjury was assigned. Lord Kenyon, C. J. said, that "he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and supposing it in fact to have taken place and acknowledged by the defendant, could not be enforced either at law or in equity; that Court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury." (f)

Perjury cannot be assigned on an answer in Chancery, denying a promise absolutely void by the statute of frauds.

So where upon an indictment for perjury, alleged to have been committed in an answer to a bill filed in Chancery, it appeared that the bill was filed against the defendant and Robinson, in order to compel the specific performance of a contract for the purchase of a freehold estate, and it was not stated in the bill that the contract was in writing, but it was alleged that the defendants had frequently since the contract was entered into, admitted that the plaintiffs were interested in the purchase; and the defendants in their answer pleaded that the alleged agreement not being in writing, was within the fourth section of the Statute of Frauds and could not be enforced, and also denied the agreement as set forth in the bill, and denied that they ever admitted that the plaintiffs were interested in the purchase as stated: and upon these denials perjury was assigned. It was admitted that the agreement was not in writing, and that there was not any memorandum or declaration of trust respecting it. It was objected that the alleged perjury was not material or relevant to the matter in issue in Chancery; the agreement not being in writing, the defendant relied on the Statute of Frauds as a good ground of defence. The denial therefore of an agreement which the Court had no power to enforce, was immaterial and irrelevant to the investigation of the several matters in the bill. The counsel for the prosecution cited *Bartlett v. Pickersgill*, (g) where a party was convicted of perjury for the denial of a parol agreement for the purchase of an estate,

Perjury cannot be assigned in swearing as to a parol contract for the sale of land.

(c) Rex v. Griepe, 1 Ld. Raym, 256.
(d) Reg. v. Rhodes and Cole, 2 Ld. Raym. 886.
(e) Rex v. Pepys, cor. Kenyon, C. J., Peake, N. P. R. 138.
(f) Rex v. Benesech, Peake, Add. C. 93.
(g) 4 Burr. 2255. 4 East, 577, in notis.

which parol agreement a Court of Equity had refused to enforce. Abbott, Ld. C. J.—"It does not appear from the short statement of the case which has been cited, and which is not very distinctly reported, whether the Statute of Frauds was there pleaded and relied on. But in the present case the defendants have in their answer pleaded the statute, and insisted that this agreement not being in writing, and relating to the sale of land, is within the fourth section of that statute, and cannot be enforced. As a Judge of a Court of common law, it is competent for me to form my opinion upon the construction of this statute, although I cannot be presumed to know how a Court of Equity might deal with it. The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is, whether under such circumstances the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false, should be material and revelant to the matter in issue: the matter here sworn is in my judgment immaterial and irrelevant, and the defendant must be acquitted." (*h*)

But where a bill is filed to set aside a written contract on the ground of fraud, a party may be guilty of perjury in swearing falsely as to terms of the contract not contained in writing.

But where an indictment stated that a bill was filed in Chancery against the defendant, stating an agreement to purchase certain wheat, to be paid for by draft at three months, which agreement was not reduced into writing, and that afterwards a bought note was delivered to the defendant, which note did not contain fully the terms of the agreement; that the defendant brought an action and recovered a verdict, and that he was enabled to obtain such verdict by reason of his fraudulently concealing the true terms of the agreement, and the bill prayed that one of the terms of the contract might be declared to be that the purchase money should be paid by a bill of exchange, payable three months after date; and the defendant by his answer denied the parol agreement stated in the bill, and the bill was dismissed, and the denial by the defendant was the subject of the indictment for perjury. It was contended that the indictment could not be sustained. The only legitimate evidence of the contract was the bought and sold notes. The contract by parol was void by the Statute of Frauds, and a false answer to a bill for the discovery of such a contract would not subject a person to an indictment for perjury; and *Rex v. Dunston* (*i*) was relied upon. Coleridge, J.—"In that case, the bill in Chancery was to enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds; and the case of *Rex v. Benesech* (*j*) proceeded on the same ground. Though it is true that a party cannot vary the terms of a written contract by parol evidence, he may shew by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud." "I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence, as in this case, is to im-

(*h*) Rex *v.* Dunston, R. & M. N. P. R. 109.

(*i*) *Supra.*

(*j*) *Supra*, note (*f*).

peach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think therefore that the objection cannot be sustained." (*k*)

Perjury on the trial of an indictment reversed upon error.

Perjury may be committed on the trial of an indictment, which is afterwards held bad upon a writ of error. An indictment charged the defendant with having committed perjury on the trial of a previous indictment for perjury, upon which a party had been convicted and sentenced, but the judgment reversed on a writ of error on the ground that the assignment of perjury was insufficient; (*l*) and it was objected that the evidence of the defendant never could have been material, as the former indictment was held bad upon a writ of error; but the objection was overruled, on the ground that whether a witness had committed wilful and corrupt perjury or not, could not depend on the validity in point of form of the indictment as to which he gave evidence. (*m*)

A man may be perjured by an oath taken in his own cause.

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c., as by an oath taken by him as a witness in the cause of another person. (*n*) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth, but only to judge truly of the depositions of others. (*o*)

But a false *verdict* does not come under the notion of perjury.

It is not necessary that the false oath were credited.

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it, for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (*p*)

False oath indictable in some cases, though not assignable as perjury.

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our courts of justice is punishable by indictment as for a misdemeanor; and Lord Ellenborough, C. J., said, "that he had not the least doubt, that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment." (*q*)

Statutes relating to perjury.

We may now proceed to consider the 5 Eliz. c. 9, and other statutes which relate to the offence of perjury.

5 Eliz. c. 9, s. 3. Procuring

The 5 Eliz. c. 9 (made perpetual by the 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8) enacts by sec. 3, "that all and every such

see p. 619 infra

(*k*) Reg. *v.* Yates, 1 C. & Mars. 132.

(*l*) See Reg. *v.* Burraston, *post*, p. 641.

(*m*) Reg. *v.* Meek, 9 C. & P. 513, Williams, J. Mullett *v.* Hunt, 1 Cr. & M. 752, was cited in support of the objection. See also Davis *v.* Lovell, 4 M. & W. 678. See 1 Hawk. P. C. c. 69, s. 4, cited, *post*, p. 620.

(*n*) 1 Hawk. P. C. c. 69, s. 5. Bac. Abr. tit. *Perjury* (A).

(*o*) Id. ibid.

(*p*) 1 Hawk. P. C. c. 69, s. 9. Bac. Abr. tit. *Perjury* (A). In Rex *v.* Nicholls, Gloucester Sum. Ass. 1838, *cor.* Patteson, J., the prisoner had on the trial of one Pitt for larceny sworn that he had not given the stolen property to Pitt, but he was contradicted by other witnesses, and the jury disbelieved him, and acquitted Pitt, and he was convicted of perjury in so swearing, and transported for seven years. C. S. G.

(*q*) Omealy *v.* Newell, 8 East, 364.

any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam* punishable by forfeiture of 40*l.*

person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the Courts before mentioned, (*r*) or in any of the Queen's majesty's Courts of record or any leet, view of frank-pledge or law-day, ancient demesne Court, hundred Court, Court baron, or in the Court or Courts of the stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam;* that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds."

Sec. 4. Such offender not having goods, &c., to the value of 40*l.* to suffer imprisonment.

By sec. 4, "if it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convict or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or mainprize, and to stand upon the pillory (*s*) the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

Sec. 5. Persons convicted not to be received as witnesses until judgment reversed.

By sec. 5, "no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within England, Wales, or the Marches of the same,) until such time as the judgment given against the said person or persons shall be reversed by attaint (*t*) or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm."

Sec. 6. Persons committing perjury to forfeit 20*l.* and to be imprisoned for six months; and their oath not to be received in any

By sec. 6, "if any person or persons either by the subornation, unlawful procurement, sinister persuasion or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the Courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to

(*r*) *Viz.* (as in sec. 1) "the King's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the king's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth should have authority by virtue of the king's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter or witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments."

(*s*) The 1 Vict. c. 23, abolishes the punishment of pillory in all cases, but does not "change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of the pillory."

(*t*) Abolished by the 6 Geo 4, c. 50, s. 60.

have imprisonment by the space of six months without bail or mainprize; and the oath of such person or persons so offending from thenceforth not to be received in any Court of record within this realm of England or Wales, or the Marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attaint (*u*) or otherwise: and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases according to the course of the common laws of this realm."

court of record until judgment reversed.

By sec. 7, "if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set on the pillory (*v*) in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their minister, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the Courts of record aforesaid, until such time as the judgment shall be reversed, and thereupon to recover his damages in manner and form beforementioned."

Sec. 7. And if such offenders have not goods to the value of 20*l.*, they are to be set in the pillory, and have their ears nailed; and to be disabled from being witnesses until judgment reversed.

The statute further enacts, that one moiety of the said forfeitures shall be to the king, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences beforementioned, that will sue for the same, &c.; and that as well the Judge and Judges of every such of the said Courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the Justices of assize and gaol delivery, and Justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear, and determine all offences against the said act. (*w*) And it is provided, that the said act shall no way extend to any spiritual or ecclesiastical Court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said Courts. (*x*) And it is also provided, that the said statute shall not restrain the authority of any Judge having absolute power to punish perjury before the making thereof; but that every such Judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said act. (*y*)

Disposal of forfeitures.

Trial of offences.

The act is not to extend to spiritual courts.

Nor to restrain other punishment of perjury.

The important statute relating to the punishment of perjury is the 2 Geo. 2, c. 25, s. 2, which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, "that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or Judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven

2 Geo. 2, c. 25, s. 2. Perjury and subornation of perjury made further punishable by imprisonment and hard labour, in the house of correction;

(*u*) See the last note.
(*v*) See note (*s*), *supra*.
(*w*) Sec. 8, 9. But see the 5 & 6 Vict. c. 38, *post*, p. 649.
(*x*) Sec. 11.
(*y*) Sec. 13.

or by transportation for seven years.

years, there to be kept to hard labour (*w*) during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, as the Court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

Offenders so committed or transported, escaping or breaking prison, or returning from transportation.

Statutes relating to perjury committed in particular proceedings, &c., and by particular persons.

Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the author's observation.

False affirmations of Quakers.

22 Geo. 2, c. 46, s. 36.

It should first be mentioned that the false affirmation, or declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury, by the enactments of several statutes; 7 & 8 Wm. 3, c. 34; 8 Geo. 1, c. 6: and 22 Geo. 2, c. 46. The latter statute by sec. 36 enacts, "that in all cases wherein by an act or acts of Parliament now in force, or hereafter to be made, an oath is or shall be allowed, authorized, directed, or required, the solemn affirmation or declaration of any of the people called Quakers, in the form prescribed by the said act made in the eighth year of his said late Majesty's reign, (*x*) shall be allowed and taken instead of such oath, although no particular or express provision be made for that purpose in such act or acts; and all persons who are or shall be authorized or required to administer such oath shall be and are hereby authorized and required to administer the said affirmation or declaration; and the said solemn affirmation or declaration so made as aforesaid shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice and other places where by law an oath is or shall be allowed, authorized, directed, or required, as if such Quaker had taken an oath in the usual form: and if any person making such affirmation or declaration, shall be lawfully convicted of having wilfully, falsely and corruptly affirmed and declared any matter or thing, which if the same had been deposed in the usual form would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the like pains, penalties, and forfeitures, as by the laws and statutes of this realm are to be

(*w*) The 3 Geo. 4, c. 114, provides that any person convicted of perjury or subornation of perjury, may be sentenced to imprisonment with hard labour, for any term not exceeding the term for which the court may imprison for such offences, in addition to or in lieu of any other punishment.

(*x*) That form was as follows:—"I, A. B., do solemnly, sincerely, and truly declare and affirm."

inflicted on persons convicted of wilful and corrupt perjury." But, by sec. 37 it is provided, "that no Quaker shall by virtue of this act be qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the government."

9 Geo. 4, c. 32, s. 1. False affirmations of Quakers and Moravians.

The 9 Geo. 4, c. 32, s. 1, reciting that "it is expedient that Quakers and Moravians should be allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil," enacts that "every Quaker or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration in the words following, that is to say: "I, A. B., do solemnly, sincerely, and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such affirmation or declaration, shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been sworn in the usual form would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject."

3 & 4 Wm. 4, c. 49. Quakers and Moravians.

The 3 & 4 Wm. 4, c. 49, s. 1, enacts that "every person of the persuasion of the people called Quakers, and every Moravian be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required by the common law, or by any act of Parliament already made, or hereafter to be made:" and provides that "if any such person making such solemn affirmation or declaration shall be lawfully convicted, wilfully, falsely, and corruptly to have affirmed or declared any matter or thing, which if the same had been (*x*) in the usual form would have amounted to wilful and corrupt perjury, he or she shall incur the same penalties and forfeitures as by the laws and the statutes of this realm are enacted against persons convicted of wilful and corrupt perjury."

1 & 2 Vict. c. 77. Persons who have been Quakers and Moravians.

The 1 & 2 Vict. c. 77, enacts that "it shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians," and subjects persons guilty of making false affirmations or declarations to the same punishments as persons guilty of perjury in the same manner as the preceding statute. (*y*)

1 & 2 Vict. c. 105. All persons bound by the oath taken.

The 1 & 2 Vict. c. 105, enacts that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the united kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form

(*x*) The word "sworn," seems omitted here.

(*y*) This statute was passed in consequence of Reg. *v.* Doran, 2 Moo. C. C. R. 37. 2 Lew. 37.

and with such ceremonies as such person may declare to be binding, and every such person, in case of wilful false swearing may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

Perjury in respect of *life annuities.*

The statutes for enabling the commissioners of the national debt to grant life annuities usually contain clauses relating to perjury; as the 10 Geo. 4, c. 24, s. 44, which enacts, "that if any person in any affidavit, to be taken before any justice of the peace or magistrate, or before any officer acting under the said commissioners, under the provisions of this act, shall wilfully or corruptly swear or affirm any matter or thing which shall be false or untrue, every such person so offending, and being thereof duly convicted, shall be and is hereby declared to be subject and liable to such pains and penalties as by any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury in respect of *exchequer bills.*

The 51 Geo. 3, c. 15, which authorized an issue of *exchequer bills* to commissioners for the purpose of their making advances for the assistance and accommodation of manufactures, directs certain oaths to be administered; and then by sec. 10 enacts, "that if any person or persons upon examination upon oath or affirmation before the said commissioners respectively, or if any person or persons making any such affidavit or deposition as before mentioned, shall wilfully and corruptly give false evidence, or shall in such affidavit or deposition wilfully and corruptly swear, affirm or allege any matter or thing which shall be false or untrue, every such person or persons so offending, and being thereof duly convicted, shall be and is and are hereby declared to be subject and liable to such pains and penalties as by any law now in being persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury relating to the duties of *excise.*

Many of the statutes relating to the duties of excise contain clauses of a similar kind, as the 55 Geo. 3, c. 113, s. 6, and 56 Geo. 3, c. 108, s. 7, in respect of the duties and drawbacks upon plate-glass, &c. The 46 Geo. 3, c. 112, s. 3, contains a general provision on the subject of the excise; and, after reciting that by the several acts relating to his Majesty's duties of excise, oaths are required to be taken in manner therein mentioned, and that it was expedient to make such provision as thereinafter mentioned, for the punishment of persons wilfully taking a false oath in any of the cases in which an oath is by any such acts directed or required to be taken, it enacts, "that any person or persons who shall be convicted of wilfully taking a false oath in any of the cases in which an oath is by any act or acts of Parliament relating to the duties of excise directed or required to be taken, shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury."

Perjury relating to the duties of the *customs.*

The 3 & 4 Wm. 4, c. 51, entitled "An act for the management of the customs," enacts by sec. 29, that, "upon examinations and inquiries made by any surveyor-general of the customs, or any inspector-general of the customs, for ascertaining the truth of facts relative to the customs, or the conduct of officers or persons employed therein, and upon the like examinations and inquiries made by the collector and controller of any out-port in the United Kingdom, or of any port in the Isle of Man, or made by any person or persons in any of the British possessions abroad, appointed by the

commissioners of his Majesty's customs to make such examinations and inquiries, any person examined before him or them as a witness shall deliver his testimony on oath, to be administered by such of the surveyors-general, or such of the inspectors-general, or such collector and controller, or such person or persons as shall examine him, and who are hereby authorized to administer such oath, and if such person shall be convicted of making a false oath, touching any of the facts so testified on oath, or of giving false evidence on his examination on oath, before any of the surveyors-general or inspectors-general of the customs, or such collector and controller, or such person or persons, in conformity to the directions of this act, every such person so convicted as aforesaid shall be deemed guilty of perjury, and shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury."

Perjury relating to the stamp duties.

The last stamp act, 55 Geo. 3, c. 184, s. 53, contains a general provision in respect of oaths relating to the stamp-duties, and enacts, "that all and every person and persons before whom any affidavit or solemn affirmation is or shall be required or directed to be made by this or any former or future act of Parliament relating to any stamp duties, shall be, and they are hereby authorized to take the same and administer the proper oath or affirmation for that purpose; and if any person making any such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of or concerning any of the matters to be therein specified and set forth, every person so offending and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force, persons convicted of wilful and corrupt perjury, are subject and liable to." The 54 Geo. 3, c. 133, entitled "An act for enabling the commissioners of stamps to make allowances for spoiled stamps on policies of assurances, and for preventing frauds relating thereto," enacts, by sec. 13, "that if any person making any such affidavit or affirmation as aforesaid, shall knowingly and wilfully make a false oath or affirmation, of or concerning any of the matters to be therein specified or set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to."

Perjury relating to naval stores, &c.

The 39 & 40 Geo. 3, c. 89, entitled, "An act for the better preventing the embezzlement of his Majesty's naval, ordnance, and victualling stores," enacts, by sec. 36, "that if any person upon examination on oath or affirmation before any commissioners of the navy, ordnance, or victualling respectively, or before any justice of the peace in Great Britain, in any matter relating to the execution of this act, shall wilfully and corruptly give false evidence, or shall, in any information or deposition sworn, or affirmation taken in writing before any such commissioner or justice, wilfully and corruptly swear or affirm any matter or thing which shall be false or untrue, every such person so offending, and being thereof lawfully convicted, shall be and is hereby declared to be subject and liable to the like pains and penalties as any persons convicted of wilful and corrupt perjury are by any law now in force subject and liable to."

Perjury in affidavits, &c., for the Irish courts.

The 55 Geo. 3, c. 157, by which the Courts of law and equity in Ireland were empowered to grant commissions for taking affidavits in all parts of Great Britain, enacts, by sec. 8, "that every person

who shall in England or Scotland be sworn or deponed, and examined as a witness, or sworn or deponed to the truth of any answer or plea or affidavits before any officer or officers who shall be appointed under the authority of this act for taking the same, and who shall, in his or her answer, plea, or affidavit, wilfully swear or depone falsely, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or deponed falsely in the open Court, wherein the suit in which such oath was so taken then depended."

Perjury relating to the wills, &c., of seamen.

The 11 Geo. 4, c. 20, "an act to consolidate and amend the laws relating to the pay of the royal navy," by sec. 85 enacts, that "if any person shall fraudulently and deceitfully take a false oath, in order to obtain probate of any will, or letters of administration of the effects of any deceased commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines or marine; or if any person shall fraudulently receive or demand any wages, pay, prize-money, bounty-money, pension, or any part thereof, or any allowance of money whatever, payable or supposed to be payable in respect of the services of any such officer, seaman, or marine, or from the compassionate fund of the navy, or any pension to the widow of an officer, upon or by virtue of any probate of a will or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases to defraud any person whomsoever, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

2 Wm. 4, c. 53, s. 45. Perjury relating to army prize money.

The 2 Wm. 4, c. 53, entitled, "an act for consolidating and amending the laws relating to the payment of army prize-money," by sec. 45, enacts, that "if any person or persons shall falsely make oath to any of the matters hereinbefore required to be verified on oath, or suborn any other person so to do, such person or persons shall suffer the like pains and penalties as are incurred by persons committing wilful and corrupt perjury."

By sec. 46, "where the offence of taking a false oath, or suborning any person so to do, or any of the offences by this act made cognizable in any of his Majesty's Courts of record in Great Britain, shall be committed out of this realm, the same may be alleged to be committed, and may be laid, inquired of, tried, and determined in any county in England, in the same manner to all intents and purposes as if the same had been actually done or committed within the body of such county."

Perrjuy in matters relating to certain East India prize money.

By the 1 & 2 Geo. 4, c. 61, s. 6, which regulates the appropriation of unclaimed shares of prize-money belonging to soldiers and seamen in the service of the East India Company, it is enacted, that if any person shall be convicted of making a false oath touching any of the matters directed or required by that act to be testified on oath, such person so convicted shall be deemed guilty of perjury, and liable to be punished as persons guilty of perjury in England. And it also provides for the punishment of persons procuring or suborning any other person to swear falsely in any such oath.

The Mutiny Acts usually contain the following clause: (as in 5 & 6

Vict. c. 12, s. 79,) namely, "that any person taking a false oath or declaration in any case wherein an oath or declaration is required to be taken by this act, shall be deemed guilty of wilful and corrupt perjury, or of making a false declaration, and being thereof duly convicted, shall be liable to such pains and penalties as by any laws in force any persons convicted of wilful and corrupt perjury are subject and liable to." (*p*) And with respect to naval courts-martial, the 22 Geo. 2, c. 33, s. 17, enacts, "that all and every person and persons who shall commit any wilful perjury, in any evidence or examination upon oath at any such court-martial, or who shall corruptly procure or suborn any person to commit such wilful perjury, shall and may be prosecuted in his Majesty's Court of King's Bench, by indictment or information; and every issue joined in any such indictment or information shall be tried by good and lawful men of the county of Middlesex, or such other county as the said Court of King's Bench shall direct; and all and every person and persons, being lawfully convicted upon any such indictment or information, shall be punished with such pains and penalties, as are inflicted for the like offences respectively by the 5 Eliz. c. 9, and 2 Geo. 2, c. 25."

Perjury by the mutiny acts.

And in naval courts-martial.

The 6 Geo. 4, c. 78, s. 29, enacts, "that in all cases wherein by virtue of this act, or any other act hereafter to be made touching *quarantine*, any examination or answer shall be taken or made upon oath, the person who shall be authorized and required to take such examinations and answers shall and may be deemed to have full power and authority to administer such oaths; and if any person who shall be interrogated or examined shall wilfully swear falsely to any matter concerning which such person shall depose or make oath on such examination, or in such answer, or if any person shall procure any other person so to do, he or she so swearing falsely, or procuring any other person so to do, shall be deemed to have been guilty of, and shall be liable to be prosecuted for perjury, or subornation of perjury, as the case may be, and shall suffer the pains, penalties, and punishments of the law, in such case respectively made and provided."

Perjury relating to *quarantine*.

The 6 Geo. 4, c. 125, entitled, "an act for the amendment of the laws respecting pilots and pilotage," enacts by sec. 80 "that every person, who in any examination upon oath under the provisions of this act, shall wilfully give false testimony or a false account of the matter sworn to by him, shall be liable to be prosecuted for the same by indictment; and if duly convicted of false swearing in the premises, shall be subject and liable to such punishments, disqualifications, and disabilities, as any person would be subject or liable to for wilful and corrupt perjury, in any other case, by the laws and statutes of this realm."

Perjury in respect of pilotage, &c., of ships.

The act for the registering of vessels, 3 & 4 Wm. 4, c. 55, s. 45, enacts, that if any person shall falsely make declaration to any of the matters thereinbefore required to be verified, such person shall forfeit five hundred pounds.

In respect of the registering vessels.

The 5 Geo. 4, c. 113, which was passed to prevent the traffic in slaves, enacts by sec. 41 "that if any oath taken under this act shall be wilfully false, or if such false oath shall be unlawfully or wilfully procured or suborned, the offender shall incur and suffer the like

Perjury under the slave trade act.

(*p*) And see a similar clause in the 5 & 6 Vict. c. 13, s. 59, being the act for regulating the *marine forces*.

pains and penalties as are by law inflicted upon persons committing wilful and corrupt perjury or subornation of perjury respectively." And section 58 provides for the prosecution, trial, and punishment of persons who may give false evidence in any examination or deposition, or affidavit had or taken upon or in any proceeding before the commissary, judges, or commissioners, mentioned in the act, or before the secretary or registrar under the treaties, conventions, instructions or regulations therein mentioned. (*a*)

Perjury in respect of the land revenues, &c., of the crown.

The 10 Geo. 4, c. 50, an act to amend the laws relating to the land revenues of the crown, &c., enacts, by sec. 83, "that any officer or other person, who shall in any verification, or examination upon oath mentioned in that act, be guilty of wilful and corrupt perjury, shall be liable to be punished in such manner as by the different laws and statutes then in force for the punishment of wilful and corrupt perjury."

Perjury by the general inclosure act.

The General Inclosure act, 41 Geo. 3, c. 109, s. 43, enacts, "that if any person or persons shall, in any examination, affidavit, deposition, or affirmation, to be had or taken in pursuance of this act, before such justice or justices, or such commissioner or commissioners, knowingly and wilfully swear and affirm any matter or thing which shall be false or untrue, every such person so offending shall, on conviction thereof, be deemed guilty of perjury, and shall suffer the like pains and penalties as persons guilty of wilful and corrupt perjury are now subject and liable to."

Perjury under the Registry Acts for Yorkshire and Middlesex.

The Registry Act for the West Riding of Yorkshire, 2 & 3 Ann. c. 4, enacts, by sec. 19, "that if any person or persons shall at any time forswear himself before the said register or his deputy, or before any Judge or Master in Chancery, in any of the cases aforesaid, and be thereof lawfully convicted, such person or persons shall incur and be liable to the same penalties, as if the same oath had been made in any of the Courts of record at Westminster." A similar provision is contained also in the 5 & 6 Ann. c. 18, which regulates the inrolment of bargains and sales of lands, &c. in the same Riding; in the Middlesex Registry Act, 7 Ann. c. 20, s. 15; and also in the 8 Geo. 2, c. 6, s. 33, which relates to the registry of deeds, &c. in the North Riding of the county of York.

Perjury by electors, &c., 2 Geo. 2, c. 24.

The Bribery Act, 2 Geo. 2, c. 24, gives the form of an oath or affirmation (in the case of a Quaker,) to be taken by electors, and the form of an oath to be taken by the returning officer; and then enacts by sec. 5, "that if any returning officer, elector or person taking the oath or affirmation hereinbefore mentioned, shall be guilty of wilful and corrupt perjury, or of false affirming, and be thereof convicted by due course of law, he shall incur and suffer the pains and penalties, which by law are enacted or inflicted in cases of wilful and corrupt perjury."

2 Wm. 4, c. 45, s. 58. False answers by voters at elections.

The 2 Wm. 4, c. 45, entitled "an act to amend the representation of the people of England and Wales," by sec. 58, enacts that in all elections whatever of members to serve in Parliament, "no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows; that is to say, that the returning officer or his respective deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions or any of them, and no other:

(*q*) See also the 6 & 7 Wm. 4, c. 5, s. 8.

1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of (or for the riding, parts, or divisions, &c., or for the city, &c. as the case may be)?
2. Have you already voted, either here or elsewhere, at this election for the county of (or for the riding, parts, or division of the county of or for the city or borough of as the case may be)?
3. Have you the same qualification for which your name was originally inserted in the register of voters now in force for the county of, &c. (or for the riding, &c., or for the city, &c. as the case may be, specifying in each case the particulars of the qualification as described in the register)?

And if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of an indictable misdemeanor, and shall be punished accordingly, (r) and the returning officer or his deputy, or a commissioner, or commissioners to be for that purpose by him or them appointed, shall (if required on behalf of any candidate at the time aforesaid,) administer an oath (or in case of a Quaker or Moravian, an affirmation) to any voter in the following form: (that is to say,)

"You do swear, (or being a Quaker or Moravian, do affirm,) that you are the same person whose name appears as A. B. on the register of voters now in force for the county of (or for the riding, parts, or division of the county of or for the city or borough of as the case may be,) and that you have not before voted, either here or elsewhere, at the present election for the said county, (or for the said riding, parts, or division of the said county, or for the said city or borough, as the case may be.)

So help you God." (s)

And no elector shall hereafter at any such election be required to take any oath or affirmation except as aforesaid, either in proof of his freehold or of his residence, age, or other qualification or right to vote, any law or statute, local or general, to the contrary notwithstanding."

Sec. 52. Perjury before revising barristers.

The same statute by secs. 41 & 50 provides that the Revising Barristers shall hold open Courts for the purpose of revising the lists of voters for counties and boroughs, and sec. 52 enacts, that "every such barrister holding any Court under this act as aforesaid, shall have power to adjourn the same from time to time, and from any one place to any other place or places within the same county, riding, parts, or division, or within the same city or borough, or within any place sharing in the election for such city or borough, but so as that no such adjourned Court shall be held after the 25th day of October in any year; and every such barrister shall have power to administer an oath (or in the case of a Quaker or Moravian,

(r) Rex v. Harris, 7 C. & P. 253, *post*, p. 671. Reg. v. Dodsworth, 8 C. & P. 218, *post*, p. 672. Reg. v. Irving, 2 M. & Rob. 75, note (a), *post*, p. 672.

(s) Although the statute does not expressly make the falsely taking this oath either perjury or a misdemeanor, yet it is conceived that it would be a misdemeanor at common law. See Rex v. De Beauvoir, 7 C. & P. 17, *post*, p. 672.

an affirmation) to all persons making objection to the insertion or omission of any name in any of such lists as aforesaid, and to all persons objected to, or claiming to be inserted in any of such lists, or claiming to have any mistake corrected or any omission supplied in any of such lists, and to all witnesses who may be tendered on either side, and that, if any person taking any oath or making any affirmation under this act, shall wilfully swear or affirm falsely, such person shall be deemed guilty of perjury, and shall be punished accordingly." (*t*)

1 & 2 Vict. c. 48. False declarations by members of Parliament.

The 1 & 2 Vict. c. 48, entitled "an act to amend the laws relating to the qualification of members to serve in Parliament," after providing by sec. 3, that candidates at elections shall make and subscribe the declaration therein specified, and by sec. 6, that every person returned as a member shall make and subscribe the declaration therein mentioned; by sec. 7, enacts, that "any person who shall make and subscribe any such declaration as aforesaid, or who shall sign and deliver in any such paper as aforesaid, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor."

4 & 5 Vict. c. 58, s. 75. Perjury before election committees.

The 4 & 5 Vict. c. 58, entitled "an act to amend the law for the trial of controverted elections, by sec. 75 enacts, "that where in this act any thing is required to be verified on oath to the House of Commons, it shall be lawful for the clerk or clerk assistant of the House of Commons to administer an oath for that purpose, or an affidavit for such purpose may lawfully be sworn before any justice of the peace or master of the high Court of Chancery."

By sec, 76, "every person who shall wilfully give any false evidence before the House of Commons, or any committee or examiner of recognizances, under the provisions of this act, or who shall wilfully swear falsely in any affidavit authorized by this act to be taken, shall, on conviction thereof, be liable to the penalties of wilful and corrupt perjury."

6 & 7 Wm. 4, c. 85. Perjury as to marriages.

The Marriage Act, 6 & 7 Wm. 4, c. 85, s. 38, enacts, that "every person who shall knowingly and wilfully make any false declaration, or sign any false notice or certificate required by this act, for the purpose of procuring any marriage, shall suffer the penalties of perjury." (*u*)

Perjury by bankrupts and other persons examined before commissioners of bankrupt.

The 6 Geo. 4, c. 16, entitled "an act for amending the laws relating to bankruptcy," enacts, by sec. 99, "that any bankrupt or other person who shall, in any examination before the commissioners or in any affidavit or deposition authorized or directed by the present, or any act hereby repealed, wilfully and corruptly swear falsely, being convicted thereof, shall suffer the pains and penalties in force against wilful and corrupt perjury: and where any oath is hereby directed or required to be taken or administered, or affidavit to be made by or to any party, such party, if a Quaker, shall or may make solemn affirmation, and such Quaker shall incur such danger or penalty for refusing to make such solemn affirmation in such

(*t*) See Reg. *v.* Thornhill, *post*, p. 647.

(*u*) The 3 Geo. 4, c. 75, s. 10, contained a clause making persons wilfully swearing any false oath in order to procure a marriage license guilty of perjury, but that clause seems to be repealed by the 4 Geo. 4, c. 17, which is repealed by the 4 Geo. 4, c. 76, s. 1, and that act contains no provision making such false swearing perjury, but by sec. 23, provides that where a marriage is procured by false swearing the party may be caused to forfeit the property obtained thereby in the manner therein provided.

matters, when thereto required, as is hereby provided against persons refusing to be sworn; and all Quakers who shall, in any such affirmation knowingly and wilfully affirm falsely, shall suffer the same penalties as are provided against persons guilty of wilful and corrupt perjury; and all persons before whom oaths or affidavits are hereby directed to be made, are respectively empowered to administer the same, and also such solemn affirmation as aforesaid."(*v*)

Perjury by insolvent debtors.

The 7 Geo. 4, c. 57, entitled "an act to amend and consolidate the laws for the relief of insolvent debtors in England," enacts, by sec. 71 "that if any prisoner who shall apply for his or her discharge under the provisions of this act, or any other person taking an oath under the provisions of this act, shall wilfully forswear and perjure himself or herself, in any oath to be taken under this act, and shall be lawfully convicted thereof, he or she so offending, shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury; and that in all cases wherein by this act an oath is required, the solemn affirmation of any person, being a Quaker, shall and may be accepted and taken in lieu thereof; and that every person making such affirmation, who shall be convicted of wilful false affirmation, shall incur and suffer such and the same penalties as are inflicted and imposed upon persons convicted of wilful and corrupt perjury."

The 1 & 2 Vict. c. 110, contains in sec. 100 a similar provision.

5 & 6 Wm. 4, c. 62, s. 2. Lords of the treasury empowered to substitute a declaration in lieu of an oath, &c., in certain cases.

The 5 & 6 Wm. 4, c. 62, which was passed for the purpose of abolishing unnecessary oaths, by sec. 2 enacts, "that in any case where, by any act or acts made or to be made relating to the revenues of customs or excise, the post-office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay-office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, his Majesty's treasury, Chelsea Hospital, Greenwich Hospital, the board of trade, or any of the offices of his Majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendance of the lords commissioners of his Majesty's treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of his Majesty's treasury or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might, but for the passing of this act, be required to be taken or made; and the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer or person empowered by such act or acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person is hereby empowered and required to administer the same accordingly."

(*v*) See also the 5 & 6 Vict. c. 122, s. 81.

Sec. 3. Declaration to be published.

By sec. 3, the declaration so substituted is to be published in the *Gazette*, and after twenty-one days from the date of the *Gazette*, the provisions of this act are to apply.

Sec. 4. No oath afterwards.

By sec. 4, "after the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the lords commissioners of his Majesty's treasury to be substituted."

False declarations a misdemeanor.

By sec. 5, "if any person shall make and subscribe any such declaration as herein-before mentioned in lieu of any oath, solemn affirmation, or affidavit by any act or acts relating to the revenues of customs or excise, stamps and taxes, or post-office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor."

By sec. 6, the oath of allegiance is to be required in all cases as before the act passed.

By sec. 7, oaths in Courts of justice are to be taken in the same manner as if the act had not passed.

Universities of Oxford and Cambridge, and other bodies, may substitute a declaration in lieu of an oath.

By sec. 8, "it shall be lawful for the Universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: provided always that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular University, other body corporate and politic, or other body so authorized as aforesaid."

Churchwarden's and sidesman's oath abolished, and a declaration to be made in lieu thereof.

By sec. 9, "in future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised."

Declaration substituted for oaths and affidavits by persons acting in turnpike trusts.

By sec. 10, "in any case where, under any act or acts for making maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit shall in future be required to be or be taken or made, but the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in lieu thereof, in the presence of the trustee, commissioner, or other person before whom he might

under such act or acts be required to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person is hereby empowered and required to administer and receive the same."

Declaration substituted for oaths and affidavits heretofore required on taking out a patent.

By sec. 11, "whenever any person or persons shall seek to obtain any patent under the Great Seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed."

Declaration substituted for oaths and affidavits required by acts as to pawnbrokers.

By sec. 12, "where by any act or acts at the time in force for regulating the business of pawnbrokers, any oath, affirmation, or affidavit might, but for the passing of this act, be required to be taken or made, the person who by or under such act or acts might be required to take or make such oath, affirmation, or affidavit shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the act or acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such act or acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto."

Penalties as to such oaths, &c., to apply to declarations.

Justices not to administer oaths, &c., touching matters whereof they have no jurisdiction by statute.

Sec. 13, reciting that "a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received," and that "doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts," enacts, "that from and after the commencement of this act, it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being (*a*): provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to

Proviso.

(*a*) See Reg. *v.* Nott, 1 C. & Mars. 288, *post*, p. 673.

give validity to instruments in writing designed to be used in such foreign countries respectively."

Declaration substituted for oaths and affidavits required by Bank of England on the transfer of stock.

By sec. 14, "in any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferrable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank-note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit."

By sec. 15, declarations are substituted in lieu of the oaths required by the 5 Geo. 2, c. 7, "an act for the more easy recovery of debts in his Majesty's plantations and colonies in America," and the 54 Geo. 3, c. 15, "an act for the more easy recovery of debts in his Majesty's colony of New South Wales."

Declaration in writing sufficient to prove execution of any will, codicil, &c.

By sec. 16, "it shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration."

Suits on behalf of his Majesty to be proved by declaration.

By sec. 17, "in all suits now depending or hereafter to be brought in any Court of law or equity by or in behalf of his Majesty, his heirs and successors, in any of his said Majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that his Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present act."

Voluntary declaration in the form of the schedule may be taken.

Sec. 18, reciting that "it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters," enacts, that "it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor." (*w*)

Making false declaration a misdemeanor.

Persons making false declarations deemed guilty of a misdemeanor.

By sec. 21, "in any case where a declaration is substituted for an oath under the authority of this act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this act, or by virtue of any power hereby given, any person who shall wilfully and corruptly

(*w*) By sec. 19, the same fees are payable on declarations as on the oaths, in lieu of which they are made. By sec. 19, the declaration is to be in the form following:—"I, *A. B.*, do solemnly and sincerely declare, that and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the year of the reign of his present Majesty, entitled an act," [*here insert the title of this act*].

make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.

By sec. 22, the act commenced on the 1st October, 1835. (*x*)

Perjury by statutes of limited and local operation.

There are also some statutes of limited and local operation, which contain enactments respecting perjury, a few of which may be briefly noticed. The 11 Geo. 1, c. 18, s. 3, relates to false oaths taken at elections for the city of London; the 44 Geo. 3, c. 60, s. 4, to perjury at elections for Aylesbury; the 47 Geo. 3, sess. 2, c. 109, s. 123 (local act) to perjury under the Dublin Improvement Act; the 47 Geo. 3, sess. 2, c. 68, s. 149, 56 Geo. 3, c. 21, s. 49, and 56 Geo. 3, c. 78, s. 50, (local acts) relate to false oaths taken in the course of the vending, admeasurement, &c., of *coals* in London, and certain places in the neighbouring counties; and the 55 Geo. 3, c. 99, s. 16, (local act) to false oaths taken in respect of *bread* sold in London, or within the bills of mortality. These statutes, and others of a similar kind, either provide that the offenders shall be punishable under the 5 Eliz. c. 9, and the 2 Geo. 2, c. 25, s. 2, or (which is more generally the case) enact, "that they shall be subject and liable to the pains and penalties, which persons convicted of wilful and corrupt perjury are subject and liable to."

Construction of the 5 Eliz. c. 9.

With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9, as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law; and as it did not alter the nature of the offence, but merely enlarged the punishment, (*y*) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the king swears falsely, he cannot be indicted on the statute. (*z*)

It has been adjudged that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended that the makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., does not extend to perjury on an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. (*a*) And it has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a

(*x*) The number of statutes, which contain clauses making persons giving false evidence, making false affidavits, &c., either liable to the punishment of perjury or guilty of a misdemeanor, is so large that it is conceived they would occupy more space than the infrequency of the occasions, on which it may be necessary to consult them, warrants devoting to their insertion; all of them, therefore, have not been inserted. C. S. G.

(*y*) Buxton *v.* Gouch, 3 Salk. 269.

(*z*) Id. ibid.

(*a*) Bac. Ab. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 19.

witness; and, therefore, not to perjury in an answer in Chancery; or in swearing the peace against a man; or in a presentment by a homager in a Court baron, or in a wager of law, or in swearing before commissioners of the King's title to lands. (*b*) And by the opinions of some, a false affidavit against a man, in a Court of justice, is not within the statute. (*c*) But it is observed that if such affidavit be by a third person, and relate to a cause depending in suit, before the Court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may be strongly argued that it is within the purview of the statute. (*d*) It seems to be the better opinion that a false oath before the sheriff on a writ of inquiry of damages, is within the statute. (*e*)

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause. (*f*) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath was taken, but to shew also how it conduced to the proof or disproof of the matter in question. (*g*) And if an action on the statute be brought by more than one, it is necessary to shew how the perjury was prejudicial to each of the plaintiffs. (*h*) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed. (*i*)

Indictment on the 5 Eliz. c. 9.

It has been holden that every indictment or action upon this statute must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *falsò et deceptivè,* or *falso et corruptè,* or *falso et voluntariè,* without saying *voluntariè et corruptè,* it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti, &c.* Also it is said to be necessary expressly to shew that the defendant was sworn; and that it is not sufficient to say that *tacto per se sacro evangelio deposuit.* But there is no need to

(*b*) 1 Hawk. P. C. c. 69, s. 20. Bac. Abr. tit. *Perjury* (B).

(*c*) 2 Roll. Abr. 77. 1 Roll. 79. 3 Keb. 345.

(*d*) 1 Hawk. P. C. c. 69, s. 21.

(*e*) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 21.

(*f*) 1 Hawk. P. C. c. 69, s. 22. Bac. Abr. tit. *Perjury* (B). We have seen that this is otherwise at common law. *Ante,* p. 597.

(*g*) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 23.

(*h*) Id. ibid.

(*i*) 1 Hawk. P. C. c. 69, s. 23. Bac. Abr. tit *Perjury* (B). In 1 Hawk. P. C. c. 69, s. 4, there is a *qu.* whether perjury in a court, whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding such reversal? See Reg. *v.* Meek, *ante,* p. 603.

shew whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, "*If persons by subornation, &c., or their own act, &c., shall commit wilful perjury;*" for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and, therefore, operate nothing. (*j*)

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute. (*k*)

Facilities given to prosecutions for perjury. 23 Geo. 2, c. 11, s. 3. The Judges of assize, &c., may direct any witness to be prosecuted for perjury, and assign counsel, &c.

For the purpose of facilitating prosecutions for perjury, and of preventing great offenders from escaping punishment by reason of the expense attending such prosecutions, the 23 Geo. 2, c. 11, s. 3, enacts, "that it shall and may be lawful to and for any of his Majesty's justices of assize, or *nisi prius*, or general gaol delivery, or of any of the great sessions of the principality of Wales, or of the counties palatine; and they are hereby authorized (sitting the Court, or within twenty-four hours after) to direct any person examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity, or reward for the same; and every such prosecution, so directed as aforesaid, shall be carried on without payment of any tax or duty, and without payment of any fees in Court, or to any officer of the Court who might otherwise claim or demand the same. And the clerk of assize, or his associate or prothonotary, or other proper officer of the Court (who shall be attending when such prosecution is directed) shall, and is hereby required, without any fee or reward, to give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the Court, which certificate shall in all cases be deemed sufficient proof of such prosecution having been directed as aforesaid, provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

Provision for the more easy framing of indictments.

The same statute also makes provision for the more easy framing of indictments for perjury and subornation of perjury. The first section, reciting that by reason of the difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes had frequently gone unpunished, enacts, "that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, *it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, or before whom the oath was taken* (averring such Court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters, wherein the perjury or perjuries is or are assigned, without setting

See how 14 & 15 Vic. c. 100. s. 20.

(*j*) 1 Hawk. P. C. c. 69, ss. 17, 18. Bac. Abr. tit. *Perjury* (B), and the authorities there cited.

(*k*) 2 Hale, 191, 192. See the cases cited, vol. 1, p. 655.

forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, other than as aforesaid, and without setting forth the commission or authority of the Court, or person or persons before whom the perjury was committed." And the second section enacts, "that in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the Court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed."

The provisions of this statute should be attended to in drawing indictments.

It was lamented by a very great Judge, that the party prosecuting for perjury, did not more frequently avail himself of this excellent law, made for the purpose of obviating difficulties in drawing the indictments. (*l*) In the case in which this remark was made, the commission at the Admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was holden that the commission at the Admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the Court must take it to mean that if either of the persons, named of the quorum, were present, it would be sufficient. (*m*)

Several persons not to be joined in an indictment for perjury.

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several. (*n*) But this does not apply to subornation of perjury. (*o*)

Venue.

With respect to the *venue* in an indictment for perjury it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material, and that it will be sufficient to shew the offence committed any where within the county. But it seems to be necessary that a place should be stated in the indictment to which a venue may be properly awarded; and an indictment was holden to be bad for laying the offence to have been committed "at the Guildhall of the city of London," without stating any parish or ward. (*p*) In a case where

(*l*) By Lord Kenyon, C. J., in Rex *v.* Dowlin, 5 T. R. 317. And a case is mentioned in which the Court of K. B. referred an indictment for perjury, which had been removed from Hick's Hall, to the master, to see what part of the record was unnecessary; and made an order that the clerk of the peace should pay the expense incurred by such unnecessary part. The indictment was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. 1 Leach, 201.

(*m*) Rex *v.* Dowlin, 5 T. R. 311.

(*n*) Rex *v.* Philips and another, 2 Str. 921.

(*o*) Reg. *v.* Rhodes and another, 2 Ld. Raym. 886. In Reg. *v.* Goodfellow and another, Stafford Spr. Ass. 1842, one defendant was indicted for perjury, and the other for suborning him to commit the perjury, and no objection taken to both being included in the same indictment; and it should seem none could have been successfully taken on that ground, as it is like the case of principal and accessory before the fact, included in the same indictment. C. S. G.

(*p*) Harris's case, 2 Leach, 800. But it may perhaps be doubted whether this decision would be considered a binding authority since the 6 Geo. 4, c. 50, s. 13, and see Rex *v.* Woodward, R. & M. C. C. R. 323, *ante*, p. 568. C. S. G.

perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large. (*q*) And where perjury had been committed on the trial of an indictment at the Worcestershire Quarter Sessions, which were held in the Guildhall at Worcester, which is situate in the county of the city of Worcester, it was held that the indictment, which was found by the grand jury of the county of the city of Worcester was good, as it was preferred in the county where the oath was actually taken. (*r*) A sufficient venue was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the Court made in answer to a summary application against him, and where it was objected that it was not stated where the Court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge, it being expressly averred that the defendant "then and there before the said Court was duly sworn." (*s*) In the instance of making an affidavit in the country, the party is not to be indicted where the affidavit may happen to be used, but in the county where the offence was complete, by making the false oath. (*t*)

Allegation of *time* in the indictment.

The indictment must also contain an allegation of *time*, which is sometimes material and necessary to be laid with precision, and sometimes not. (*u*) Where it is not material, it need not be positively averred; and if, under a videlicet, it may be rejected. (*v*) In a case where an indictment for perjury, charged to have been committed in the defendant's answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record: and, therefore, that it was no variance, though the bill, when produced, appeared to be entitled generally of a preceding term. (*w*) But in the same case where an assignment of perjury alleged that the defendant, at the time of effecting a policy of insurance purporting to have been underwritten by A., B., C., and others, on a day specified, well knew, &c., and it appeared on producing the policy that A. underwrote it on a different day, the defect was holden to be fatal, although it appeared that B., C., &c., did underwrite the policy on that day. (*x*) Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the Court, it was held to be no variance, the amended bill being part of the original bill. (*y*) So it has been held on an indictment for perjury committed on the trial of a cause at *nisi prius* to be no variance that the *nisi prius*

(*q*) Rex *v.* Gough, Dougl. 760. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The Judges intimated their opinions that the indictment might be in either county, but they were clear it might be in the county at large.

(*r*) Rex *v.* Jones, 6 C. & P. 137, Tindal, C. J.

(*s*) Rex *v.* Crossley, 7 T. R. 315, *ante*, p. 598.

(*t*) By Lord Kenyon, C. J. Id. ibid.

(*u*) Rex *v.* Aylett, 1 T. R. 69.

(*v*) Rex *v.* Aylett, 1 T. R. 70, 71.

(*w*) Rex *v.* Hucks, *cor.* Lord Ellenborough, C. J., 1 Stark. R. 521. And see Rastall *v.* Straton, 1 H. B. 49. Woodford *v.* Ashley, 2 Campb. 193, and 1 Stark. Crim. Plead. 122.

(*x*) Rex *v.* Hucks, 1 Stark. R. 521.

(*y*) Rex *v.* Waller, Mich. 6 Geo. 1. 3 Stark. Evid. 856.

record states the trial to have been on a day different from that stated in the indictment, there being no express reference in the indictment to the record. (z)

Necessary statement in the indictment.

It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And the statements in the indictment must, in general, be made with great accuracy. An indictment for perjury stating a bill of Middlesex as "issuing out of the office of the chief clerk assigned to inrol pleas in the Court, &c.," has been holden to be bad. (a) And a misrecital of the judgment-roll of the cause, at the trial of which the perjury is alleged to have been committed, is also fatal. (b) And if the indictment state that at the assizes, holden before justices assigned to take the said assizes, the oath was taken before A. B., one of the said justices, the said justice then and there having power, &c., it will be a fatal variance if the oath was adminstered when the Judge was sitting under the commission of oyer and terminer and gaol delivery. (c) And where an indictment for perjury, committed in a written deposition before a magistrate, in which deposition a word necessary to the sense had been omitted, set out the *substance and effect* of the deposition, and supplied a word which the sense required, as though it were actually in the deposition, the variance was holden to be fatal. (d) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in *substance* and effect he swore the whole of what is set out, though several distinct assignments of perjury are made thereon. (e)

Variances.

False statements whether in an affidavit or in evidence may be set out continuously, though matter intervene, if such

Where perjury is assigned upon several parts of an affidavit, and such parts are set out continuously, it is no variance if such parts are separated by other intervening matter, provided what intervenes does not vary the effect of what is set out. An indictment for perjury alleged to have been committed in an affidavit, set out various matters deposed to as if they had been continuous in the affidavit, but on the production of the affidavit, it appeared that the parts set

(z) Rex v. Coppard, Moo. & M. 118. 3 C. & P. 59, per Lord Tenterden, C. J., on the authority of Purcell v. Macnamara, 9 East, 156, where in an action for a malicious prosecution it was held to be no variance that the record of acquittal stated the acquittal to have been on a different day from that laid in the declaration, as the day named in the declaration was not laid as part of the description of the record of acquittal.

(a) Rex v. Scole, *cor.* Kenyon, C. J., Peake, N. P. R. 112.

(b) Rex v. Eden, *cor.* Kenyon, C. J., 1 Esp. R. 97. The indictment alleged that the cause came on to be tried before Lloyd, Lord Kenyon, &c., William Jones being associated, &c.; and from the judgment-roll it appeared that Roger Kenyon was associated, &c.; and the variance was held to be fatal.

(c) Rex v. Lincoln. Mich. T. 1820, MS. Bayley, J., and Russ. & Ry. 421.

(d) Rex v. Taylor, *cor.* Ellenborough, C. J., 1 Campb. 104. The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition so set forth, was that a person therein named assaulted the deponent with an umbrella, and, *at the same time* threatened to shoot her with a pistol; but when the deposition was produced it appeared that after stating the assault with the umbrella, it proceeded thus, "and at the *same* threatened to shoot," &c., omitting the word *time*.

(e) Rex v. Leefe, *cor.* Ellenborough, C. J., 2 Campb. 134, *post*, note (h). It appears, however, that in Reg. v. Rhodes and another, 2 Lord Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see Compagnon and wife v. Martin, 2 Black. R. 790.

out in the indictment were not continuous, but were separated by the introduction of other matter. It was contended that there was clearly a variance between the affidavit set out in the indictment and that given in evidence. The proper mode of stating it was, "in one part whereof the defendant swore such and such things, and in another part whereof he swore certain other things." In actions or indictments for libel such a variance would clearly be fatal. Abbott, C. J., "In actions or indictments for libel the tenor must be set out; in indictments for perjury it is sufficient to state the substance and effect of the false oath; the variance pointed out is therefore immaterial." (*f*) And the same has been held as to evidence given upon a trial. An indictment for perjury committed on the trial of an action for assault and battery, charged the defendant with having sworn that the plaintiff spit in the defendant's face before the defendant struck him, and that he, the defendant in the indictment, had not said certain words, and assigned perjury on both statements. The evidence given by the defendant on the former trial contained all the matter charged as perjury, but other matter intervened between the statement as to the spitting and that as to the words. It was objected that this was a variance, as the evidence charged as perjury in the indictment appeared to have been given continuously; but Abbott, C. J., held it was immaterial, as what intervened did not vary the effect of what was stated. (*g*)

matter do not vary their effect.

In an indictment for perjury committed before a select committee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient; but the indictment also stated that A. and B. were *returned* to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described as the borough of Malton, and the variance was holden to be fatal. (*h*) But where an information for perjury committed before a select committee of the House of Commons, stated that the committee was chosen to try and determine the merits of an election, and that the committee were sworn "to try the merits of the petition referred to them;" it was held that the committee was well described, although by the 10 Geo. 3, c. 16, s. 13, they were to be a committee "to try and determine the merits of the return or election." (*i*)

Mode of stating election returns.

Committee of the House of Commons.

An indictment may be supported upon an answer in a Court of equity, though the answer is not correctly entitled and the name of one of the parties be mistaken. Thus where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the Exchequer, &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than

Proceedings in Chancery.

(*f*) Rex *v.* Callanan, 6 B. & C. 102.
(*g*) Rex *v.* Solomon, R. & M. N. P. R. 252.
(*h*) Rex *v.* Leefe, 2 Campb. 134.
(*i*) Rex *v.* Dunn, 1 Dowl. & R. 10.

by the bill itself, the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (*j*) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, "as appears by the said bill, &c., filed of record;" on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that Francis Cavendish Aberdeen exhibited his bill. (*k*) And in an indictment for perjury committed in an answer to a bill in Chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) and another, though in fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (*l*) So where an indictment for perjury in answer to a bill in Chancery described the bill as exhibited against three persons only, viz., A., B., and C., and the bill when produced appeared to be against A., B., and D.; Abbott, C. J., held that this was not a fatal variance, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such a variance would have been fatal, but the bill was substantially described, and that was sufficient. (*m*) So if an indictment for perjury state that there was a suit depending in the Ecclesiastical Court between W. Peacock and R. Miles, and the proceedings in that Court state that the suit was between W. Peacock and R. Miles, *the elder;* this is no variance. (*n*) And it has been holden, that though there be two counts in the original proceeding, an averment that an *issue* came on to be tried is not a variance. (*o*)

Ecclesiastical Court.

And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter *s* in the word *understood*, was holden to be immaterial. (*p*) In a subsequent case, the defendant was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "*whereby his life was greatly despaired of;*" but that in the indictment for *perjury*, the indictment for *the assault*, being introduced in these words "which indictment was presented *in manner and form following, that is to say,*" and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word "*despaired;*" upon which the counsel for the defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words "*in manner and form following, that is to say,*" had undertaken to recite it; and that, having so done, he was bound to set it forth *verbatim*. But the

(*j*) Rex *v.* Roper, *cor.* Ellenborough, C. J., 6 M. & S. 327. 1 Stark. R. 518.

(*k*) Id. ibid.

(*l*) Rex *v.* Benson, *cor.* Ellenborough, C. J. 2 Campb. 508.

(*m*) Rex *v.* Powell, R. & M. N. P. R. 101.

(*n*) Rex *v.* Bailey, 7 C. & P. 264, Williams, J. See Rex *v.* Peace, 3 B. & A. 579.

(*o*) Peake's N. P. C. 37.

(*p*) Beech's case, 1 Leach, 133. The inspection of a record is within the peculiar province of the court; and therefore, if a doubt arise as to any word upon a record, the court and not the jury must resolve that doubt. By Lord Ellenborough, C. J., in Rex *v.* Hucks, 1 Stark. R. 521.

learned Judge overruled the objection; and said, that the word "*tenor*" had so strict and technical a meaning as to make a literal recital necessary; but that by the words "*in manner and form following, that is to say,*" nothing more was made requisite than a substantial recital; and that the variance, therefore, in the present case was only matter *of form*, and did not vitiate the indictment. (*q*)

Variance in substance and effect.

Where an indictment for perjury in setting out the substance and effect of a bill in equity, to which the defendant put in an answer, and upon which the perjury was assigned, stated an agreement between the prosecutor and defendant concerning *houses*, and upon the original bill being read it appeared that the word was "*house*" in the singular number; Abbott, C. J., held that, although the indictment professed to describe the substance and effect of the bill, and not to set out the tenor, yet this was a difference in substance, and consequently a fatal variance. (*r*)

Where an indictment for perjury stated that on an inquiry before two justices of the peace on an information under an excise statute, it became a material question where a certain individual was at 4 A. M., on the 2nd of July, and that the defendant swore she had been in his company from two in the same morning until four, and on the trial for perjury the evidence was that she had said she had been in his company from eleven until half-past four; Parke, J. doubted whether the evidence supported the allegation, but on conference with Bolland, B., he inclined to think it did. (*s*)

Mode of charging matter sworn in a joint deposition.

If an indictment charge that the defendant swore in substance and effect in a deposition, and the deposition be made jointly by him and his wife, his statement following that of his wife, it will not be a variance. The indictment stated that upon a certain information upon oath, entitled "the information," &c., the defendant wilfully deposed in substance and to the effect following: "the defendant (meaning C. D.) I am certain is one of the persons that assaulted and ill treated my wife," &c. The information began, "The information and complaint of Jane, the wife of C. E. Grindall, and of the said C. E. Grindall, made on oath," &c. "And first, the said J. Grindall for herself saith that the defendant is one of the persons who assisted W. J. S. and others in handcuffing and otherwise assaulting me on, &c." (Signed) "J. Grindall." "And the said C. E. Grindall sworn, says the defendant I am sure is one of the persons that assaulted and ill treated my wife," &c. It was objected that there was a variance, as the indictment set forth the deposition as sworn by the defendant alone; but it was held that, as what the defendant swore was set out in substance, it was sufficient. (*t*)

Where an indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against B.

(*q*) May's case, *cor.* Buller, J., 1799. The learned Judge cited Beech's case, *ante*, note (*p*).

(*r*) Rex *v.* Spencer, R. & M. N. P. R. 97. 1 C. & P. 260. In the latter report it is stated that the indictment alleged the agreement to be that the defendant would execute a lease of a certain piece of ground adjoining the *new houses*, whereas the agreement set out in the bill stated that the defendant would execute a lease of certain ground adjoining the new *house*, and Abbott, C. J., held the variance fatal, because "in the bill the land is said to be contiguous to one house, in the indictment to more than one."

(*s*) Anonymous, 1 Lew. 271.

(*t*) Rex *v.* Grindall, 2 C. & P. 563, Abbott, C. J.

had been reversed upon error after the bill of indictment against the defendant had been found, it was held that this was no variance. (u)

Variance between information set out and that produced.

Where an indictment for perjury alleged that an officer of excise went before two justices of the peace, and gave the said justices to understand and be informed that "W. Stock, victualler, *being a brewer of beer or ale for sale,*" did neglect to make a declaration of the quantity of beer brewed; and the words in italics were not found in the information when produced; it was held that this was a fatal variance, as the meaning of the indictment was that "Stock *being a brewer* neglected." (*uu*)

Variance. Where an indictment uses an equivocal term, its meaning is to be collected from the context, and by that it is to be determined whether or not there be a variance.

If an indictment use a word of equivocal meaning, the meaning in which it is used must be collected from the context of the sentence in which it occurs. An indictment for perjury alleged that a commission of bankrupt was issued against the defendant, under which he was duly declared bankrupt, and that afterwards he preferred a petition to the Chancellor, stating (amongst other things) that a commission had issued, that the petitioner, on the 1st of March, 1821, was declared bankrupt, and that at the several meetings *before the commission* the petitioner declared that the bill of exchange (on which the commission had issued) was not due, &c. But the allegation in the petition was that at the several meetings *before the commissioners* the petitioner declared that the bill was not due. It was contended that the words "commission," and, "commissioners," were not convertible terms; that the word "commission" denoted the authority under which the parties acted, and therefore the variance was fatal. Abbott, C. J., "The objection is that there is a variance between the petition set forth in the indictment and that which was given in evidence at the trial. Now, in a proceeding of this kind it was not necessary to set out in the indictment verbatim the tenor of the petition; it is sufficient if it be set out truly in substance and effect. The petition, as set out in the indictment, purports that at the several meetings before the commission, the petitioner declared in the hearing of the said assignee that the bill of exchange given to G. Drowley for the debt was not due at the time when he struck the docket. Now the allegation in the petition, which was proved in evidence, was that at the several meetings before the commissioners the petitioner declared so and so, and the question is whether that is a fatal variance. The word commission is one of equivocal meaning; it is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. And if it may denote the persons exercising the authority, we must collect from the context of the sentence in which the words "before the commission" occur, and of the other parts of the petition, whether it was used in that sense or not." After stating the indictment the very learned Chief Justice proceeded, "Now, if the word commission as there used was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the petitioner could not have made his declaration in the hearing of the said assignee. Then, if that cannot be the mean-

(u) Reg. v. Meek, 9 C. & P. 513. See Reg. v. Burraston, *post*, p. 641.

(uu) Rex v. Leech, 2 Man. & Ry. 119.

ing of the word commission, we must construe it in the other sense, which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence; the consequence is, that there must be judgment for the Crown." (*u*)

The court may order variances to be amended under the 9 Geo. 4, c. 15, but this power ought to be sparingly exercised.

The 9 Geo. 4, c. 15, s. 1, authorizes the Court to cause the record "in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record" to be amended; but it has been held that such amendment ought to be made very sparingly in the case of perjury. Thus where a prisoner was indicted for perjury committed in an affidavit made for the purpose of setting aside judgment entered up on a warrant of attorney, and the indictment charged that the defendant made his warrant of attorney, and that "afterwards, to wit, *in or as* of Trinity Term," in the 5 Wm. 4, judgment was entered up on the said warrant of attorney; and in the margin of the copy of the record when produced was entered "June the 26th, 5 Wm. 4," pursuant to rule H. T., 4 Wm. 4, s. 3. It was objected that the indictment was bad, as every averment in an indictment must be positive and not in the alternative. It was answered that the words "in or" might be rejected, or the indictment might be amended under the 9 Geo. 4, c. 15. But Patteson, J., after consulting Littledale, J., held that the judgment was not properly stated, and although this was a recital upon the record, refused to allow the amendment, as amendments ought to be made very sparingly in criminal cases, and the objection to the form of averment "in or as of," furnished a very good reason why the amendment should not be made. (*v*) So where an indictment for perjury, alleged to have been committed before certain commissioners appointed to examine witnesses in a Chancery suit, alleged that a commission was issued whereby Hobbes, Woodward, Kendall, and Cheek were commanded to examine each of the witnesses upon their oaths, and the commission itself commanded Hobbes, Woodward, Kendall, and Cheek, *or any three or two of them*, to examine each of the witnesses on oath, and it appeared that the defendant had been sworn before three of the commissioners only; Coleridge, J., held the variance fatal; and on being asked to allow an amendment to be made under the 9 Geo. 4, c. 15; Coleridge, J., said, "I think that I ought not to allow this amendment. I entirely agree with my brother Patteson, that the discretion of the Judges, as to amending in criminal cases, ought to be exercised very sparingly. One objection to readily permitting an amendment in an indictment, is that by the amendment a presentment on the oath of the grand jury is altered. I am also unwilling to amend variances, which, by ordinary care in collation, might be avoided." (*w*)

Averment that the complaint was heard, &c.

In a case where a complaint having been made *ore tenus* by a solicitor, before the Chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, "at and upon the hearing of the said complaint," the defendant deposed, &c.; and this was holden to be a sufficient

(*u*) Rex *v.* Dudman, 4 B. & C. 850.
(*v*) Rex *v.* Cooke, 7 C. & P. 559.
(*w*) Reg. *v.* Hewins, 9 C. & P. 786.

averment that the complaint was *heard.* (*x*) And it has been holden that an indictment for perjury, assigned on an affidavit sworn before the Court, need not state that the affidavit was filed of record, or exhibited to the Court, or in any manner used by the party. (*y*)

Before whom a trial may be alleged to have taken place.

An indictment for perjury may state the trial to have taken place either before the Judge, who in fact tried the case, or before the Judges before whom it is considered in point of law to have taken place. Therefore an indictment for perjury, stating the oath to have been taken on a trial before one Judge is good, although the record of the trial names both. The indictment stated that the defendant appeared as a witness on a trial at *nisi prius*, and was sworn before the Hon. Edward Willes, but the *nisi prius* record stated in the usual form that the trial was before both the Judges, and upon a case reserved, the Judges were unanimously of opinion that the evidence maintained the indictment. (*z*) So an indictment for perjury on the trial of a cause at the sittings after Term, stating the trial to have been before the puisne Judge, who in fact tried the cause is good, although the postea states the trial to have been before the Chief Justice. An indictment for perjury, charged to have been committed on a trial at the sittings after Term in London, alleged the trial to have taken place before Littledale, J.; and on producing the record it did not appear before whom the trial took place, but the postea stated it to have been before the Lord Chief Justice; in point of fact, however, the trial took place before Littledale, J.; and it was objected that this was a variance; it was answered that there was no reference in the indictment to the record, and no *prout patet per recordum:* it was merely stated that the trial took place before Littledale, J., and that was proved. Lord Tenterden, C. J., "On a trial at the assizes the postea states the trial to have taken place before both justices; it is considered in law before both, though in fact it is before one only, and I am not aware that the *postea* is ever made up here differently when a Judge of the Court sits for the Chief Justice. I cannot stop the case upon such an objection; you may have leave to move upon this point in case it shall become necessary." (*a*)

Variance in stating the adjournment of a quarter sessions.

If an indictment for perjury committed on a trial before the sessions alleges an adjournment to have been made by certain justices, and the record states it to have been made by other justices, this is a variance; but the defect may be cured by proving that in fact the adjournment was made by the justices named in the indictment. An indictment for perjury on the trial of an indictment for an assault alleged an adjournment to have been made by Const, and A. B., and others their fellows, justices, &c. The examined copy of the record of the conviction stated the adjournment to have been made by Const, and E. F., and others, their fellows, justices, &c. It was contended that this was a fatal variance; and Abbott, C. J., held that it was; but that the defect might be cured by other evidence, as by calling

(*x*) Rex *v.* Aylett, 1 T. R. 70.

(*y*) Rex *v.* Crossley, 7 T. R. 31. Nor is it necessary to prove such facts. Id. ibid. And see the cases, *post*, p. 667. But it is otherwise when the proceeding is under the statute of Eliz. Stark. Crim. Plead. 121. And see 3 Stark. Evid. 857, citing Rex *v* Taylor, Skin. 403, where it was held that the bare making of the affidavit without producing or using it is not sufficient.

(*z*) Rex *v.* Alford, 1 Leach, 150. See this case, *post*, p. 631.

(*a*) Rex *v.* Coppard, Moo. & M. 118. 3 C. & P 59.

some person who could state that he was present and saw the justices named in the indictment present on the day in question. (*b*)

It is sufficient to state in the indictment that the defendant was *duly* sworn. (*c*) In a case where it was averred that he was *sworn on the Gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (*d*) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the Judges in the commission, and the *nisi prius* record imported that the trial was before the two Judges of assize. (*e*)

The indictment must state that the defendant was duly sworn, &c.

An indictment at common law, which charged that the defendant "falsely, maliciously, wickedly, and corruptly swore, &c.," was holden sufficiently to imply that the offence was committed *wilfully*; (*f*) but it was considered at the same time that, in an indictment on the 5 Eliz. c. 9, the offence must be laid expressly to have been wilfully committed. (*g*)

Wilfully and corruptly.

The indictment should aver that the defendant "*wilfully and corruptly*" swore, and every count should expressly state that the defendant was sworn, and the fact of his having been sworn cannot be taken by intendment. The first count stated that the defendant on the trial of an indictment against J. H., intending to injure J. H., and to cause him to be wrongfully convicted, appeared as a witness and was sworn, and "then and there falsely and maliciously gave false testimony against J. H., by then and there deposing and

The indictment should state that the defendant swore *wilfully and corruptly*, and every count should aver that the defendant was sworn.

(*b*) Rex *v.* Bellamy, R. & M. N. P. R. 171. In order to remedy the defect, a witness from the office of the clerk of the peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment: these minutes were made by a clerk in the same office, of the name of Richards, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making these entries at the time; but Richards was not called as a witness, and there was no evidence to show whether he was present on the particular day further than the entry itself. In the same book, on the opposite page to the entry already stated was another, drawn up by the witness who produced the book; this was in the form of a record, and was in fact a summary of all the names of the justices attending upon the quarter sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day; amongst these names also were the justices mentioned in this indictment. But Abbott, C. J., held that this evidence was not sufficient to supply the defect; the minutes made by Richards was not a record, or in the nature of a record, and the entry on the opposite page was insufficient, as it did not give the names of the justices who were present on the particular day.

(*c*) Rex *v.* M'Carthur, *cor.* Kenyon, C. J., Peake's N. P. C. 155.

(*d*) Id. ibid.

(*e*) Rex *v.* Alford, 1 Leach, 150. Hil. T. 1777. MS. Bayley, J. Eyre, B., doubted on the trial whether one commissioner of assize alone had competent authority to administer the oath, and conceived the indictment ought to have alleged the oath to have been taken before both the Judges in the commission, but on a case reserved the Judges were unanimous that the indictment was right. But as to a record in the Crown Court, see Rex *v.* Lincoln, *ante*, p. 624. In Reg. *v.* Deman, 2 Ld. Raym. 1221, an exception was taken to an indictment; that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objections were overruled; and the court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.

(*f*) As to the offence being *wilful*, see *ante*, p. 597.

(*g*) Cox's case, 1 Leach, 71.

giving evidence," &c. The fifth count, the only one that differed materially from the first, alleged that by means of the false testimony in the first count mentioned, J. H. was found guilty; that a rule *nisi* for a new trial was granted; that the defendant intending to hinder the said rule from being made absolute came before a commissioner and was sworn, and being so sworn, wickedly, wilfully, and corruptly did depose, swear, and make affidavit in writing, in substance that the evidence which he, J. S., had given on the said trial was true, whereas the evidence which the said J. S. had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth. The defendant having been convicted, a rule was obtained for arresting the judgment, and after argument Abbott, C. J., delivered the judgment of the Court as follows:—" I am of opinion that this rule must be made absolute. As to the first class of counts the objection is that they do not charge that the defendant swore wilfully or corruptly. Every definition of perjury is swearing wilfully and corruptly that which is false. Whether the word maliciously might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's case*, (*h*) which has been referred to, proves at all events that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel; it was intended to allege perjury in an affidavit made in this Court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false, and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested." (*i*)

That the person had authority to administer the oath.

It must appear or be alleged in the indictment that the person by whom the oath was administered had competent power to administer it. Thus upon an indictment for perjury before a justice in swearing that I. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the county for which the justice acted, Eyre, J., arrested the judgment; because as the charge did not so import the justice had no jurisdiction to administer the oath in question to the defendant. (*j*)

Perjury at a petty sessions of justices acting for a particular division of a county.

Where a statute requires an act to be done by justices of the peace acting for a particular division in petty sessions, an indictment for perjury committed before two such justices must allege that they were acting for such division, but need not aver that they were assembled in petty sessions. An indictment for perjury on the

(*h*) *Supra*, note (*g*).

(*i*) Rex *v.* Stevens, 5 B. & C. 246. The 5 Eliz. c. 9, s. 6, *ante*, p. 604, uses both the words "wilfully and corruptly," and therefore it should seem that both these words must be used in an indictment on that statute. C. S. G.

(*j*) Rex *v.* Wood, Exeter, 1723. MS. Bayley, J.

hearing of an information for selling beer at improper hours (*i*) stated that the proceeding was before two justices, but not that they were assembled in petty sessions, or that they were acting for the division in which the house was situated; and it was held that the indictment was defective for want of an allegation that the justices were acting for the division in which the house was situated; but it was held not necessary to aver that they were assembled in petty sessions, for that the meeting of the two justices was in itself a petty sessions.

there being no allegation that they had competent power &c.

Indictment held bad for not showing that there was a charge made before a justice.

Where an indictment for perjury stated that the prisoner, maliciously intending to subject W. Mortiboy to the punishments of felony and larceny, went before J. C. and H. H., two justices of the peace, and was sworn (J. C. and H. H. having competent power, &c.) and deposed in substance that on Wednesday last he (the prisoner) was in W. M.'s, Peg Alley, and that he (the prisoner) put his hand into his watch fob, and took out a *5l.* note to make a bet with W. M., and put it into his breeches pocket. That W. M. collared him, and knocked him down, and put his knee on him, and then put his hand into his (the prisoner's) pocket, and took the said *5l.* note, &c. It was submitted that the indictment was bad, as it did not show that there was any proceeding pending before the magistrate, or that this was a deposition on any charge of felony. Coleridge, J., "There might be cases of an affidavit, where there was no charge, and no prosecution, and, indeed, no cause in hand. It might have been averred that the defendant made a charge, and that in support of that charge the deposition was made. If the defendant had merely come before the magistrates to swear this, without more, it would not be perjury. I think that the indictment is not sufficient." (*j*)

here there is no allegation that there was any proceeding

An indictment for perjury, stating that the prisoner came before a magistrate, and maliciously deposed, swore, charged, and

The first count of an indictment for perjury stated in substance that the prisoner, meaning to subject C. F. E. to the punishment provided for persons guilty of felony, &c. &c., went and was sworn before a justice of the peace for the county having competent authority to administer the oath, and being so sworn then and there upon a certain information and examination, entitled "County of Oxford to wit: the information and examination of R. G. taken upon oath

(*i*) Reg. *v.* Rawlins, 8 C. & P. 439, Park, J. A. J., and Patteson, J., after time taken to consider the points. Patteson, J., intimated that he had not given particular consideration to the question as to the necessity of a written information, but the inclination of his opinion was that it was not necessary. The 1 Wm. 4, c. 66, s. 15, provides that "all penalties, &c., may be recovered upon the information of any person whomsoever before two justices acting in petty sessions," &c., and that every person "who shall be convicted before two justices so acting in and for the division or place in which shall be situate the house kept," &c.

(*j*) Reg. *v.* Pearson, 8 C. & P. 119. When the objection was first made, Coleridge, J., said, "this might have been the original information. Might it not be that this statement to the magistrates was the charge?" And it is conceived that this was the correct view of the case. In cases of felony and misdemeanor it is a very common practice for the party complaining to state the facts to the magistrate's clerk, who takes them down in the shape of an information, such information is then taken to the magistrate, and the complainant sworn to the truth of it; in such cases it is conceived the making the charge before the magistrate, and the making the deposition, is one and the same thing; it could not, therefore, be averred and proved that the party made the charge, and *in support of it* made the deposition. See Candle *v.* Seymour, 1 A. & E. Q. B. R. 889, where some strong observations were made against the propriety of such a practice. It may, however, be questionable whether such a mode of taking the information would afford any ground of defence to the party who was sworn to its truth. It may be observed, also, that although it may admit of doubt whether the deposition disclosed a felony, yet as it clearly showed an assault, the magistrate had jurisdiction to administer an oath. C. S. G.

gave him to be informed that C. F. E. had a venereal affair with a donkey, shows sufficiently a proceeding before a magistrate to make the false swearing perjury.

before me, &c.," falsely, &c., did depose, &c. The whole of the information was then set out, it contained the following passage:—"I then went and got over Mrs. Calcut's wall into the close, and went and looked over the wall between her close and Mr. E.'s ox-pens. I then saw the donkey standing with its side towards and near to the manger of the second pen, with her head towards Mrs. Calcut's close. Mr. C. E. was standing behind her. I saw that he had the flap of his trowsers unbuttoned and hanging down. I saw the corner of the inside of it; he was rather on the move; he appeared to be on the donkey (meaning that he appeared to the said R. G. to be in the actual commission of that detestable crime, &c.) He remained in that position about five minutes, when the donkey kicked Mr. C. E.'s leg, upon which he moved aside, turning his back rather more towards me than it had been, and stooped down to rub his leg; he then lifted himself up again, and turned round with his face towards me. I then saw his private parts exposed: I saw him tuck up his shirt and button up his trowsers: the upper part of them as well as the flap had been unbuttoned." This count contained no averment as to the materiality of any of the matters deposed to. It contained several assignments of perjury. Those on which the prisoner was found guilty were as follows:—"Whereas in fact the said C. F. E. then and there had not the flap of his trowsers unbuttoned or hanging down. And whereas the said C. F. E. had not then and there, or at any other time or place whilst standing behind the said donkey, or any other donkey, the flap of his trowsers unbuttoned, and hanging down, nor had the trowsers the said C. F. E. then wore any flap whatsoever. And whereas the said C. F. E. did not appear to the said R. G. to be, nor was he, then and there, or at any other time, or at any other place, in the actual commission of that detestable crime, &c., with the female donkey aforesaid, or with any other animal, or in any other manner whatsoever. And whereas the said C. F. E. did not remain in that situation for about five minutes, nor did the said donkey kick the said C. F. E.'s leg, nor did, &c. &c." Here followed a number of other averments, which were not proved for want of two witnesses. The third count was the same as the first, except that it stated the prisoner's intention to be, to subject C. F. E. to the punishment inflicted on persons guilty of misdemeanors, and the innuendo was, that C. F. E. was attempting to commit the offence. The seventh count stated, that the prisoner, intending to aggrieve C. F. E., "came before Mr. Rawlinson, and was sworn (he having authority) and falsely, &c., did depose, swear, charge, and give the said justice to be informed that the said C. F. E. upon, &c., had a venereal affair with a certain animal called a donkey, and feloniously and against the order of nature did commit and perpetrate that detestable and abominable crime, &c., with the said donkey. And further (it being then and there material to the inquiry into the said charge and information to know the state of the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed as aforesaid) that he, the said R. G., then and there saw that the said C. F. E. then and there had the flap of his trowsers unbuttoned and hanging down, and that he, the said R. G. then and there saw the inside of the said flap; whereas the said R. G. did not then and there, or at any time, or at any place, see the said C. F. E. at any time in the act of having a vene-

real affair with a donkey, or with any other animal whatsoever, nor did the said C. F. E. then, or at any time, or at any place, or in any manner commit, nor was the said C. F. E. at any time, or at any place, or in any manner in the act of committing that detestable and abominable crime. And whereas the said R. G. did not then and there see the flap of his, the said C. F. E.'s trowsers unbuttoned, or hanging down, nor was the flap of the said C. F. E.'s trowsers then and there unbuttoned, or hanging down, nor did the said R. G. then and there see the inside of the flap of the said trowsers. The information signed by the prisoner was put in, and it was proved that he was duly sworn, and that the charge was dismissed. The two witnesses, produced to the facts, were C. F. E., a lad of fifteen, and his elder brother, J. H. E. They swore that they went together to the field, J. H. having a gun; that they spoke of going to Chipping Norton, and that Charles went to see whether the donkey was able to go to Chipping Norton, and parted from his brother for that purpose—that he was absent three minutes—that the trowsers he had on, which were produced in Court, had no flap. These were the only facts to which they both spoke. C. F. E. fully negatived what the prisoner had sworn to, in a manner quite satisfactory to the jury. The brother, J. H., also stated that he was about forty yards from the ox-pens—that he had his back towards them—that if he had turned round he could have seen them and the wall, and must have seen if any one was looking over it, but he did not turn round. It was objected, first, that the first and third counts did not distinctly show any proceeding pending before the magistrate; that they ought to have averred directly that a charge was pending. *Reg.* v. *Pearson.* (*i*) But Patteson, J., thought that case distinguishable, because of the words "upon an information and examination," &c. (*k*) Second, that the flap of the trowsers being unbuttoned did not appear on the face of the counts to be material, and there was no averment of its materiality. The same objection applied to the precise time of five minutes. Third, that the assignment of perjury as to the main charge was too large, because it denied all animals, and all times and places. Fourth, as to the first count, that the language used by the prisoner as there set out, did not import that a felony was committed, but only an attempt. These objections were urged in arrest of judgment. Fifth, as to the seventh count, the first objection to the first and third counts was urged. Sixth, to the same count it was urged that, although in that count the state of C. F. E.'s dress was averred to be material, yet, that by such averment was meant—not whether the flap of his trowsers was unbuttoned—but the trowsers generally. Seventh, that the seventh count alleged, that the prisoner charged the capital offence, whereas, by his information, he appeared to have charged only an attempt. The sixth and seventh objections were taken before the verdict, and did not apply in arrest of judgment, as was also the objection, whether the evidence of the brother, J. H. E., went to any material fact sufficient to satisfy the rule as to two witnesses in cases of perjury. On all these questions, the learned Judge requested the opinion of the Judges, and all of them (except Vaughan, J.,

(*i*) *Ante*, p. 633.

(*k*) The present indictment is in the same form as the one in 4 Wentw. 244. 2 Chitty's Crim. Law, 443.

Gurney, B., Williams, J., and Maule, J., who were absent) held the conviction good on the seventh count, and most of the Judges appeared to think it good on all the others. (*l*)

Insufficient allegation of making an information on oath.

Where an indictment stated that "heretofore to wit, on, &c., at, &c., before M. G. and T. H. H., two of the justices, &c., came one J. Osborne, and then and there exhibited to and before the said M. G. and T. H. H., so being such justices as aforesaid, a certain information upon oath, and then and there informed the said justices" that certain quantities of stolen silk were found in a certain house; it was held, that this allegation did not sufficiently show that the oath was taken before the said justices, as it was consistent with the allegation that the oath might have been taken before some other justices. (*m*)

Indictment for perjury in an affidavit under an interpleader rule, must allege that there was an application to the Court.

Where an indictment for perjury committed under the Interpleader Act, set out the issues found in the Court of Exchequer between A. B. and C. D., the trial at Westminster, the verdict for the plaintiffs, the judgment, the writ of fieri facias consequent thereon to the Sheriff of Somersetshire, dated the 5th of June, 1841, the warrant, the seizure of the goods of C. D., and the notice on the part of J. Bishop, the party indicted for perjury, to the sheriff not to sell the goods so seized, but to deliver them up to him, the same being his property. And the indictment then charged that the said J. Bishop came before a commissioner, and produced an affidavit in writing, and swore to the truth of the matter contained in it; and the affidavit in fact was, that the deponent having heard that the defendant C. D. had certain goods (those seized under the fieri facias of the 5th of June) bought them and paid for them on the 1st of June. The sale and purchase were then negatived, and this was the perjury charged. It was submitted that, as there was no allegation that any application had been made under the Interpleader Act, it did not appear that the affidavit was made in a judicial proceeding; and Coleridge, J., held the objection fatal; as for anything that appeared this was a voluntary oath, and not made in any judicial proceeding. (*n*)

Writ of inquiry issued out of B. R., returnable in C. P.

Where an indictment for perjury alleged that a certain cause had been depending in the King's Bench, and that such proceedings were had, that a writ of inquiry was duly issued out of the said Court, directed to the sheriffs of London to inquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof before the justices of our said Lord the King at Westminster, and then assigned perjury on the taking of the said inquisition before the secondary; the Court of King's Bench seem to have been of opinion that the indictment was bad, as it appeared that the perjury was committed *coram non judice;* for the writ of inquiry was issued out of the King's Bench, and made returnable in the Common Pleas, and therefore the secondary had no jurisdiction to administer the oath. (*o*)

(*l*) Reg. *v.* Gardiner, 2 Moo. C. C. R. 95. 8 C. & P. 737.

(*m*) Reg. *v.* Goodfellow and another, Stafford Spr. Ass. 1842, MSS. and 1 C. & Mars.

(*n*) Reg. *v.* Bishop, 1 C. & Mars. 302.

(*o*) Pippet *v.* Hearn, 5 B. & A. 634. The question arose in an action for a malicious prosecution for perjury, and the first count set out the indictment for perjury as stated in the text, and the Court held that the count was good, for where a man maliciously prefers an indictment for a crime he is liable to an action for it, although the indictment be defective.

It should seem that an indictment for perjury committed before commissioners of bankrupt in an examination touching the estate of the bankrupt, should allege that there was a trading, petitioning creditor's debt, and act of bankruptcy. (*p*) But if the indictment were for perjury committed in the preliminary proceedings before the commissioners to ascertain whether the party should be adjudged bankrupt or not, it should seem that an indictment would be good, although it omitted to state that there was a good petitioning creditor's debt. (*q*)

Indictment for perjury before commissioners of bankrupt.

In an indictment for perjury in an affidavit, it is sufficient to state that the defendant was sworn before A. B. (A. B. having power to administer an oath) without stating the nature of A. B.'s authority. An indictment for perjury in an affidavit, alleged that the defendant did take his corporal oath before F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf) and that the defendant did before the said F. J. Chell, as such commissioner as aforesaid, depose, &c. It was contended, in arrest of judgment, that the indictment was bad, as it did not describe the official station of the person before whom the defendant was sworn. It was, indeed, stated that he made affidavit of certain matters before F. J. Chell, as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and, therefore, that averment could not cure the defect. The 23 Geo. 2, c. 11, made it unnecessary to set out the commission of the person before whom the oath was taken, but that did not dispense with the necessity of shewing the nature of his office. Abbott, C. J., "Looking at the act of Parliament, 23 Geo. 2, c. 11, we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what Court or before whom the oath was taken, averring such Court or person to have competent authority to administer the same, without setting forth the commission or authority of the Court or person before whom the perjury was committed. It is, therefore, to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn, the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does, therefore, contain all that is required by the words of the statute; and taking into consideration the object of the act, which was framed to remove the difficulties before felt by reason of the averments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the Legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I am, therefore, of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the Court, if he was sworn before

If an indictment state that the party had authority to administer the oath, it is sufficient without showing the nature of the authority.

(*p*) Rex *v.* Jones, 4 B. & Ad. 345, *ante*, p. 232. Reg. *v.* Ewington, 1 C. & Mars. 319, *post*, p. 661. The second count in this case alleged that a fiat "duly issued" against the bankrupt, and it was objected that it was bad because it did not allege any petitioning creditor's debt or act of bankruptcy, and Rex *v.* Jones was relied upon, but the point was not decided.

(*q*) Reg. *v.* Ewington, *supra*.

a Court. There is not then any reason for granting this application." (*q*)

Indictment for perjury on an appeal before commissioners of the assessed taxes must show that the appeal was one they had jurisdiction to try, in order to show they had authority to administer the oath.

This case was reconsidered in the following case:—The indictment stated that before and at the time of the taking of the false oath by J. O. hereinafter mentioned, R. L., F. D. P., and H. S. G., were commissioners acting in the execution of certain acts of Parliament relating to the duties of assessed taxes in and for the district of the hundred of Knighton, in the county of W., and thereupon heretofore, to wit, on, &c., at, &c., in the district and county aforesaid (at a meeting then and there held by the commissioners aforesaid for the purpose of hearing and determining appeals against the certificate of supplementary charges made by one J. L., crown surveyor in pursuance of the said acts) a certain appeal of one W. H. of C., in the district and county aforesaid in due form of law came on to be heard. The indictment then averred that the defendant on, &c., at, &c., appeared before the said commissioners as a witness for and on the behalf of the said W. H. on the hearing of the said appeal, and was then and there sworn, &c., before the said R. L., F. D. P., and H. S. G., so being such commissioners as aforesaid, that the evidence which he the defendant should give upon the hearing of the said appeal should be the truth and nothing but the truth (they the said commissioners then and there having authority to administer the said oath, &c.) The indictment then proceeded to aver the materiality, the giving the evidence, &c. The defendant having been convicted, a writ of error was brought, and one of the errors assigned was, that it did not appear that the said appeal was an appeal against such a certificate as in the said indictment mentioned, or that the same appeal was such an appeal as the said commissioners or any of them had power, authority, or jurisdiction to determine, and if they had no such power, &c., they had no jurisdiction to administer the said oath; and the Court of Queen's Bench held

(*q*) Rex *v.* Callanan, 6 B. & C. 102. 9 D. & R. 97. This case having been much relied upon in the following case, and the record examined, I have thought it right to insert the following statement of the first count, which I took from the record. The indictment stated that C. C., contriving and intending to injure one T. Stevens, and in order to obtain a rule of the Court of B. R., whereby it might be ordered by the said Court that the said T. S. should show cause why a certain judgment signed on a warrant of attorney in a cause in the said Court of Stevens against Callanan, and the execution issued thereon should not be set aside, and the said warrant of attorney be delivered up to be cancelled, and why the proceeds of the said execution should not be restored to the said C. C., and why the said T. S. should not pay the costs of that application, and that in the meantime the said proceeds should remain in the hands of the sheriff of the county of Middlesex, came in his proper person, &c., on, &c., at, &c , before F. J. Chell, gentleman, and the said defendant then and there, to wit, on, &c., at, &c., was duly sworn, and did take his corporal oath upon the Holy Gospel of God before the said F. J. Chell, (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the said C. C. in that behalf), and the said C. C. being so sworn as aforesaid, falsely, &c., did then and there before the said F. J. Chell, as such commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance, &c. The indictment then set out the affidavit, which stated, amongst other things, that C. C. had applied to the said T. S. for a loan of 160*l.*, which T. S. had agreed to let C. C. have upon having a mortgage upon his C. C.'s house, and as a collateral security a warrant of attorney to accompany the said mortgage, that the mortgage and warrant of attorney were prepared for 250*l.*, although no more than 150*l.* was advanced, &c.: "all which said several matters and things so deposed and sworn by the said C. C. as aforesaid were, and each of them was material for the obtaining and supporting the said rule." C. S. G.

that the indictment was bad upon this ground, and the judgment was reversed. (r)

It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (s) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; and it will be sufficient to allege generally that the particular question became a material question. (t) Thus statements, that, at a court of Admiralty session, J. K. was "in due form of law tried upon a certain indictment then and there depending against him" for murder, and that "at and upon the said trial it then and there became, and was made a material question," whether, &c. were holden to be sufficient averments that the perjury was committed on the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (u) If the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may, it seems, be omitted. (x) And where, upon an indictment for perjury on a trial for felony, it did not appear that the matter sworn was material nor was it alleged that it was so, the Judges held, upon a case reserved, that if the original indictment had been set out, and it could plainly have been collected that the matter was material, it would have been sufficient without an averment of materiality, but that as this was not the case, the indictment was bad. (y) So where upon an indictment for perjury committed in an answer in Chancery, the perjury was assigned in defendant's denial in the answer of his having agreed upon forming an insurance company of which he was director, &c., to advance 10,000*l.* for three years, to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, or what was the prayer, the judgment was arrested. (z)

It must appear on the face of the indictment that the oath was *material* or it must be alleged that it was.

It seems to be fully settled that either it must appear upon the indictment that the matter in respect of which the perjury is assigned was material or it must be expressly alleged to have been so. An indictment for perjury alleged that on the trial of a certain issue the defendant was sworn as a witness, and that on such trial certain questions became material, that is to say "whether one J. Kenworthy had been arrested by one J. Lister: whether the said J. L. had on the occasion of the said alleged arrest touched the person of the said J. K.; and whether the said J. L. had on the occasion of the said

The indictment must show either by a statement of the proceedings, or by express averment that the matter sworn was material.

(r) Reg. v. Overton, Jan. 26, 1843, in B. R. Many other errors were assigned, but not determined by the Court.

(s) Rex v. Aylett, 1 T. R. 69.

(t) Rex v. Dowlin, 5 T. R. 311.

(u) Id. ibid.

(x) 2 Chit. Crim. L. 307 *a*, citing Trem. P. C. 139, &c., and 7 T. R. 315. Rex v. Crossley.

(y) Rex v. M'Keron, East. T. 1792, MS. Bayley, J. 5 T. R. 316. S. C.

(z) Rex v. Bignold, Trin. T. 1824, MS. Bayley, J. The indictment was shewn to Lord Gifford, Master of the Rolls, and Mr. Bell, King's Counsel, who both thought that upon the face of the indictment it could not be said whether the question was material or not; and the materiality of all questions in a Chancery suit depending upon the purpose for which the suit is instituted, the Court held that the indictment could not be supported. MS. Bayley, J.

alleged arrest put his arms round the said J. K. and embraced him." The indictment then charged that the defendant swore falsely to the following effect. "Lister (meaning the said J. L.) put his arms round him (meaning the said J. K.) and embraced him (meaning the said J. K., and meaning thereby that the said J. L. had *on the occasion, to which the said evidence applied,* touched the person of the said J. K.) It was further alleged that in answer to a question put to the defendant "whether the said J. L. did not put his arms round him (meaning the said J. K.) and embrace him," the defendant falsely swore as follows "he (meaning the said J. L.) did:" (meaning that the said J. L. did *on the occasion to which the said evidence applied* put his arms round and embrace the said J. K. and did touch the person of the said J. K.) The defendant having been convicted, a writ of error was brought, and the error specially assigned was that the materiality of the evidence alleged to have been false was not sufficiently averred in the indictment; and it was contended that in the evidence, on which the perjury was assigned, there appeared neither time, place, nor circumstance to connect the statement with the alleged arrest. The whole might have turned upon some former and entirely different transaction. And the innuendos did not remove the difficulty: for there was no averment in them that it was on the occasion of the alleged arrest; it merely imported that the evidence was given concerning *an* occasion, which was not identified with that in question. Bayley, J. "An indictment must be good without the help of argument or inference. In the case of perjury the indictment must shew, either by a statement of the proceedings, or by other averments, that the question to which the offence related was material. That is not shewn here in either way. The words on which perjury is assigned, if taken without the innuendos, have no necessary reference to the occasion of an alleged arrest; nor is there anything in the indictment to connect them with it. It is contended that the inquiry, to which part of the evidence was an answer, would not have been relevant if applicable to any other matter and occasion than those now in question; but we know nothing of the merits of the case except from the indictment. The innuendos rather introduce greater doubt than greater certainty, and lessen the force of the argument that only one occasion could have been contemplated. I am, therefore, of opinion that the indictment is defective, and the judgment ought to be reversed." (*a*)

Hewins' case. Imperfect allegation of materiality.

Where an indictment stated that a suit was pending in the Court of Chancery, and that a commission was issued to certain commissioners to examine witnesses upon interrogatories, and then set out the ninth interrogatory, and averred that, "upon the examination of the defendant upon the said interrogatories, it became, and was, material to ascertain the truth of the matters hereinafter alleged to have been sworn to and deposed by the defendant, upon his oath, in answer to the said ninth interrogatory;" it was objected that the averment of materiality was insufficient, there being no statement of the alleged perjury being material to the Chancery

(*a*) Rex *v.* Nicholl, 1 B. & Ad. 21. Littledale, J., and Parke, J., concurred, and Parke, J., added, "It is part of the definition of perjury that the false swearing is on some point material to the question in issue. In an indictment this may appear either from the matter of the suit, as shewn on the record, or by direct averment."

suit, or to any question in that suit; and Coleridge, J., expressed some doubt whether the averment of materiality was sufficient, and would have reserved the point if it had become necessary. (*b*) And where an indictment for perjury, after alleging that an information was exhibited before two magistrates, and that the same information came on to be heard before M. G. and J. S., two justices, and that "upon the hearing of the said information before the said M. G. and J. S., so being such justices as aforesaid, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. S. upon his oath;" it was held, that this averment of materiality was insufficient. (*c*)

Goodfellow's case.

An indictment stated that, on the trial of an action of *Meek* v. *Knight*, "it became and was *a material question*, whether a certain bill of exchange, bearing date, &c.," (here the bill was described,) "was accepted by the said J. Meek, for the accommodation of the said W. Knight, and without valuable consideration to the said J. Meek from the said W. Knight; and whether a certain paper writing or memorandum, *then and there* produced, by and in the handwriting of the defendant, J. Burraston, was really and truly executed by the said W. Knight, by affixing his mark thereto, *at the time of the making of the said bill of exchange.* (The indictment then set out the memorandum.) And whether the said memorandum was read over by the said J. Burraston to the said W. Knight, at the time of making the said bill of exchange as aforesaid." The indictment then alleged that the defendant swore that the said paper-writing or memorandum was duly executed by the said W. Knight, by affixing his mark to the same, in the presence of the said J. Burraston, *on the day on which the same bears date, and at the time of the making of the said bill of exchange,* and that the said memorandum was then and there read over by the said J. Burraston to the said W. Knight. "Whereas, in truth and in fact, the said W. Knight did not execute the said paper-writing or memorandum by affixing his mark thereto, in the presence of the said J. Burraston, *on the day on which the same bears date,* nor was the said memorandum read over by the said J. Burraston to the said W. Knight at the time of the making of the said bill of exchange, nor was the said memorandum produced or shewn to the said W. Knight by the said J. Burraston, at the time of making the said bill of exchange. Upon a writ of error, brought after a general verdict of guilty, the errors assigned were, that no perjury was assigned upon the question alleged to have been a material question upon the trial, and that no perjury was assigned upon any question alleged to have been a material question upon the trial; and the Court of Queen's Bench held that the indictment was bad. The assignment of perjury, that the bill was not executed on the day on which the same bears date, departed from the statement of the evidence, and the allegation of the materiality. And the assignment of perjury, that the paper was not executed at the time of the making of the bill, bore no relation

Burraston's case. Insufficient averments of materiality and of the falsity of the matter sworn.

(*b*) Reg. *v.* Hewins, 9 C. & P. 786. The defendant was acquitted. The form of the averment in this and the following case was taken from 2 Chitty's Cr. L. p. 307 *a*; where it is said that this "concise statement would, it should seem, in all cases suffice."

(*c*) Reg. *v.* Goodfellow and another, Stafford Spr. Ass. 1842, Patteson, J., after consulting Cresswell, J., 1 C. & Mars. 569. See the averment of materiality in Rex *v.* Callanan, *ante*, p. 638, note (*q*).

to the allegations of the evidence of the defendant. The statement of the evidence of the defendant, as well as the allegation of the falsehood, were uncertain. The words "then and there" might refer to the two dates, the date of the memorandum, and the day of the making of the bill, and it might consist with the fact that it never was read over on both days, or the defendant might never have intended to say that it was. (*d*)

Ann Bird's case. Materiality not necessarily apparent on the face of the indictment.

The indictment must shew on the face of it that the matter *was* material; it is not sufficient if it only shews that it *might* or might not have been material. An indictment for perjury alleged that, on the trial of an indictment for an assault, with intent to commit a rape, and for a common assault, upon one Ann Bird, the said Ann Bird swore that she was the wife of one J. Bird, and had been married to him at such a time and such a place, whereas she was not the wife of the said J. Bird, and had never been married to him; and the indictment contained an allegation of materiality, which was insensible in consequence of an error in copying it from the draft; it was, nevertheless, contended, that it sufficiently appeared, on the face of the indictment, that the evidence, on which the perjury was assigned, was material on two grounds. First, that on an indictment for an assault, with intent to commit a rape, it was most material, not only as affecting the credit of the witness, but as going to the very gist of the charge itself, whether the party assaulted had falsely sworn that she was a married woman. Secondly, that by swearing that she was the wife of J. Bird, the prosecutrix, supported the allegation that the assault was upon "Ann Bird," which would have failed if she had admitted that she was not married to J. Bird. But Cresswell, J., held that it did not sufficiently appear that the evidence was material; it might or might not be material, and that was not sufficient. (*e*)

c.e. it must there or allege distinctly in extenso case that it was, not that it might be material! See p. 639 supra.

Apparent materiality of

Where an indictment for perjury stated that a cause was set down for trial, and appointed for a particular day, and that the defendant

(*d*) Reg. *v.* Burraston, Q. B., Easter T. 1840, Jurist, vol. 4, p. 697. The Court expressed strong doubts whether it was possible to separate the three propositions, which were said to have formed one question; and Littledale, J., said that if it was one assignment of perjury, and part was bad, the whole was vitiated. It was also doubted whether where a matter was stated to be a material question the prosecutor could abstain from stating any swearing as to such matter, or assigning any perjury upon it. But it became unnecessary for the Court to decide either of these points, as the indictment was held bad on the grounds stated in the text.

(*e*) Reg. *v.* Ann Bird, Gloucester Spr. Ass. 1842. The indictment for the assault simply stated the assault to be upon Ann Bird, without any further description. The learned Judge expressed an opinion that the indictment was insufficient before the case went to the jury, but he left it to them, and after they had found the prisoner guilty, arrested the judgment, in order that the prosecutor might bring a writ of error if he thought fit. No writ of error was brought, the prosecutor being unable to incur the expense of such a proceeding. It sometimes happens that upon an objection taken to an indictment before verdict, the Judge who tries the case, if he considers the objection valid, directs an acquittal; but the course adopted by the learned Judge in this case is certainly the better course, as if the decision be incorrect where the judgment is arrested, it may be reversed upon error, whereas if the prisoner is acquitted, and the decision is incorrect, there is no means of correcting the error, and as the verdict of the jury has been taken, it may be very questionable whether if a fresh indictment were preferred a plea of *autrefois acquit* might not be successfully pleaded. See per Lord Tenterden, C. J., Rex *v.* Fowle, 4 C. & P. 592, *post*, p. 694. In Reg. *v.* Purchase, 1 C. & Mars. 617, tried at the same assizes, Patteson, J., after consulting Cresswell, J., refused to allow any objection to be taken to an indictment for embezzlement, except upon demurrer or in arrest of judgment, and it seems most in accordance with the regular course of proceeding that such a course should be adopted in all cases. C. S. G.

in that cause, before that day, made an affidavit before a Judge, in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills, on which it was brought, were void for usury; and then assigned perjury on these allegations; it was objected that the indictment was clearly bad: the only manner, in which such an affidavit could be a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment did not shew that any such application was made or intended. Lord Tenterden, C. J., however, thought that the occasion, on which the affidavit was intended to be used, might be sufficiently collected from the indictment, and refused to stop the trial, as the defendant, if there was any weight in the objection, might have the benefit of it after he was convicted. (*f*)

an affidavit to postpone a trial.

But if the false oath has any tendency to prove or disprove the matter in issue, though but circumstantially; as, if the party wilfully misstate the colour of a man's coat, or speak to the credit of another witness, it will amount to perjury. (*g*)

Circumstantial materiality.

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient: the indictment must proceed by particular averments, (or, as they are technically termed, by *assignments of perjury*,) to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word "falsely" does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole but only such parts as the prosecutor can falsify, admitting the truth of the rest. (*h*) It is suggested that in negativing the defendant's oath where he has sworn only to his *belief*, (*i*) it will be proper to aver that "*he well knew*" the contrary of what he swore. (*j*) It seems that an assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid *for* any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the

The indictment must expressly contradict the matter sworn to by the defendant.

Assignment fuller than the statement of the defendant.

(*f*) Rex *v.* Abraham, 1 M. & Rob. 7. The defendant was convicted, but did not appear to receive judgment when called upon, and no motion in arrest of judgment was made.

(*g*) Rex *v.* Griepe, 12 Mod. 142. Reg. *v.* Muscot, 10 Mod. 195. 3 Stark. Evid. 859, and see Reg. *v.* Gardiner, *ante*, p. 633.

(*h*) Rex *v.* Perrott, 2 M. & S. 385, 390, 391, 392. And see *ante*, p. 316.

(*i*) *Ante*, p. 597.

(*j*) 2 Chit. Crim. L. 312.

defendant was not guilty of perjury; but the objection was over ruled. (*k*)

The averments negativing the truth of the matter sworn ought to be distinct and precise.

The averments introduced to negative the matter sworn, ought to be so distinct and definite as to inform the defendant of the particular and precise charges, which are intended to be proved against him. An indictment for perjury committed in the Insolvent Debtors' Court, alleged, that the defendant swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas, the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time; and Lord Tenterden, C. J., after consulting the other Judges of the Court of King's Bench, held, that the indictment was insufficient, as it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him; the allegations conveyed no information whatever of the particular charges, against which the defendant ought to be prepared to defend himself. (*kk*)

Perjury cannot be assigned on contradictory depositions without showing which of them is false.

It has been decided in a recent case that perjury cannot be legally charged and assigned by shewing that the defendant did on two different occasions make certain depositions contradictory to each other with an averment that each of them was made knowingly and deliberately, but without averring or shewing in which of the two depositions the falsehood consisted. The information stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.: setting out the evidence so given. And then the count averred that the said defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent did say, swear, and give in evidence, &c.: setting out in like manner the latter evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid, do say that the said Edward Harris did commit wilful and corrupt perjury. And this was holden to be bad on motion in arrest of judgment. (*l*)

Of the *innuendo*.

If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely: (*m*) but it is not allowed to add to, extend, or change the sense. (*n*) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document,

(*k*) Rex *v.* Atkinson, Dom. Proc, 1785. Bac. Abr. tit. *Perjury* (C). See Reg. *v.* Gardiner, *ante*, p. 633.

(*kk*) Rex *v.* Hepper, R. & M., N P. R. 210. Lord Tenterden, C. J., referred to J'Anson *v.* Stuart, 1 T. R. 748, where in an action for a libel in describing the plaintiff as a swindler, a justification that the defendant had been guilty of divers acts of swindling, was held on demurrer too general to be sustained. See Rex *v.* Mudie, 1 M. & Rob. 128, *post*, p. 671.

(*l*) Rex *v.* Harris, 5 B. & A. 926. It should have been averred and shown in which of the two depositions the falsehood consisted.

(*m*) Rex *v.* Aylett, 1 T. R. 70. Rex *v.* Taylor, 1 Campb. 404.

(*n*) Rex *v.* Griepe, 1 Lord Raym. 256. 2 Salk. 513. And see as to the use of an innuendo, 1 Saund. 243, note (4). 1 Chit. on Plead. 406. 1 Stark. Crim. Plead. 118, *et seq.*

and that such word ought to have been inserted and explained by an innuendo. (*o*) In a case where an objection was taken to an indictment, that it added, by way of innuendo to the defendant's oath, "his house situate in the Haymarket in St. Martin in the Fields;" without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket; or, (even admitting him to have such a house,) that *his oath was of and concerning the said house*, so situated, the objection was overruled; on the ground that the innuendo was only a more particular description of the same house which had been previously mentioned. (*p*) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an innuendo that it was the outer door was holden good. (*q*) Where an innuendo is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (*r*) But if the innuendo, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (*s*)

Where it may be rejected.

The proper office of an innuendo is to fix and point the meaning of something that has been previously averred. The indictment stated the presenting of a petition to the House of Commons concerning the election of F. H. F. Berkeley, and set out the petition, which stated the said F. H. F. Berkeley before and at the election was guilty of bribery, and that certain agents of the said F. H. F. Berkeley, being trustees of divers public charities, and by virtue of such office entitled to dispose of the funds of such charities, before and at the said election were guilty of various corrupt acts, &c., in order to procure the return of the said F. H. F. Berkeley. The indictment then averred that one T. Carlisle was a trustee of divers of the said public charities, and "that shortly before the said election, (to wit) on, &c., the said T. Carlisle, the said F. H. F. Berkeley, and other persons went to the house of one W. Virrier for the purpose of soliciting the said W. Virrier to vote for the said F. H. F. Berkeley at the said election." The indictment then stated that certain members of the House of Commons were chosen to try and determine the merits of the said election, and that the said persons so chosen met to try and determine the matter of the said petition. The indictment then averred that S. Virrier appeared "as a witness before the said select committee touching the matter of the said petition," and that the said S. Virrier was duly sworn, &c. "And it then and there became and was a material question, whether at the time aforesaid when the said T. Carlisle, the said F. H. F. Berkeley, and the said other persons so went to the house of the said W. Virrier, the said T. Carlisle said that he would give the said W. Virrier 6*l.* out of the funds of one of the aforesaid charities at Christmas, whereof the said T. Carlisle was trustee as aforesaid, or that he would give him 6*l.* at Christmas." (*t*) And that the said S. Virrier falsely, &c., did depose, &c., to the select committee aforesaid,

Virrier's case. An innuendo held good, as it fixed the meaning of what was previously stated.

Indictment held sufficiently to show that the occasion, to which the matter sworn related, was the one to which the allegation of materiality referred.

(*o*) Rex *v.* Taylor, 1 Campb. 404. *Ante*, p. 624.
(*p*) Rex *v.* Aylett, 1 T. R. 70.
(*q*) Id. ibid.
(*r*) Rex *v.* Griepe, 1 Ld. Raym. 260.
(*s*) Roberts *v.* Camden, 9 East, 93. 2 Chit. Crim. L. 311.
(*t*) The indictment here stated other questions to be material in a similar manner.

"touching the matters and merits of the said election, and the matter of the said petition, in substance and to the effect following, viz., that *before the said election* a canvassing party came to her husband's house, and Mr. Berkeley (meaning the said F. H. F. B.), and Mr. Carlisle (meaning the said T. C.), came into the house of the said W. Virrier, and Mr. Carlisle asked her if she knew who her husband was going to vote for at the ensuing election; that she said she believed he was going to vote one and one, and that Mr. Carlisle then said that he would act like a sensible man, and "I will give him the 6*l.* at Christmas," (thereby meaning that at the said time when the said F. H. F. Berkeley, and the said T. Carlisle, and the said other persons so went as aforesaid to the house of the said W. Virrier, for the purpose of soliciting him to vote for the said F. H. F. Berkeley, the said T. Carlisle said he would give the said W. Virrier 6*l.* at Christmas, out of the funds of one of the aforesaid public charities, whereof the said T. Carlisle was trustee as aforesaid.") (*t*) "Whereas in truth and in fact the said T. Carlisle did not at the said time when the said F. H. F. Berkeley, the said T. Carlisle, and other persons went to the said house of the said W. Virrier to solicit him to vote as aforesaid, or during the time when, on that occasion, they were in or at the said house, say to the said S. Virrier that the said T. Carlisle would give to the said W. Virrier the 6*l.* at Christmas, or any sum of money from or out of any of the said public charities, or any sum of money whatsoever at Christmas or at any other time." (*u*) The defendant having been found guilty, it was moved in arrest of judgment that it did not appear either from the evidence said to have been given by the defendant, or from any other part of the indictment, except the innuendo, that the occasion on which the speaking of the words was said to have been material, was the same occasion with reference to which the evidence was given; that the averment of materiality might relate to one occasion, and the evidence to another occasion of the same kind; and that the innuendo would not aid, because an innuendo can only explain, and cannot supply the place of a substantial averment. The indictment also alleged that the defendant swore "touching the matters and merits of the said election, and the matter of the said petition," but that did not shew that her evidence related to the material time before mentioned. Nor did her evidence, as set out, identify the occasion without the innuendo. The innuendo, therefore, did more than explain; it supplied that which made the evidence material. Lord Denman, C. J., after full argument and time taken to consider, delivered the judgment of the Court as follows: "Upon this indictment a motion has been made to arrest the judgment upon two objections. 1st. That the allegation of the oath having been taken "touching the matter of the said election, and the matter of the said petition," did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence; and secondly, that there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July. We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was

(*t*) The indictment here set out more of the evidence. See the case, *post*, p. 650.

(*u*) The indictment here set out other assignments of perjury to the other parts of the evidence, which was set out in the indictment.

had, that a material question arose as to the existence of certain facts, to which the defendant deposed, and was therein guilty of perjury. Now although it is certainly true that the averment stating the oath to have been "touching and concerning the matters and merits of the said election, and the matter of the said petition," does not directly refer to what are alleged to be the material questions which arose, yet, where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation "touching and concerning, &c.," is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore 'as follows,' &c. The second objection is, that the evidence, upon which the perjury is alleged to have been committed, is not referred with sufficient distinctness to the said canvassing visit, and that the innuendo, by which it is attempted so to apply it, introduces new matter, and is, therefore, bad. We, however, think otherwise, for an introductory averment expressly states that there was, in fact, such canvassing visit, and the innuendo directly refers thereto. It is plain, therefore, that this case comes within the rule laid down by Ld. C. J. De Grey, in *Rex* v. *Horne*, (*v*) which has always been recognised as the true one, and that the innuendo does only point and fix the meaning of something previously averred, which is the proper office of an innuendo, and that it does in no respect enlarge it. We think, therefore, that there is no ground for arresting the judgment." (*w*)

Conclusion of the indictment.

An indictment for perjury at common law need not conclude against the form of the statute; but where perjury is committed under such circumstances that it is only punishable by the provisions of a statute, and not at common law, the indictment ought to conclude against the form of the statute. The defendant was indicted for perjury in giving false evidence before the revising barrister, as to the occupation of a tenement in the borough of Bridgnorth, and the indictment did not conclude against the form of the statute. It was objected that as this was a crime created by the 2 Wm. 4, c. 45, s. 52, the indictment ought so to have concluded. It was answered that the revising barrister held a court, which was made so by sec. 50 of the same act. That any false swearing in a court was perjury at common law, and therefore the indictment was good. Lord Abinger, C. B., thought the only question was, whether the statute by sec. 50, constituted a court; for if it did, the offence of false swearing in it was perjury at common law, and his opinion was that it did constitute a court, and therefore the indictment was sufficient. (*x*)

The court will, in general, oblige the defendant to plead or demur to a defective indictment.

In general the Court will oblige the defendant to plead or demur to a defective indictment for perjury. (*y*) And they are also very cautious in granting a certiorari to remove it. (*z*) And it appears that Lord Thurlow refused permission to amend an answer where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to take the

(*v*) 2 Cowp. 672.

(*w*) Reg. *v.* Virrier, 12 Ad. & E. 317.

(*x*) Reg. *v.* Thornhill, Salop Sum. Ass. 1838, reported on another point, 8 C. & P. 575. In Rex *v.* De Beauvoir, 7 C. & P. 17, the indictment seems not to have concluded "against the form," &c. See the note at the end of the case.

(*y*) 2 Hawk. P. C. c. 25, s. 146.

(*z*) 2 Hawk. P. C. c. 27, s. 28.

false oath intentionally. (*a*) In a late case, Abbott, Lord C. J., said that, inasmuch as the objection taken to an indictment for perjury appeared upon the record, he did not feel himself warranted in taking notice of it at nisi prius. (*b*)

Where an indictment for perjury is clearly bad the Judge will refuse to try it.

But where an indictment for perjury is clearly bad upon the face of it, a Judge at *nisi prius* may refuse to try such indictment. An indictment for perjury charged that one A. B., had been convicted of certain offences, and that A. B. afterwards obtained a rule to shew cause why a new trial should not be granted, and that the defendant in order to prevent the said rule from being made absolute made the affidavit whereon the perjury was assigned, but there was no averment that the matters falsely sworn were material, nor could it be collected from the indictment that they were so; and Garrow, B., having consulted Abbott, C. J., who concurred with him in opinion that the indictment was clearly bad, held that it was the duty of the Judge not to proceed to try the case. (*c*) So where in an indictment for perjury, the allegations negativing the matter sworn, were so vague and indistinct as to convey no information of the particular charges against the defendant; Abbott, C. J., after consulting the other Judges of the Court of King's Bench, ordered the case to be struck out of the list. (*d*) So where an indictment for perjury at common law was found at the Quarter Sessions, and removed by certiorari into the Court of King's Bench, and sent down to be tried at *nisi prius;* Gaselee, J., refused to try it, as it was quite clear that the sessions had no jurisdiction over perjury at common law, and the indictment was, therefore, void. (*e*) But a Judge will not allow counsel to argue at length at *nisi prius* the invalidity of an indictment, for the purpose of inducing the Court to refuse to try it, as that is not the time or place to discuss such disputed questions. (*f*)

Plea of *autrefois acquit.*

The right of the defendant to plead a plea of *autrefois acquit* came under the consideration of the Court of King's Bench in the following case. The defendant was indicted in Middlesex, for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit filed in the Court of King's Bench, at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex, for the same perjury, with this difference only, that the second indictment set out the

(*a*) Brown's Chan. Cas. 419.

(*b*) Rex *v.* Souter, 2 Stark. R. 423. The objection was, that the indictment was drawn in the compendious manner prescribed by the 23 Geo. 2, c. 11; and yet no count alleged that the question upon the answers to which perjury was assigned was material.

(*c*) Rex *v.* Tremearne, R. & M., N. P. R. 147. In Rex *v.* Deacon, R. & M., N. P. R. 27, Abbott, C. J., refused to try an indictment for a forcible entry, which was bad for want of alleging that the entry was *manu forti*, although the counsel for the defendant insisted that the case should proceed in order that the defendants might have the benefit of an acquittal by a jury, as they intended to institute proceedings for a malicious prosecution.

(*d*) Rex *v.* Hepper, R. & M., N. P. R. 210.

(*e*) Rex *v.* Haynes, R. & M., N. P. R. 298. See Reg. *v.* Rigby, 8 C. & P. 770, where Erskine, J., quashed an indictment for forging a request for the delivery of goods, which had been found at the quarter sessions on the same ground.

(*f*) Rex *v.* Abraham, 1 M. & Rob. 7. *ante*, p. 643. In this case the defendant's counsel pointed out the objections in order to induce the Court to stop the trial, and Lord Tenterden, C. J., said that "it might be con-

jurat of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that, in fact, the defendant was so sworn in Middlesex, and not in London: and the Court of King's Bench held, that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and, therefore, the defendant had been once before put in jeopardy for the same offence. (*g*)

Trial. Jurisdiction of the quarter sessions.

5 & 6 Vict. c. 38, s. 1.

With respect to the trial of perjury it may be observed, that the Courts of quarter sessions have no jurisdiction over the offence at common law, and though they had jurisdiction over it under the 5 Eliz. c. 9, yet that jurisdiction is taken away by the 5 & 6 Vict. c. 38, s. 1, which enacts, that "neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for (*inter alia*) perjury or subornation of perjury;" or "making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury, or as a misdemeanor." The mode of proceeding is by indictment at the assizes, or in the King's Bench. And indictments for perjury at common law, preferred at the quarter sessions, appear to have been quashed for want of jurisdiction. (*h*)

Time of trial at the Central Criminal Court.

It may be observed that it is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is in any way undetermined, except in cases in which the Court, where the suit is pending, postpones the decision of it in order that the criminal charge may first be disposed of. (*i*)

Summary proceeding.

Where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in Court, came there, and confessed it to be false, the Court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (*k*) In answer to the objections of the defendant's counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9, and that even if the Court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any Court might punish such a criminal for an offence committed in *facie curiæ*. (*l*)

Evidence. One witness not sufficient.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would be only one oath against another. (*m*) But this rule must not be understood as establishing that two *witnesses* are necessary to dis-

venient sometimes for counsel to suggest a point on which an indictment is clearly bad, to save the time of the Court." In Rex *v.* Hepper, and Rex *v.* Tremearne the objections to the indictment were pointed out by the Court. See note (*e*), *ante*, p. 642.

(*g*) Rex *v.* Emden, 9 East. 437.

(*h*) 3 Burn. Just. tit. *Perjury*, &c. Rex *v.* Bainton, 2 Str. 1088. Rex *v.* Westiness, id. ibid. 1 Chit Crim. L. 301. Rex *v.* Haynes, R. & M. N. P R. 298, *ante*, p. 648.

(*i*) Rex *v.* Ashburn, and Rex *v.* Simmons, 8 C. & P. 50. The reporters state that the reason of the practice is that so long as the case is undecided the plaintiff and defendant, who might be witnesses on the trial for perjury, have a direct interest in giving their evidence, which they would not have after the case was finally decided.

(*k*) Rex *v.* Thorogood, 8 Mod. 179.

(*l*) Id. ibid.; and Bushell's case, Vaugh. 152, was cited.

(*m*) Reg. *v.* Muscot, 10 Mod 193. 4 Black. Com. 358. Peake on Evid. 10. 1 Phil. on Evid. 151, 7 edit.

One witness and corroborative evidence.

prove the fact sworn to by the defendant, for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. (*n*)

Where there is only one direct witness there must be strong evidence to confirm that witness in order to warrant a conviction.

Upon an indictment for perjury, Coleridge, J., is reported to have said, "one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C. J., was of opinion that two witnesses were *necessary* to a conviction." (*o*) In a later case, where the evidence of one witness went in support of all the assignments of perjury; and to confirm him another witness was examined as to a conversation between himself and the defendant, and some entries in the defendant's books were given in evidence; it was submitted that there was no evidence to go to the jury; that the rule is that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence of confirmation, it was not enough that there should be *some* evidence in confirmation, as in an ordinary case at *nisi prius*, where some evidence is necessary to prevent a nonsuit, but it must be such evidence as, in the opinion of the Judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness. Coleridge, J., "I think that the case must go to the jury, but I also think without the slightest chance of a verdict for the crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction." (*p*)

Virrier's case. Confirmation on two out of three assignments of perjury.

In one case where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the facts contained in the other assignments. The indictment stated that the defendant swore that Mr. B. and Mr. C. came to her husband's house, that Mr. C. said, "I will give him the 6*l.* at Christmas," and Mr. B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper; and Mr. C. told her he should not forget it was in his power to give her husband the 6*l.* at Christmas. The assignments of perjury were, 1st, that Mr. C. did not say that he would give the 6*l.* at Christmas; 2ndly, that Mr. B. did not put a sovereign into the hand of the defendant; and, thirdly, that Mr. C. did not tell the defendant that he should not forget it was in his power to give her husband the 6*l.* at Christmas. Evidence was given in support of all the assignments of perjury. Lord Denman, C. J., in summing up, said, that as to the second

(*n*) Rex *v.* Lee, Mich. 6 Geo. 3. MS. Bayley, J., 1 Phil. Evid. 152, 7 edit.

(*o*) Champney's case, 2 Lew. 258. and the same point is said to have been ruled by the same learned Judge in Rex *v.* Wigley, ibid. note. And Mr. Starkie observes, "And *semble* that the contradiction must be given by *two direct witnesses*, and that the negative supported by one witness, and by circumstantial evidence would not be sufficient. It has been so held (*ut audivi*,) by Lord Tenterden, C. J." 3 Stark. Evid. 860, note (*g*).

(*p*) Reg. *v.* Yates, 1 C. & Marr. 132. See Reg. *v.* Parker, *post*, p. 654.

assignment the proof lay almost entirely in the evidence of one witness, and, therefore, he did not see how the jury could convict of the perjury imputed; but that on the others there was a distinct contradiction of the defendant's testimony by Mr. C. who was supposed to have offered the 6*l.*, and several other witnesses; and he left it to the jury to say whether there was not a strong body of evidence clearly supporting Mr. C.'s denial. (*q*)

Gardiner's case.

But where upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trowsers unbuttoned, and that he was there five minutes; and to disprove this the prosecutor swore that he did not commit the offence, and that his trowsers had no flap on; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trowsers he had on, which were produced in Court, had no flap; Patteson, J., held that the corroborative evidence was quite sufficient to go to the jury; and, upon a case reserved, the Judges held the conviction right. (*r*) So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of costs to taxation, and to prove the perjury one witness was called, and in lieu of a second witness, it was proposed to put in the defendant's bill of costs delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Lord Denman, C. J., "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." (*s*)

One witness and a bill of costs of defendant.

Knill's case. Contradictory oath of the defendant.

And the rule does not apply where the evidence consists of the contradictory oath of the party accused. Thus, in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons, and, further, it was insisted, that mere proof of a contradictory statement by the de-

(*q*) Reg. *v.* Virrier, 12 Ad. & E. 317. The learned Chief Justice considered the most convenient mode of summing up the case to be to treat the second assignment as the first, and the first and third as one, and did so leave the case to the jury, who found a verdict of "not guilty on the first *assignment* of perjury for want of sufficient evidence, and guilty on the second," but said nothing on the third. and the verdict was entered accordingly. The Chief Justice did not at the time make any note of his summing up, but did so afterwards; and having a distinct remembrance of it, and no doubt of the jury's intention, he (on summons) allowed the *postea* to be amended by entering a verdict of "guilty" on the first and third assignments, and "not guilty" on the second; but the Court afterwards held that the amendment ought not to have been made, there being no note or memorandum of the Judge or other document to amend by.

(*r*) Reg. *v.* Gardiner, 2 Moo. C. C. R. 95. See a fuller statement of this case, *ante*, p. 633, *et seq.*

(*s*) Rex *v.* Mayhew, 6 C. & P. 315.

fendant on another occasion was not sufficient, without other circumstances, showing a corrupt motive, and negativing the probability of any mistake. But the Court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances, and the rule was refused. (*t*) And the same principle appears to have been acted upon in a former case. The defendant had first made his information upon oath before a justice of the peace, that three women were concerned at a riot at his mill (which was dismantled by a mob on account of the price of corn), and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore they were not in the riot. There was no other evidence on the trial of the defendant for this perjury, to prove that the women were in the riot (which was the perjury assigned) but the defendant's own original information on oath, which was produced and read, and by which he had sworn that they were in the riot. And the Judge thought this evidence sufficient, and the defendant was convicted and transported. (*u*) And with respect to this evidence, it has been observed, that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichsoever is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence, as it came from himself. (*v*)

Wheatland's case. Contradictory oath of the defendant not sufficient without other evidence.

But where the defendant was indicted for perjury, alleged to have been committed on the the trial of an indictment for larceny, and it appeared that the defendant had sworn to several material facts before the committing magistrate, but, when he was called on the trial, denied the whole of what he had stated before the magistrate; and *Rex* v. *Knill* and *Anon.* (*w*) were cited to shew that the contradiction by the oath before the magistrate, would alone be sufficient evidence to convict the defendant; but Gurney, B., held, that it was not sufficient to prove that the defendant had, on two different occasions, given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively that what he swore at the trial was false; and that would not be sufficiently shewn to be false by the mere fact that the defendant had sworn the contrary at another time; it might be, that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate, as proved that the evidence given by the defendant, at the trial, was false. (*x*)

(*t*) Rex *v.* Knill, 5 B. & A. 929. note (*a*).

(*u*) Anon. *cor.* Yates, J., Lancaster Sum. Ass. 1764. And afterwards, Lord Mansfield, C. J., and Wilmot, J., and Aston, J., to whom Yates, J., stated the reasons of his judgment, concurred in his opinion. Notes to Rex *v.* Harris, 5 B. & A. 939, 940, MS. Bayley, J.

(*v*) From the Precedent-book of Chambre, J., cited 5 B. & A. ibid.

(*w*) *Supra*, notes (*t*) and (*u*)

(*x*) Reg. *v.* Wheatland, 8 C. & P. 238. Although at first sight this decision may seem at variance with those cited, perhaps it may not in fact be so. In Rex *v.* Knill, the Court held that "the jury might infer the motive from the circumstances," none of which are stated in the short minute of the case; some of them

Jackson's case.

And where the prisoner was indicted for perjury, and it appeared that she had made two statements on oath, one of which was directly at variance with the other; Holroyd, J., is reported to have said, "Although you may believe, that on one or other occasion, she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false." (*x*)

Mudie's case. Several witnesses speaking to several assignments of perjury.

In the following case, it was doubted whether the rule, which requires two witnesses, was satisfied by several witnesses, each supporting a separate assignment of perjury, but no two speaking to the same assignment. Upon the trial of an indictment for perjury, alleged to have been committed by an insolvent debtor in falsely swearing to the correctness of his schedule, the defendant's account book, given by him to the Insolvent Debtors' Court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and "paid" was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected that this was not sufficient evidence, inasmuch as it was only oath against oath, the defendant having sworn that the debts

might have been such as to show that the one statement was false, or the other statement true. In the Anonymous case the defendant had been *tampered* with after his first examination, and the evidence of the tampering with the defendant might be such as to lead to the conclusion that his evidence on the trial was false. But supposing those cases to go the length of establishing the proposition, that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned; it is conceived they cannot be supported. The prosecutor may charge the perjury either on the one statement or on the other, and whichever he selects it is clear that the defendant could not avail himself of a plea of *autrefois acquit*, or *convict* in case he were subsequently indicted for the other, and therefore he might be twice put in jeopardy, and perhaps twice convicted for the same offence. The judgment in Rex *v.* Harris, 5 B. & Ald. 926, is conclusive to show that this is a good objection. Again, such evidence leaves it wholly uncertain which of the two statements is true; now it is a clear rule of criminal law that if the evidence on the part of the prosecution leaves it wholly uncertain whether the *crime charged* has been committed or not, the defendant must be acquitted; and as to the observation that "it can hardly be in the defendant's mouth to deny the truth of the evidence that came from himself," it must be remembered that there are two statements upon oath, and if he is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and it would surely be very unreasonable to hold that he is concluded to deny the truth of whichever the prosecutor may think fit to select. It is conceived, also, that an indictment charging each of the statements to be false in separate counts, could not succeed. The charges being directly contradictory the one to the other, it may be doubted whether the grand jury would be warranted in finding such an indictment; or, if found, whether it would not be bad on the face of it; and as the defendant could only make a defence to one charge by proving himself guilty of the other, the Judge would probably insist upon the prosecutor electing on which charge he would proceed. But supposing these difficulties to be surmounted, it is not easy to see how it would be possible for the jury to find a verdict without any evidence to show which statement was false. If they found a general verdict they would at one and the same time find each of the statements to be both true and false, unless indeed they were satisfied that the defendant had, upon both occasions, wilfully sworn to matters about which he had no knowledge at all. *Ante*, p. 597. C. S. G.

(*x*) Mary Jackson's case, 1 Lew. 270.

v. *Dalby*, (*j*) was relied upon; but Coleridge, J., held that he was competent. In *Rex* v. *Dalby*, the fate of the bill in Chancery might have depended on the result of the indictment, but in this case the perjury was assigned upon an answer to a bill upon which a decree had been made. (*k*)

And even if the indictment proceed upon the 5 Eliz. c. 9, (*l*) which gives the prosecutor half the forfeiture incurred, it is conceived that, as in an action to recover his moiety he would be precluded from giving the conviction in evidence, there would be no objection to his competency. (*m*)

Bankrupt's assignees, &c.

On an indictment for perjury alleged to have been committed by a bankrupt in an affidavit in support of his petition to the Court of Review to supersede his bankruptcy, upon the ground that he was not at or previously to the time of the issuing of the fiat a trader, and if he had been a trader, that he had not committed an act of bankruptcy, the petitioning creditor, the assignees, and creditors are competent witnesses to prove the validity of the fiat. (*o*)

Witness who has before sworn to the same fact, or is himself indicted for perjury.

It has been ruled to be no objection to the competency of a witness on an indictment for perjury, committed in an answer in Chancery, that, in his answer to a cross-bill, he has sworn to the same fact which he is called to prove upon the indictment. (*p*) And if several persons are separately indicted for perjury in swearing to the same fact, either of them, before conviction, may be a witness on the trial of the other. (*q*)

Chairman at quarter sessions not allowed to be examined as a witness.

Where a bill of indictment was preferred against the defendant for perjury, alleged to have been committed on a trial at the quarter sessions, and it was proposed to examine one of the grand jury, who had acted as chairman of the quarter sessions at the trial at which the alleged perjury was committed, but that gentleman expressed a desire not to be examined as a witness, and the grand jury wished to know whether they ought to examine him or not; Patteson, J. held that they ought not to examine him. He was the president of a Court of Record, and it would be dangerous to allow such an examination, as the Judges of England might be called upon to state what occurred before them in Court. (*r*)

(*j*) *Ante*, p. 654, note (*e*).

(*k*) Reg. *v.* Yates, 1 C. & Mars. 132.

(*l*) *Ante*, p. 603

(*m*) 1 Phil. on Evid. 66. In the note, however, Mr. Phillipps adds "*Sed qu.* The point appears to have been ruled otherwise in an old case. Bacon's case, 2 Rol. Ab., 685; and see Bul. N. P. 289. Gilb. Evid. 111. The question of course depends upon the point, whether a separate action is or is not necessary for the recovery of the penalties." See the cases collected, 1 Phill. Evid. 66.

(*o*) Reg. *v.* Keat, 2 Moo. C. C. R. 24.

(*p*) Rex *v.* Pepys, Peake N. P. C. 138.

(*q*) 2 Hale P. C. 280.

(*r*) Reg. *v.* Gazard, 8 C. & P. 595. In Rex *v.* Jones, 6 C. & P. 137, on an indictment for perjury the chairman of the Worcestershire Quarter Sessions proved what a witness swore on a trial before him at the Quarter Sessions. In Reg. *v.* Gazard, the chairman was required as a witness for the same purpose, and not being examined the bill was ignored. Mr. Starkie, after citing this case, adds a *quære*, without stating any reason for so doing. 3 Stark. Evid. 861. It may, however, have struck him that no sufficient reason could be assigned for the decision. It would, no doubt, be extremely inconvenient if the Judges were called upon to give evidence as to what occurred before them in Court, but the inconvenience in the case of chairmen of Quarter Sessions is comparatively slight, especially as they are usually present at the Assizes, and the evidence must be given in the county were they are chairmen. Assuming, however, that the inconvenience in their case were considerable, it seems worthy of further consideration how far that can prevent their liability to be called as witnesses. The general rule undoubtedly is, that every person is liable to be compelled to give evidence in a criminal case, and it may be dangerous to introduce exceptions which may prevent persons from giving evidence either for the Crown or for the defendant. C. S. G.

Proof of the defendant having sworn *in substance and effect.*

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary, in support of this count, to prove, that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J., said, "Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to show, that under *secundum substantiam*, you are not bound to prove the *substance* of what you state, as under *secundum tenorem*, you are bound to prove the *tenor?* To hold otherwise, would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts." (*s*)

(*s*) Rex *v.* Leefe, 2 Campb. 134. The learned reporter says, "I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject, *vide* 2 Hawk. P. C. c. 46, s. 34, 35, 36. Compagnon *v.* Martin, 2 Bl. Rep. 790." The count upon which the question in this case turned alleged that a committee was appointed and met to try the merits of a petition complaining of an undue election, that certain questions were material, and that the defendant swore "touching the said material questions, and the merits of the said petition," in substance and effect as follows, that he, by the directions of J. L., waited upon Lord H., and proposed to the said Lord H. that the said J. L. would decline upon the expenses being paid him, including the previous expenses of the day before; that Lord H. agreed that the said expenses should be paid, including the expenses that had been incurred at different inns in the town; that J. L.'s voters were to be applied to in consequence of that arrangement for the purpose of voting for the said Lord H., and that the defendant enumerated the expenses; that the defendant upon his return to the committee of the said J. L. communicated to them what had so passed between the said Lord H. and him, and that the said committee dispersed to carry the said agreement into effect; and that the said J. L. asked the defendant if the expenses were secured, and that the defendant told the said J. L. his lordship had given his assurance *that it should be so.* The assignments of perjury negatived each of these statements, and it was proved that everything alleged was sworn, except the last words "that it should be so." The decision in this case seems questionable. As it is clearly settled that a defendant may be convicted of any one distinct assignment of perjury, though acquitted of all the rest, see *post*, p. 668, note (*a*), there seems no reason why proof of having sworn the matter negatived by one assignment should not be sufficient. In the case of obtaining goods by false pretences, it is clearly settled that proof of any one false pretence, and that the goods were obtained by that pretence, is sufficient, *ante*, p. 310; and that is a stronger case, because there the indictment in effect avers that all the pretences operated towards the obtaining the goods. In per-

The objection is not, that there is insufficient evidence, but that is a variance in material averment. It is not objected there is insufficient evidence of the truth of part of his statement, but there is a variance between allegation and the proof of the statement!

Proof of the *whole* of the defendant's testimony.

It appears to have been ruled, that upon an indictment for perjury committed at the trial of a cause, the prosecutor must prove *the whole* of the defendant's testimony; (*t*) unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case proof of the whole cross-examination has been ruled to be sufficient. (*u*) And the ground upon which proof of the *whole* of the examination, or cross-examination, was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But, it is observed, that this doctrine of compelling the prosecutor to prove more than a *primâ facie* case, is an anomaly in the criminal law; that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward; and that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to show that he had corrected the part of his evidence assigned. (*v*) And it is said by another learned writer, that at most the rule seems to amount to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved. (*w*) And the rule hardly seems to be necessary for the protection of the defendant, as it will be open to him to cross-examine the witness by whom his statements upon oath are proved, whether he did not in some other parts of his evidence correct or explain those statements upon which the prosecution is founded, and unless the witness can positively deny any such correction or explanation, or if he admits that they may have occurred, the proof would probably be deemed insufficient for a conviction. And it will of course be open to the defendant to prove that any corrections or explanations were given by him in other parts of his evidence. (*x*) And it has since been held upon a case reserved, that on an indictment for perjury committed on the trial of a cause, it is sufficient to go to the jury, if a witness states from recollection the evidence that the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. (*y*)

Proof of all that was given on the particular point is sufficient.

jury each assignment of perjury is separate and distinct, and the Court will give judgment upon one, although all the others are bad in point of law. Reg. *v.* Rhodes, 2 Ld. Raym. 886. C. S. G.

(*t*) Rex *v.* Jones, *cor.* Kenyon, C. J., 1791, Peake, N. P. C. 37.

(*u*) Rex *v.* Dowlin, *cor.* Kenyon, C. J., 1793, Peake, N. P. C. 170.

(*v*) 2 Chit. Crim. L. 312, referring to 1 Sid. 418, Rex *v.* Carr.

(*w*) 3 Stark. Evid. 858. And the author further observes, that the rule even to this effect appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.

(*x*) Rex *v.* Carr, 1 Sid. 418.

(*y*) Rex *v.* Rowley, R. & M. C. C. R. 111, and R. & M. N. P. R. 299, where Littledale, J., is reported to have said, "I take the true rule to be this, that all the evidence referable to the fact on which the perjury is assigned must be proved." In Rex *v.* Munton, 3 C. & P. 498, three witnesses stated what the defendant had said on the trial of an indictment for an assault, and the defendant was convicted, although none of the witnesses took down the evidence as it was given, and none of them professed to state the whole of the evidence given. And this course has been followed in subsequent cases. Reg. *v.* Meek, re-

It is sufficient to support the averment that the party administering the oath had competent authority for that purpose, by showing in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the Ecclesiastical Court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate, was sufficient *primâ facie* evidence of his having been duly appointed, and having authority to administer it. And Lord Ellenborough, C. J., said, "I think the fact of Dr. Parson having acted as surrogate is sufficient *primâ facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do." (z) But it was holden, in the same case, that upon its appearing that the surrogate was appointed contrary to the canon (which requires that no judicial act shall be speeded by any Ecclesiastical Judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf,) his appointment was a nullity, and the averment that he had authority to administer the oath was negatived. (a) So where perjury was assigned upon an affidavit sworn before Chell, a commissioner, &c., and it was proved that Chell acted as a special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a Judge; Patteson, J., held that this was sufficient evidence that Chell was a commissioner, and that it was not necessary to prove the commission under which the affidavit was taken, upon the general principle that a person acting as a public officer must be taken to have authority as such, and that a commissioner for taking affidavits came within that principle. (b)

Proof of authority to administer the oath.

Acting as an officer sufficient.

It has recently been held that an indictment for perjury in an affidavit sworn in the Insolvent Debtors' Court by an insolvent, respecting the state of his property and expenditure, for the purpose of obtaining an extended time to petition under sec. 10 of the 7 Geo. 4, c. 57, cannot be supported, without proving that the Court by its practice required such an affidavit: and it was also held that such proof was not given by an officer of the Court producing printed rules, purporting to be rules of the Court, which he had obtained from the clerk of the rules, and was in the habit of delivering out as the rules of the Court, but which were not otherwise shown to be sanctioned by the Court; the officer professing to have no knowledge of the practice except from such printed rules. (c)

Perjury in an affidavit in the insolvent court.

It wld not be shown a judicial proceeding. wd be in the nature a voluntary deposit?

Upon an indictment for perjury committed before Mr. Dudley, an arbitrator, it appeared that an action was referred to the arbitrator, by an order of Lord Tenterden, which ordered that the witnesses should be sworn before a judge or "before *a commissioner duly authorized.*" Mr. Dudley was a commissioner for taking affidavits in the Court of King's Bench, and he, under this order, swore the present

Examination on oath *viva voce* by a commissioner authorized to take affidavits.

ported, 9 C. & P. 513, as to another point. Reg. v. Ann Bird, Gloucester Spr. Ass. 1842, *cor.* Cresswell, J.

(z) Rex v. Verelst, 3 Campb. 432. Rex v. Creswell, 2 Chit. Cr. L. 312. S. P. per Lord Ellenborough, C. J.

(a) Rex v. Verelst, *supra.*

(b) Rex v. Howard, 1 M. & Rob. 187.

(c) Rex v. Koops, 6 Ad. & E. 198, 1 N. & P. 828. It was also contended for the defendant that the Insolvent Court had no power to make the rule, and that the offence was at any rate not perjury; but no opinion was expressed upon these points.

defendant as a witness before himself, and signed a jurat stating that she had been so sworn; and he then examined her *vivâ voce*. It was objected that Mr. Dudley had no authority to administer an oath for any *vivâ voce* examination. Gaselee, J., "By the 29 Car. 2, c. 5, the Courts are empowered to appoint commissioners for taking affidavits; and if this order had empowered a commissioner for taking affidavits to administer this oath, I would have reserved the point, because, whether the Court of King's Bench has any power to authorize their commissioners to take anything but affidavits, is a question that I should have left them to decide. However, on this order that question does not arise, for the order only allows the witnesses to be sworn before a commissioner duly authorized; now, as Mr. Dudley was never authorized to administer an oath for a *vivâ voce* examination, I am of opinion that the defendant must be acquitted." (*d*)

The oath must be proved as alleged.

The taking the oath must be proved as it is alleged. Therefore, if it be averred that the defendant was sworn upon the Holy Gospels, &c., and it turn out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance will be fatal. (*e*) But where the allegation in an indictment was, that on the trial of an action the prisoner "was duly sworn, and took his corporal oath on the holy Gospel of God," and the proof was that the witness was sworn and examined; and it was objected that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian; Littledale, J., held the evidence sufficient, as the ordinary mode of swearing was the one specified. (*f*)

The place stated in the jurat is evidence that the defendant was sworn there, but not conclusive.

The recital of the place where the oath is administered in the jurat has always been considered as a sufficient proof that the oath was administered at the place named. (*g*) Where, therefore, perjury was assigned on an answer in Chancery, and the defendant's signature to the answer, and that of the Master in Chancery to the jurat, were proved, and that Southampton Buildings, which the jurat recited as the place where the oath was administered, was in the county of Middlesex; Lord Tenterden, C. J., held that this was sufficient proof that the oath was administered in Middlesex. (*h*) But a variance as to the place of taking the oath will not be material, if it be proved to have been taken in the county where the defendant is indicted. (*i*) And upon an indictment in Middlesex, it may be shown that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in London. (*j*)

Proof against a bankrupt.

2. Jurisdiction to administer is proved if there are proved!

It seems that on an indictment against a bankrupt for perjury before the commissioners, in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy. (*k*) For where the authority delegated is of a special nature, limited to particular circumstances, it is essential to prove their existence, in order to show the authority to administer the oath. (*l*)

(*d*) Rex *v.* Hanks, 3 C. & P. 419.

(*e*) 3 Stark. Evid. 857. Rex *v.* M'Arthur, Peake's C. 155.

(*f*) Rex *v.* Rowley, R. & M. N. P. R. 299.

(*g*) Per Lord Tenterden, C. J. Rex *v.* Spencer, R. & M. N. P. R. 97. 1 C. & P. 260.

(*h*) Rex *v.* Spencer, *supra*.

(*i*) Rex *v.* Taylor, Skin. 403.

(*j*) Rex *v.* Emden, 9 East. 437. 3 Stark. Evid. 858.

(*k*) Rex *v.* Punshon, 3 Camph. 96. And see Rex *v.* Bullock, 1 Taunt. 71.

(*l*) 3 Stark. Evid. 854. If the defendant was not a bankrupt, there was no

Upon an indictment for perjury against a witness examined as to a bankrupt's estate, a good petitioning creditor's debt must be shown.

Upon an indictment for perjury, committed in an examination of a witness, touching the estate of a bankrupt, it must be proved that there was a good petitioning creditor's debt. The indictment stated that A. P. carried on the business of a builder, and that he was indebted to W. B., in the sum of 100*l.* and upwards, that he committed an act of bankruptcy; that a fiat issued against him, on the petition of W. B.; that the commissioners adjudicated A. P. to be a bankrupt; that in the prosecution of the fiat it became material to inquire into the estate and effects of A. P.; and that at a meeting of the commissioners the defendant appeared before them as a witness, and was sworn, &c. It appeared that the debt due to W. B., was much less than 100*l.*, but that there were two other creditors, to each of whom A. B. owed more than 100*l.*; therefore, under the 6 Geo. 4, c. 16, s. 18, the Lord Chancellor might, on application, have directed the substitution of a good petitioning creditor's debt for that of W. B., but that in fact this had not been done. It was objected, that the defendant was entitled to be acquitted, as the averment that W. B. was a creditor to the amount of 100*l.*, was not only not proved, but was disproved. The counsel for the Crown cited *Rex* v. *Raphael*, (*m*) where Abbott, J., held, that on an indictment against a third person, examined before commissioners of bankrupt, their declaration that the party is a bankrupt, was sufficient. The defendant having been convicted, the Judges, upon a case reserved, held the conviction wrong. (*n*)

Proof of the defendant having taken the oath in an answer in Chancery, or upon obtaining administration of a seaman's effects.

On an indictment for perjury, in an answer in Chancery, the bill must be proved in the usual way; and proof of the defendant's signature, and of that of the Master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further proving the identity of the defendant as being the very same person who had signed the answer. (*o*) But unless there be such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return of commissioners, or of a Master in Chancery, will be sufficient. (*p*) In a case upon the 31 Geo. 2, c. 10, s. 24, (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages) it was holden necessary to prove, directly and positively, that it was the prisoner who took the oath. And the Court said that the evidence given was defective, as there was a possibility, from any thing that had been given in evidence to the contrary, that the prisoner might have gone through all the rest

authority to administer the oath. But the case might admit of a different consideration, where the perjury is assigned upon the deposition of a witness who comes to prove the bankruptcy; for there the commissioners have jurisdiction to inquire into the fact, though it should ultimately turn out that there was no bankruptcy. Id. ibid. See note (*n*).

(*m*) Manning's Ind. 232.

(*n*) Reg. *v.* Ewington, 1 C. & Mars. 319. In the course of the argument before the Judges, Lord Abinger, C. B., said, "You cannot dispute the authority of the commissioners to take the preliminary proceedings under the fiat, to ascertain whether the party should be adjudged bankrupt or not. They were authorized to do that by the fiat of the Lord Chancellor; but you say that if there was no good petitioning creditor's debt, the commissioners had no authority to inquire and examine witnesses as to the bankrupt's property."

(*o*) Rex *v.* Benson, 2 Campb. 508. Rex *v.* Morris, 2 Burr. 1189. 1 Leach, 50. The reason why the Court of Chancery made a general order that all defendants should *sign* their answers was with a view to the more easy proof of perjury in answers. 2 Burr. 1189.

(*p*) Id. ibid.

of the fraud, and have avoided the circumstance of taking the oath, especially as he probably knew that the taking the oath was a capital felony. And they further said, that if this had been an indictment for perjury at common law, it would have been incumbent on the prosecutor to have given precise and positive proof that the prisoner was the person who took the oath; and it was equally incumbent on him so to do upon an indictment on the statute in question. (*q*)

Proof of materiality.

In order to show the materiality of the deposition or evidence of the defendant, it is essential, where perjury is assigned in an answer to a bill in equity to produce and prove the bill, (*r*) or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the Court, in answer to which the affidavit in question has been made. (*s*)

If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose must be proved. (*t*)

Evidence of a deceased witness.

It is reported to have been held upon the trial of an information for perjury, alleged to have been committed on the trial of an ejectment, that in order to prove the perjury a witness might prove what a witness, who was since dead, swore on the trial of the ejectment. (*u*) It has been observed that this ruling seems to be utterly inconsistent with the principles now established. (*v*)

Proof of *nisi prius* record.

If the perjury was committed on the trial of a cause at *nisi prius*, the record ought to be produced, in order to shew that such a trial was had: but the production of the postea will be sufficient for this purpose. (*w*) And, in addition to the production of the record, the previous evidence and state of the cause should be so far proved as to shew that the matter sworn to was material: and the prefatory circumstances and innuendos averred in the indictment for the purpose of shewing such materiality must also be proved. The record will shew what issues were joined between the parties; but such proof must be given of what occurred at the trial as will shew the bearing and materiality of the defendant's evidence. (*x*)

Officer's minute of a verdict at *Nisi Prius*.

Where, in order to prove an allegation in an indictment for perjury that a cause came on to be tried, the *nisi prius* record was produced, and it appeared that no *postea* had been indorsed upon it, but there was a minute, in the handwriting of the officer, indorsed upon the jury panel which was affixed to it, in these words, "Verdict for plaintiff, damages 1*s*." Lord Tenterden, C. J., after consulting the other Judges of the Court of King's Bench, held that

(*q*) Brady's case, 1784, 1 Leach, 327.

(*r*) 3 Stark. Evid. 859, citing Rex *v.* Alford, 1 Leach, 150.

(*s*) 3 Stark. Evid. 859.

(*t*) 3 Stark. Evid 859.

(*u*) Rex *v.* Buckworth and others, T. Raym. 170, per Twisden, J., and Morton, J., against Keeling, C. J, who said it was not to be allowed, because between other parties.

(*v*) 3 Stark. Evid. 861, where the case is erroneously cited as Taylor *v.* Brown. The report does not show for what precise purpose the evidence was adduced; if for the purpose of proving what passed on the former trial in order to show that the matter was material, *qu.* whether it was not admissible. C. S. G.

(*w*) Rex *v.* Iles, Hard. 118. Bull. N. P. 243 2 Hawk. P. C. c. 46, s. 57. 3 Stark. Evid. 855.

(*x*) 3 Stark. Evid. 859.

the officer's minute was sufficient evidence that the trial took place. (*y*)

An indictment for perjury averred that there was an action pending between W. C. and B., and the defendant. The writ was not produced, but to shew the existence of the action, the attorney for the plaintiffs in the action produced a notice of set-off entitled in the cause, which he had received from the attornies for the defendant in the action; it was objected that the notice of set-off was inadmissible, as at most it was only secondary evidence; and the objection was held good. (*z*)

A notice of set-off is not evidence that an action was pending.

Where, upon an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, the sessions book was produced by the clerk of the peace in order to prove the trial of the appeal, and the clerk of the peace stated that he would, if applied to, have drawn up a record of the trial of the appeal on parchment; it was held that the sessions book was not sufficient evidence of the trial of the appeal. (*a*) But it has since been held that the sessions book containing the orders and other proceedings of the Court made up and recorded after each sessions, with an entry containing the style and the date of the sessions, and the name of the justices in the usual form of a caption, no other record being kept, is good evidence of the trial of an appeal against an order of removal. (*b*)

Proof of the trial of an appeal.

Where perjury was assigned on the answer to a bill in Chancery as it originally stood, which bill had afterwards been amended, and the bill was produced by a clerk from the six clerks' office, who stated that it was an amended bill, but that it was the original record which was filed in the six clerks' office in the first instance, but altered by the amendments, which were made by altering the original record, and that these alterations were all made by a clerk in the six clerks' office, whose handwriting he knew, and that that person wrote the word "amendment" against each alteration; but none of the alterations related to the particular parts of the answer upon which the perjury was assigned. It was contended that this was not sufficient evidence of what the bill was before the alterations, and that the person who made the alterations ought to be called. But Lord Tenterden, C. J., was of opinion that the amendments were sufficiently proved, and also thought them not material to the case. (*c*)

Amended bill in Chancery, evidence of the original bill.

In order to prove a bill in Chancery by an office copy, such copy must be a correct copy of the words in the bill, and if it contain abbreviations of words which are written at length in the bill, it is insufficient. Upon an indictment for perjury, in order to prove a suit in Chancery, an office copy of the bill was produced, which contained many abbreviations, (*d*) and had all the dates in figures, and it was proved that in the original bill all the words were written at full length, and all the dates expressed by words; and it was held that this copy was not sufficient evidence of the bill in Chancery. (*e*)

A copy of a bill in Chancery containing abbreviations is insufficient.

(*y*) Rex *v.* Browne, M. & M. 315. 3 C. & P. 572.

(*z*) Rex *v.* Stoveld, 6 C. & P. 489, Lord Denman, C. J.

(*a*) Rex *v.* Ward, 6 C. & P. 366, Park, J. A. J.

(*b*) Reg. *v.* Yeoveley, 8 A. & E. 806.

(*c*) Rex *v.* Laycock, 4 C. & P. 326.

(*d*) Such as "posed of considble pnl este."

(*e*) Reg. *v.* Christian December 6, 1842. MSS. 1 C. & Mars., 388, Lord Denman, C. J.

It seems that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it. (*f*)

Proof of taking the freeholder's oath at an election.

Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of J. W.; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., who swore to his freehold, and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder, and sometime afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid that he should be pulled for his *bad vote;* and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or any other than the name of J. W.; it was holden, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. (*g*)

The fact of a defendant in a cause having been examined, may be proved by parol.

Where, upon an indictment for perjury committed upon a trial, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness, and the indictment for perjury did not state his acquittal, nor did the minute of the verdict produced shew it; it was held, that although the evidence of a shorthand writer, who stated that the defendant was acquitted and then examined, was not any proof of his acquittal, yet it was good proof that he was examined. (*h*)

An affidavit of a marksman is inadmissible unless it is shown to have been read over to the deponent, *secus* if made by a party who can write.

If perjury is assigned upon an affidavit made by a marksman, either the jurat must state that the affidavit was read over to the defendant, or it must be proved that it was so read. Upon an indictment for perjury in an affidavit, which was signed with the mark of the defendant, but the jurat to which omitted to state that it was read over to the defendant; Littledale, J., said, "as the defendant is illiterate, it must be shewn that she understood the affidavit. In those cases, where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents, but in the case of a marksman it is not so. If in such case the Master by the jurat authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the evidence of any other person to that fact." And no evidence being adduced to shew that the affidavit was read over in the presence of the defendant, it was held that the assignments of perjury on this affidavit could not be supported. (*i*)

An affidavit referring to an inadmissible affidavit.

It was held in the same case, that where one affidavit, which has a perfect jurat, refers to another affidavit which is inadmissible for

(*f*) Rex *v.* James, Show. 397. 3 Stark. Evid. 857. And see Brickell *v.* Hulse, 7 A. & E. 454.

(*g*) Rex *v.* Price, *alias* Wright, 6 East, 323.

(*h*) Rex *v.* Browne, M. & M. 315. Lord Tenterden, C. J., after consulting the other Judges of the Court of King's Bench. See this case as to another point, *ante*, p. 662.

(*i*) Rex *v.* Hailey, R. & M. N. P. C. 94. 1 C. & P. 258.

want of proof that it was read over to the defendant, the former affidavit cannot be read. (*j*)

Where an indictment for perjury, alleged to have been committed in the Insolvent Debtors' Court, stated that the defendant gave in his schedule on oath that the same and all its contents were true, and contained a full, true, and perfect account of all his just debts, credits, &c., and then went on to state that the said schedule and its contents were not true, and that certain persons whose names were set out, were debtors to the defendant at the time of giving in his schedule; Lord Tenterden, C. J., held that the evidence must be confined to the cases specified in the indictment, as the defendant could only come prepared to answer those cases, and that evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant and were omitted in the schedule, was inadmissible. (*k*)

Where the assignments of perjury allege that certain persons by name were debtors, evidence of others being so is inadmissible.

Where an indictment for perjury alleged that Hallett exhibited a bill in Chancery, by which he set forth that he, Bowden, and Tucker (the defendant), entered into a verbal agreement to become joint dealers and co-partners in the trade or business of druggists; and assigned perjury against the defendant in swearing that he, Hallett and Bowden did not become joint dealers in the trade or business of druggists; and it appeared that Hallett was a druggist, but the defendant and Bowden were drug brokers, and had nothing to do with Hallett's shop, or the drugs sold there; but were continually in the drug market, but being brokers of the city of London they could not deal in their own names, and it was agreed that they should buy and sell drugs in Hallett's name, and then they were to divide the profit and loss. Abbott, C. J., held that the allegation in the bill in Chancery could only apply to an ordinary partnership, and not to such a transaction as this, and, consequently, that the indictment could not be supported. (*l*)

Averment of a partnership not supported by the facts.

Where an indictment for perjury alleged that a bill was pending in the Court of Chancery, and that it became material to ascertain whether an annuity granted by G. Hawkins to the defendant, or granted to J. B. Bostock, as trustee for the defendant, had been paid up to the year 1828, and that the defendant falsely swore that the annuity had not been paid up to 1828; and in order to shew that Bostock, who was abroad, had paid the money to the defendant, it was proved that Bostock had sent money to his banker's by his clerk; and it was held that what the clerk said about the money at the time he paid it into the banker's was admissible in evidence, on the ground that it was a declaration made by an agent acting at the time within the scope of his authority. (*m*)

Declaration by an agent at the time of paying money into a bank.

Upon an indictment for perjury alleged to have been committed upon the hearing of an information for sporting without a game certificate, in order to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in, and it was held that evidence was not admissible of other things stated by the defendant, when he was examined as a witness

Parol evidence to add to a deposition.

(*j*) Rex *v.* Hailey, 1 C. & P. 258. The report does not state in what manner the one affidavit referred to the other.

(*k*) Rex *v.* Mudie, 1 M. & Rob. 128. S. C. as Rex *v.* Moody, 5 C. & P. 23. The indictment is set out in the note to the latter report. See Reg. *v.* Parker, Stafford Sum. Ass. 1842. 1 C. & Mars. 639.

(*l*) Rex *v.* Tucker, 2 C. & P. 500.

(*m*) Reg. *v.* Hall, 8 C. & P. 358, Littledale, J.

before the magistrate, but which were not contained in the written deposition. (*n*)

Conviction before justices, when not admissible.

Where perjury is assigned upon the evidence of a witness examined before magistrates on the hearing of an information, the conviction is not admissible in evidence on the trial of the indictment for perjury, as it is irrelevant to the matter in issue. (*o*)

Count for perjury on a charge of receiving stolen goods not supported by proof of perjury on hearing an information under the 17 Geo. 3, c. 56.

Where a count alleged perjury to have been committed before magistrates in examining a charge of feloniously receiving stolen silks, knowing them to have been stolen, and it appeared that the evidence was given upon the hearing of an information, under the 17 Geo. 3, c. 56, for having possession of silks suspected to have been purloined or embezzled; Patteson, J., held, that the count was not supported, as the evidence was given upon the specific charge contained in the information. (*p*)

Evidence of the corrupt intent of the defendant.

Evidence is essential, not merely to shew that the defendant swore falsely in fact, but also, as far as circumstances tend to such proof, to shew that he did so corruptly, wilfully, and against his better knowledge. For it has been justly and humanely said that a jury ought not to convict where it is probable that the fact was owing rather to the *weakness* than the *perverseness* of the party; as where it was occasioned by surprise or inadvertency, or by a mistake of the true state of the question. (*q*) The jury may infer the corrupt motive of the defendant from the circumstances of the case, (*r*) and in order to show that the defendant swore wilfully and corruptly what was not true, evidence may be given of expressions of malice used by the defendant towards the person against whom he gave the false evidence. (*s*) The evidence appears to have been received in this case without objection.

Defence.

The defendant, although perjury be assigned on his answer, affidavit, or deposition in writing may prove that an explanation was afterwards given qualifying or limiting the first answer. (*t*)

General expressions in an answer, explained by another answer.

Thus where the perjury was assigned upon an answer in Chancery, in which the defendant had sworn that she had received no money; the defendant proved that, upon exceptions taken to this answer for the insufficiency thereof, she had put in another answer, which explained the generality of the first answer, and stated that she had received no money before such a day; and it was held, upon a trial

(*n*) Rex *v.* Wylde, 6 C. & P. 380, Park, J. A. J. The correctness of this decision seems questionable. In the case of summary convictions there is no statute which requires magistrates to take down the evidence in writing, and therefore what a party says in an examination before a magistrate on such an occasion may be proved by parol, whether any person took it down or not. Robinson *v.* Vaughton, 8 C. & P. 252, Alderson, B. Inasmuch, therefore, as all the defendant said might have been proved by parol, it is difficult to see how the deposition being put in could prevent other matters not contained in it from being proved by parol. The distinction between depositions in felony and in summary convictions was not noticed in this case, nor was any reference made to Rex *v.* Harris, R. & M. C. C. R. 338. And the decision in the text appears at variance with the ordinary practice of cross-examining a witness in cases of felony as to other statements made by him before the committing magistrate, after his deposition has been put in and read. C. S. G.

(*o*) Reg. *v.* Goodfellow and another, Stafford Spr. Ass. 1842, MSS., and 1 C. & Mars. 569. See Rex *v.* Dowlin, 5 T. R. 311.

(*p*) Reg. *v.* Goodfellow, *supra.*

(*q*) 3 Stark. Evid. 860, citing 1 Hawk. c. 69, s. 2. Rex *v.* Melling, 5 Mod. 349. Reg. *v.* Muscott, 10 Mod. 192. As where a man swore that he had seen and read a deed, and on the trial it appeared that he had read the counterpart only.

(*r*) Rex *v.* Knill, 5 B. & Ald. 929, note (*a*), *ante*, p. 652.

(*s*) Rex *v.* Munton, 3 C. & P. 498, *cor.* Lord Tenterden, C. J.

(*t*) 3 Stark. Evid. 860.

at bar, that nothing could be assigned as perjury which was explained by the second answer, because the second answer clearly showed that that which at first appeared to be perjury, was not perjury. (*u*)

Evidence for the defendant.

Where an indictment for perjury contains several assignments of perjury, and no evidence is adduced upon one of the assignments, the defendant is not entitled to give any evidence to shew that the matter, charged by such assignment to be false, was in fact true. (*v*)

It is no defence that an affidavit is inadmissible by reason of a defective jurat.

The crime of perjury is complete at the time when an affidavit is sworn, it is no defence, therefore, that the affidavit cannot, through certain omissions in the jurat, be received in the Court for which it is sworn. Upon an indictment for perjury in an affidavit, relating to the service of a petition upon a bankrupt, it appeared that the affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the party, and it was proved by a clerk in the Master's office in Southampton Buildings that in cases where the party swearing the affidavit cannot write, the jurat ought after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn, that he had truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed; and that no affidavit would be received which did not contain this form of jurat when the party could not write. Littledale, J., "The omission of the form directed by this and other Courts to be used in the jurat of affidavits may be an objection to their being received in the Court, whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the Court for which it is prepared, that nevertheless perjury may be assigned upon it." (*w*) So where an affidavit when sworn, had been marked by the Judge's clerk with his initials, but through mistake not then presented to the Judge for his signature, but some days afterwards it was signed by the Judge; Alderson, B., in the presence of the other Barons of the Exchequer, expressed a clear opinion that perjury might be assigned upon the affidavit, although the Judge's signature was omitted. (*x*)

So it is no defence that the affidavit has not been used for the purpose for which it was made.

Upon an indictment for perjury, it appeared that the defendant had filed a bill in Chancery for an injunction, and had made the affidavit, on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and it stated the matters assigned as perjury to be material to the questions arising on the bill; but it did not contain any statement that a motion had been made for an injunction, and it did not appear by the evidence that any such motion had in fact been made. It was submitted that the defendant was entitled to an acquittal. By the practice of the Court of Chancery, an injunction could not be obtained, except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases is the affidavit of the plaintiff admissible; or else *ex parte* before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, could the plaintiff's affidavit be used. The averment,

(*u*) Rex *v.* Carr, 1 Sid. 418. 2 Kebl. 576. 3 Stark. Evid. 860. The reporter adds, "at which unexpected evidence and resolution the counsel for the prosecution were surprised."

(*v*) Rex *v.* Hemp, 5 C. & P. 468.

(*w*) Rex *v.* Hailey, R. & M. N. P. C. 94. 1 C. & P. 258. See Rex *v.* Crossley, *ante*, p. 630, note (*y*).

(*x*) Bill *v.* Bament, 8 M. & W. 317.

therefore, that the perjury was assigned on matter material to the bill, was not true; it could only be material to an application of a peculiar nature, and it did not appear, and was not alleged, that such an application was ever made. It was answered, that the objection, if tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used. Lord Tenterden, C. J.—" I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question." (*y*)

Or that it has a defective title.

Where an indictment for perjury alleged that the defendant produced before a Master in Chancery an affidavit, "entitled, in the said Court of Chancery, and in the said suit therein at the suit of the said E. J. C., and also in the said suit therein at the suit of the said *Commissioners* of Charitable Donations and Bequests in Ireland," and the affidavit, when produced, appeared to be entitled "between the *Commissioner* of Charitable Donations and Bequests in Ireland, against J. E. D., &c., (naming the other defendants,) and between E. J. C. and J. E. D., the Commissioners of Charitable Donations and Bequests in Ireland, *and Others.*" It was objected that this affidavit was not one on which perjury could be assigned, as there was no such suit as that in which the *Commissioner* of Charitable Bequests were plaintiffs; and the affidavit suit was improperly entitled, as the names of all the defendants were not stated, and therefore the affidavit was not admissible in the Court of Chancery. Lord Denman, C. J., "The Courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with." (*z*)

Verdict.

If any one distinct assignment of perjury be proved, the defendant ought to be convicted. (*a*)

Proof upon a prosecution for subornation of perjury.

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended, on the part of the crown, that the bare production of the record of Macdaniel's conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such con-

(*y*) Rex *v.* White, M. & M. 271. The defendant was acquitted.

(*z*) Reg. *v.* Christian, December, 6, 1842. 1 C. & Mars. 388.

(*a*) Reg. *v.* Rhodes, 2 Lord Raym. 886, 887. 3 Stark. Evid. 860. And see Compagnon *v.* Martin, 2 Black. Rep. 790. Reg. *v.* Virrier, 12 Ad. & E. 317. Reg. *v.* Gardiner, *ante*, p. 633. In Rex *v.* Nicholls, Gloucester Sum. Ass. 1838, perjury was alleged to have been committed by the defendant in evidence given on a trial for larceny, in which he denied having been at a particular house on a particular occasion, and denied having had a conversation with certain persons there, and the indictment contained many distinct assignments on the going to the house, and the conversation, upon all of which evidence was given, and Patteson, J., directed the jury simply to consider whether the defendant had been to the house, and if they were satisfied that he had to convict him, which they did. MSS. C. S. G.

viction was right; that Reilly had a right to controvert the guilt of Macdaniel; and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury; and the recorder obliged the counsel for the crown to go through the whole case, in the same manner as if the jury had been charged to try Macdaniel. (*b*)

Punishment of perjury and subornation of perjury.

The punishment of perjury and subornation of perjury, at common law, has been various; being anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods. (*c*) At the present time it is fine and imprisonment, at the discretion of the Court, (*d*) to which, as we have already seen, the 2 Geo. 2, c. 25, (*e*) superadds a power for the Court to order the offender to be sent to the House of Correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9, that statute, as we have seen, (*f*) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory; (*g*) and punishes perjury itself with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory.

3 Geo. 4, c. 114. Hard labour.

The 3 Geo. 4, c. 114, enacts, that "whenever any person shall be convicted of any of the offences hereinafter specified and set forth that is to say (*inter alia*) of wilful and corrupt perjury, or of subornation of perjury, it shall and may be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such Court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such Court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this act; and every such offender shall thereupon suffer such sentence, in such place, and for such time, as aforesaid, as such Court shall think fit to direct."

It has been holden that the punishments directed by the 18 Geo. 2, c. 18, to be inflicted upon perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the 5 Eliz. c. 9, s. 6, (*i*) and 2 Geo. 2, c. 25, s. 2, (*j*) to which the first mentioned statute, 18 Geo. 2, c. 18, refers. (*k*)

(*b*) Reilly's case, 1 Leach, 454. See vol. 1, p. 43.

(*c*) 4 Black. Com. 138.

(*d*) 4 Black. Com. 138. Rex *v.* Nueys and Galey, 1 Black. R. 416. Rex *v.* Lookup, 3 Burr. 1901. In this last case the form of the sentence was that the defendant "should be set in and upon the pillory at C. cross, for an hour between the hours of twelve and two, and that he should afterwards be transported to some of his Majesty's colonies or plantations in America, for the space of seven years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid." The 1 Vict. c. 23, abolishes the punishment of the pillory in all cases, "provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever, which may now be by law inflicted in respect of any offence except only the punishment of pillory."

(*e*) *Ante*, p. 605

(*f*) *Ante*, p. 604.

(*g*) See note (*d*). *supra.*

(*i*) *Ante*, p. 604.

(*j*) *Ante*, p. 605.

(*k*) Rex *v.* Price, *alias* Wright, 6 East, 323. Grose, J., passed sentence upon the

Judgment in case of perjury.

Upon a conviction for perjury at the Chester Assizes, after the entry of the verdict the record proceeded "it is therefore *ordered* that the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years;" and upon a writ of error the following errors were relied upon; that the judgment was erroneous in form, being, "it is ordered;" whereas it should have been "it is considered;" that it was bad in substance, being a judgment of transportation only, whereas the 2 Geo. 2, c. 25, s. 2, enacts that judgment of transportation may be pronounced, *besides* the punishment that might before be inflicted; that the place, to which the prisoner was to be transported, ought not to have been fixed by the Court, the power of appointing that being given to the King in council by the 56 Geo. 3, c. 27; and that at all events the appointment of the place was bad, being to one or other of various places, and, therefore, uncertain. And the Court of King's Bench held that by the 2 Geo. 2, c. 25, s. 2, two things were required to be done by the Court before which the party was tried: an order for transportation is to be made, and thereupon judgment is to be given: and here the Court had made an order not followed up by a judgment. Inasmuch, therefore, as no judgment had been entered in the Court below, and the Court of King's Bench had no power to supply the deficiency, as the punishment was discretionary, that Court awarded a procedendo, commanding the Court below to proceed to give judgment on the conviction. (*l*)

Conviction for perjury incapacitates the offender from giving evidence.

A consequence of a conviction for perjury, though it forms no part of the judgment, is, that the offender is incapacitated from giving evidence in a court of justice. (*m*) But a pardon will restore his competency: except in the case of a conviction for perjury or subornation of perjury on the 5 Eliz. c. 9, (*n*) which provides that the offender shall never be admitted to give evidence in Courts of justice until the judgment be reversed; and, therefore, the King's pardon will not in such case make him a competent witness. (*o*)

Summary proceeding where persons convicted of perjury practise as attornies or solicitors.

A very summary mode of proceeding is given, where persons convicted of perjury practise as attornies or solicitors in courts of law or equity. The 12 Geo. 1, c. 29, s. 4, enacts, "that if any person who hath been or who shall be convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury, or common barratry, shall act or practise as an attorney, or solicitor or agent, in any suit or action, brought or to be brought in any court of law or equity within that part of Great Britain called England, the Judge or Judges of the Court, where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the

defendant and two other persons who had been convicted of similar perjuries in the following form:—"That each of them for this offence should lose and forfeit 20*l*., and be imprisoned in Newgate by the space of six months without bail or mainprize, and that his oath from thenceforth be not received in any court of record within England or Wales, or the marches of the same, until such time as this judgment should be reversed by attaint or otherwise; and that after the expiration of the said six months he be transported to such place beyond the seas as his Majesty, with the advice of his privy council, should think fit to direct and appoint, for the term of *six* years."

(*l*) Rex *v.* Kenworthy, 1 B. & C 711.

(*m*) Gilb. Ev. 126. Bull. N. P. 291. 4 Black. Com. 138. 2 Hawk. P. C. c. 46, s. 101.

(*n*) *Ante*, p. 604.

(*o*) 1 Phil. on Evid. 21, and the authorities there cited.

matter in a summary way in open Court; and if it shall appear to the satisfaction of such Judge or Judges, that the person complained of, or against whom such information shall be given, hath offended contrary to this act, such Judge or Judges shall cause such offender to be transported for seven years to some or one of his Majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported."

The following cases, which have occurred with reference to some of the statutes mentioned in the course of this chapter, seem deserving of being introduced in this place.

An indictment for perjury will not lie under the 7 Geo. 4, c. 57, s. 71, against an insolvent debtor for omissions of property in his schedule.

An indictment for perjury, alleged to have been committed in the Insolvent Debtors' Court, stated that the defendant gave in his schedule on oath that the same contained a true and correct account of all his debts, credits, &c., and then went on to state that certain persons, whose names were set out, were debtors to the defendant at the time of giving in his schedule, and that they were omitted in the schedule. It was objected that no indictment for perjury would lie on such omissions; that the offence of wilfully making such omissions was made punishable as a misdemeanor by sec. 70 of the 7 Geo. 4, c. 57, and the offence of perjury created by sec. 71, only applied to positive affirmations contained in the schedule. Lord Tenterden, C. J., "I think the Legislature contemplated the particular case of omissions, and provided for them in the seventieth section, the debts omitted being comprehended under the terms 'effects or property' there used. The act then goes on in the seventy-first section to make other falsehoods in the oath of the party punishable as perjury. I therefore think the defendant must be acquitted." (*p*)

Indictment for a false answer to the third question under the reform act. Determination of tenancy.

Upon an indictment against the defendant under the 2 Wm. 4, c. 45, s. 58, for giving a false answer to the question whether he had the same qualifications to vote as that for which he was registered, it appeared that the defendant had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of the house to another person, who had put horses into the stable and beer into the cellar, but the rent of such person did not commence till after the election; it was held that the defendant must be acquitted, as there was no evidence as to the determination of the defendant's tenancy. (*q*)

Although a party who has given up the property he rented at the time he was registered cannot vote, still he ought not to be convicted of a false answer to the question

Upon an indictment against the defendant under the 2 Wm. 4, c. 45, s. 58, for falsely answering that he had the same qualification for which his name was originally inserted in the register of voters, it appeared that the defendant at the time of the registration was occupying a house at Turnham Green, as tenant to Mr. Kay, at the rent of 60*l.* per annum, but he left that house at Lady Day following, and in April commenced the occupation of another house at Turnham Green, as tenant to Mr. L., at a rent of 50*l.* and upwards per annum, and he continued in the occupation of this house from April till the time of the election. The defendant had been told that he

(*p*) Rex *v.* Mudie, 1 M. & Rob. 128. S. C. as Rex *v.* Moody, 5 C. & P. 23. See sec. 70 of the 7 Geo. 4, c. 57, *ante*, p. 235, and sec. 71, *ante*, p. 615.

(*q*) Rex *v.* Harris, 7 C. & P. 253, Lord Denman, C. J.

in sec. 58 of the 2 Wm. 4, c. 45, if he *bonâ fide* believed he had a right to vote.

had no right to vote before he did so, but he said that he believed he had a right to vote, and that he had been so informed by a committee of two of the candidates, and that their opinion was sufficient to warrant him in voting. It was held that the nature of the qualification being the same did not give the party a right to vote, merely because it fell within the general terms of the description, which he had given to the revising barrister. The identity of the qualification must continue; and if a voter ceased to occupy the premises in respect of which he was registered, he thereby ceased to have a right to vote; and it was no answer to say that, although he had ceased to occupy those premises, he had entered upon the occupation of other premises of equal value. It had been urged that if the statement of the defendant was untrue, he made it under the advice of a committee; but that made very little difference, for if a party made a statement which he knew to be untrue, the opinion of an election committee (which generally had a pretty strong bias one way or the other) did not alter the character of the offence. But still the term "same qualification" was undoubtedly an equivocal expression, and almost necessarily implied something of opinion as to a matter of law, and the jury ought not to convict a person of a misdemeanor who possessed property of equal value to that which he held at the time of the registration, if he had acted *bonâ fide*, and had been guided in his conduct in a matter of law by persons who were conversant with the law, and who had told him that he possessed the same qualification, for which his name was originally inserted in the register of voters. (*r*)

The description in the register must be read, or the party is not indictable.

Where on the trial of an indictment on the 2 & 3 Wm. 4, c. 45, s. 58, against the defendant for giving a false answer to the question, "Have you the same qualification for which your name was originally inserted in the register of voters now in force for the city of Bristol," the sheriff's deputy stated, that on the defendant tendering his vote he had asked him the question as set out in the indictment, but did not, at the end of the question, read from the register the line in which his name and qualification were inserted, "Lucy William, House, Lodge-street." Wightman, J., held that the defendant must be acquitted, as the particular qualification ought to have been read over. (*s*)

Indictment for falsely swearing to a qualification to sit as a member of Parliament.

Where a person is indicted for a misdemeanor in taking a false oath, it must be proved not only that the matter sworn was false, but that the defendant knew it to be so at the time he took the oath. Upon an indictment against the defendant for a misdemeanor, in falsely swearing that he *bonâ fide* had such an estate in law or equity of the annual value of 300*l.*, above reprizes, as qualified him to be a member of Parliament for a borough; a surveyor stated

(*r*) Reg. *v.* Dodsworth, 8 C. & P. 218. 2 Moo. & Rob. 72, Lord Denman, C. J. In Reg. *v.* Irving, 2 M. & Rob. 75, note (*a*), the same points arose, and Bosanquet J., was decidedly of opinion that in point of law the qualification was not the same, but said that if the answer was given by the prisoner under a *bonâ fide* belief that he still retained his qualification, he should be acquitted. In the same note the learned reporters advert to the case where a voter is registered for "land," described, as in his own occupation, or for "freehold houses," in some specified street, and after the registration he sells part of the land which was in his own occupation at the time of the registration, or some of the houses of which he then possessed the freehold; in each case, however, retaining enough in point of value to confer a qualification, and intimate a doubt whether such a party could truly answer the question in the affirmative. C. S. G.

(*s*) Reg. *v.* Lucy, 1 C. & Marr. 510.

that the fair annual value of the property was about 200*l.* a year, but another witness stated that it was badly let, and believed it was worth more than 300*l.* a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification, in point of value, was not sufficient. It was held, that the jury must be satisfied, beyond all doubt, that the property was not of the value of 300*l.* a year, and that at the time the defendant made the statement, he knew that it was not of that value. (*s*)

Indictment against a magistrate for administering an oath contrary to the 5 & 6 Wm. 4, c. 62, s. 13.

The first count of the indictment, founded upon the 5 & 6 Wm. 4, c. 62, s. 13, charged that the defendant, being a justice of the peace, did unlawfully administer to and receive from J. Huxtable a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognizance by any statute. The second and third counts were slightly varied, and the fourth count negatived the proviso in sec. 13. There were other counts charging the defendant with administering oaths to two other persons. The defendant had made a complaint to the bishop against two clergymen, who officiated in his parish, that one had played at thimble-rig, and that both had neglected the duties of the parish. The bishop intimated that, before he could call on the clergymen to answer the complaint, the defendant must either bring before him the persons who proved the charges, or obtain statements in writing of the facts. The defendant obtained statements from the three persons mentioned in the indictment, and swore them before himself, as a justice of the peace, to the truth of the statements. The bishop had before appointed a day for hearing the charges, and had summoned the clergymen to attend; but on finding that the depositions had been thus sworn, he declined to look at them; he went, however, into the charges on other evidence. It appeared, that the defendant was ignorant of the statute rendering the administering voluntary oaths illegal. It was contended, that the enacting part of the statute must be construed with reference to the preamble; that the enacting clause, which prohibits "any justice of the peace, or other person," from administering oaths, other than in matters over which jurisdiction was given by statute, if taken by itself, would render unlawful the taking of many oaths which could be administered by the common law, that the enactment construed together with the proviso, was still too stringent, and that the enactment and proviso must be governed by the preamble. Coleridge, J., in summing up, said, he was of opinion, that the enacting part of the statute was not governed by the preamble; that he considered the enacting part of the section and the proviso preserved to justices of the peace all the jurisdiction they had, as well at the common law as by statute, to administer oaths; and that the inquiry before the bishop was clearly a matter in respect of which the defendant had no jurisdiction, either at common law, or by statute. He directed the jury, that, if they were satisfied the defendant did administer the oaths, they should find him guilty. The jury found the defendant "guilty of inadvertently administering an oath or oaths;" and Coleridge, J., held that that was a verdict of guilty. (*t*)

(*s*) Rex *v.* De Beauvoir, 7 C. & P. 17, Lord Denman, C. J.

(*t*) Reg. *v.* Nott, 1 C. & Mars. 288. See the section, *ante*, p. 617.

CHAPTER THE SECOND.

OF CONSPIRACY.

Descriptions of conspiracy.

THE conspiring to obstruct, prevent, or defeat the course of public justice; (a) to injure the public health, as by selling unwholesome provisions; (b) or to effect any public mischief, as by raising the price of the public funds by illegal means; (c) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to the effect a legal purpose by the use of unlawful means: and this, although such purposes be not effected. (d) And it is laid down in a book of great authority that all confederacies whatsoever "wrongfully" to "prejudice" a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (e) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the gist of the offence. (f) The nature of conspiracy, therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement amongst themselves, would not have been illegal; as in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy. (g) It has been

(a) Rex v. Mawbey and others, 6 T. R. 619, *et seq.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72, s. 2.

(b) Reg. v. Mackarty and Fordenbourgh, 2 Lord Raym. 1179. 2 East, P. C. c. 18. s. 5, p. 823. 4 Black. Com. 162. And see the remarks upon the case of Mackarty and Fordenbourgh in 6 East, 133, 141.

(c) Rex v. De Berenger and others, 3 M. & S. 67.

(d) Rex v. Journeymen Tailors of Cambridge, 8 Mod. 11. Reg. v. Best, 2 Lord Raym. 1167, 6 Mod. 185. 1 East, P. C. c. 11, s. 11, p. 462. But an *action* will not lie for a conspiracy unless it be put in execution, 9 Co. 57. W. Jones, 93. Savile v. Roberts, 1 Lord Raym. 378. And see 8 Mod. 320, that conspiring to do a lawful act, if for an unlawful end is indictable. See *post*, note (j).

(e) 1 Hawk. P. C. c. 72, s. 2. It is not necessary in an indictment for conspiring to charge a man with being the father of a bastard child, to state that the charge was false, Reg. v. Best, *post*, p. 683.

(f) Reg. v. Best, 2 Lord Raym. 1167. Rex v. Spragg, 2 Burr. 993. Rex v. Rispal, 3 Burr. 1320.

(g) By Grose, J., in Rex v. Mawbey and others, 6 T. R. 636. And see Rex v. The Journeymen Tailors of Cambridge, 8 Mod. 11. If one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. By Buller, J., in Pasley v. Freeman, 3 T. R. 58.

said that perhaps few things are left so doubtful in the criminal law, as the point at which a combination of several persons, in a common object, becomes illegal. (*h*) It appears, however, to have been holden that if such persons illegally concur in doing an act they may be guilty of conspiracy, though they were not previously acquainted with each other. (*i*) It has been laid down by a very learned Judge that conspiracy is "a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means." (*j*)

Conspiracies against the public justice of the kingdom by agreeing to make false charges and accusations.

Amongst the most flagrant instances of conspiracies against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with a conspiracy, in causing a man to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by act of Parliament. (*k*) And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is "a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom, accordingly, they cause to be indicted or appealed; and afterwards the party is lawfully *acquitted* by the verdict of twelve men." (*l*) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (*m*) The description of conspirators in the old statute, 33 Edw. 1, st. 2, (sometimes cited as 21 Edw. 1,) is "that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as to the givers, and to stewards and bailiffs of great lords, who by their seigniority, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves." From which definition of con-

(*h*) 3 Chit. Crim. L. 1139.

(*i*) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 3. 1 Hawk. P. C. c. 72, s. 2, in the notes. See *post*, p. 699.

(*j*) Per Alderson, B. Reg. *v.* Vincent, 9 C. & P. 91, and in Rex *v.* Seward, 1 A. & E. 713, Lord Denman, C. J., said, "An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means;" but in Reg. *v.* Peck, 9 A. & E. 686, the very learned Chief Justice, upon this dictum being cited, said, "I do not think the antithesis very correct." In Rex *v.* Jones, 4 B. & Ad. 345. 1 N & M. 78, however, several learned Judges gave a similar definition of the crime of conspiracy. And see *ante*, note (*d*). C. S. G.

(*k*) Rex *v.* Macdaniel and others, 1 Leach, 45. And see Fost. 130. See also *ante*, vol. 1, p. 494. It should seem that the only objection to this being treated as a conspiracy is that which might arise from its being considered as a crime of the highest degree, (*i. e.* murder,) in which the misdemeanor would be merged.

(*l*) 3 Inst, 143. 4 Black. Com. 136.

(*m*) 1 Hawk. P. C. c. 72, s. 2. In the case of Rex *v.* Spragg, 2 Burr. 998, Serj. Davy said, "There is a distinction between a writ of conspiracy and an indictment for conspiracy. In an action the damage is the gist of the action; and therefore the writ and declaration must charge 'that he was indicted and sustained damage;' but that is not necessary in an indictment; which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143."

spirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not. (*n*) But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another, are indictable upon this statute, it seems to be more safe and advisable to ground an indictment for such offence upon the common law than upon the statute. (*o*)

The false charge need not be prosecuted.

A conspiracy of this kind appears, therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. (*p*)

A conspiracy to indict a person for the purpose of extorting money from him is a misdemeanor, whether the charge be or be not false. (*q*)

The confederacy to make false charges, &c., will be equally criminal, though the proceedings intended to be instituted were defective.

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal, which was preferred, or intended to be preferred in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. (*r*) Therefore, on an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient. (*s*)

Such confederacy will be equally criminal, though the parties may say that they intended only to give testimony in a legal course of justice.

Neither is it any plea for one who is prosecuted for such an unlawful confederacy, that nothing more was intended by him but only to give his testimony in a legal course of justice against the party, to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said that it would be a great discouragement to legal proceedings to make persons liable to a criminal prosecution for barely intending to give their evidence, and it would be a prejudging of a cause to try the truth of the testimony

(*n*) 1 Hawk. P. C. c. 72, s. 2.
(*o*) Ibid.
(*p*) Reg. *v.* Best and another, 2 Lord Raym. 1167. 1 Salk. 174.
(*q*) Rex *v.* Hollingberry, 4 B. & C. 329. 6 D. & R. 345.
(*r*) 1 Hawk. P. C. c. 72, s. 3.
(*s*) Rex *v.* Rispal, Black. R. 368. 3 Burr. 1320. And see Pippet *v.* Hearn, 5 B. & A. 634, *ante*, p. 636, note (*e*).

intended to be given in it before the cause itself is determined, yet the law will rather venture this mischief than suffer so flagrant a villany to go unpunished. However, if there be any probability that the principal cause will ever be tried, it seems proper to apply to the Court to stay the trial of the confederacy until the merits of the principal cause be determined. (*t*)

But the confederacy must be false and malicious, and persons may consult to prosecute a guilty person.

It is observed that it appears not only from the words of the statute, but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words of the 33 Edw. I, stat. 2, unless it be both false and malicious. (*u*) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right or wrong. (*v*) And associations to prosecute felons, and even to put the laws in force against political offenders are lawful. (*w*)

Mawbey's case. Conspiracy to pervert the course of justice, by producing a false certificate of a highway being in repair.

In the following case it was holden that a certificate by justices of the peace that an indicted highway is in repair, is a legal instrument, recognised by the Courts of law, and admissible in evidence after conviction, when the Court are about to impose a fine: and that, consequently, it was illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the Court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty; that two justices of the county, and two other persons conspired to pervert the course of justice and impose on the Court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment. Upon showing cause against this rule the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said that it follows from the very nature of the offence of conspiracy that there is no charge of any specific crime, but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy to be found in the Books. 1. Where the subject matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual: but the criminality in law arises wholly from the conspiracy. Such as an agreement to maintain each other, right or wrong; (*x*) or a combination amongst labourers or mechanics to raise their wages. (*y*) So where several conspired to hiss at the Birmingham Theatre, Lord Mansfield held it indictable, although each might have done so separately. (*z*) So a combination between officers in the service of the East India Company, to resign their commissions was held an illegal act; and consequently a resignation tendered under those circumstances was held not to be a determination of the service. (*a*) 2. Where the subject matter is not *malum prohibitum*, as referred to the individual, though *malum in se*: but the criminality in law arises from the con-

Argument of the counsel for the prosecution.

(*t*) 1 Hawk. P. C. c. 72, s. 4.
(*u*) 1 Hawk. P. C. c. 72, s. 7.
(*v*) Reg. *v.* Best and another, 1 Salk. 174. And see 1 Hawk. P. C. c. 72, s. 7.
(*w*) Rex *v.* Murray, 1 Chit. Burn's Just. 817. Matth. Dig. 90. Abbott, C. J., Guildhall, 1823.
(*x*) 9 Co. 56.
(*y*) 8 Mod. 10.
(*z*) Anon. B. R. 18 or 19 Geo. 3.
(*a*) 4 Burr. 2472.

spiracy, such as a malicious combination against a trader to ruin him in his trade. (*b*) So the taking up dead bodies, even though for the purposes of science in dissecting them is now held an indictable offence *per se* : (*c*) yet formerly it was not so considered, but even then it was held that an indictment lay for conspiracy to do so. (*d*) A false indictment is no crime as referred to the individual, (*e*) but a conspiracy for that purpose subjects the offenders to the villainous judgment. (*f*) The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, (*g*) though no legal charge be actually preferred. (*h*) And in this latter case it was held that the quarter sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (*i*) So two or more joining to do legal acts with a corrupt intent may be indicted. (*k*) And private deceits, coupled with a conspiracy, are indictable on that account. (*l*) 3. The third head of conspiracy is where the subject matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (*m*) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (*n*) or the preparation of witnesses, (*o*) or the tampering with jurors. (*p*) Such are public frauds in trade, (*q*) or public cheats, (*r*) or deceit or collusion in the King's Courts, or any consent thereto. (*s*) 4. Where there is a bare conspiracy unexecuted, (*t*) or where the conspiracy by the execution merges in a higher offence. (*u*) And he then argued that the offence charged against the defendants fell within the principles of the above cases. In giving his judgment in this case, Ashhurst, J., said, "The principal question is, whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend." And Grose, J., said, "It is laid down in some of the cases that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead

Opinions of the Judges.

(*b*) 1 Stra. 144. 1 Lev. 125. Rex *v.* Eccles and others, B. R. 24 Geo. 3, *post*, p. 687.

(*c*) Rex *v.* Lynn, 2 T. R. 733.

(*d*) Rex *v.* Young, cited in 2 T. R. 733. This was an indictment for a conspiracy to prevent the burial of a corpse. And see a precedent for such a conspiracy, 2 Chit. Crim. L. 36.

(*e*) 1 Ed. 3, stat. 2, c. 11. 2 Black. Rep. 1328, 9.

(*f*) Ibid. See as to the judgment, *post*, p. 704.

(*g*) 1 Lev. 62. 1 Vent. 304.

(*h*) 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

(*i*) 1 Salk, 382, 552. 3 Burr. 1434, 1878. 2 Lord Raym. 1031. 4 St. Tr. 515.

(*k*) Rex *v.* Robinson and others, 1 Leach, 37. 8 Mod. 321. 1 Wils. 41. 3 Burr. 1439.

(*l*) 6 Mod. 42, 301. 2 Burr. 1127. 2 Stra. 866.

(*m*) Fitzg. 66.

(*n*) 1 Hawk. P. C. c. 21, s. 15. 2 Stra. 904. And see Rex *v.* Steventon and others, 2 East. R. 362.

(*o*) Hob. 271. 3 Inst. 106. 2 Show. 1.

(*p*) 1 Saund. 300. 1 Lord Raym. 148. 1 Burr. 510. Rex *v.* Jolliffe, 4 T. R. 285. Co. Lit. 157.

(*q*) 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409. 1 Ventr. 13.

(*r*) 5. St. Tr. 486. 1 Latch. 202. 1 Roll. Rep. 2. 2 Lord Raym. 865. 1 Barnard. 330.

(*s*) 3 Edw. 1, c. 29. 2 Inst. 212, 217.

(*t*) 1 Lev. 62, 125. 1 Vent. 304. 3 Burr. 1320. 1 Lord Raym. 379. 1 Salk. 174. 1 Stra. 193. T. Raym. 417.

(*u*) 1 Lord Raym. 711.

the Court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true." And Lawrence, J., said, "The question is, whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the Court at the assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends, and the Books carry it still farther back. I have not been able to discover how or when the practice of receiving these certificates arose: but a practice that has been adopted in the Courts at least as long back as the reign of Charles the First, goes a great way to show what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder, so formerly were certificates received from the captain of Calais; and in Cro. Eliz. 502, 3, this Court said that they would give credit to the certificates of the Judges in Wales respecting the practice of their Court, and that the custom of the Court is a law in that Court." (*x*)

Conspiracy by a bail and others to obtain security from the defendant.

Where the plaintiff had been arrested for 38*l.* at the suit of Cohen, and Blake had become bail for her, and some proceedings had been taken against him as bail, and Blake, Cohen, Swaysland, and Solomon went to the plaintiff's lodgings, and Blake said he must have his money or the plaintiff must go to gaol, and stated that Swaysland and Solomon were officers, which was not the fact; and the plaintiff being frightened, delivered to Blake a watch and other articles, and Swaysland and Solomon wrote two papers, which were signed by the plaintiff and Blake, and which papers stated that the articles were deposited with Blake as a security, and that he should be at liberty to sell them within forty-two days unless he was paid in the meantime; Lord Lyndhurst, C. B., held that, as the defendants all acted in concert, they were guilty of a conspiracy, for which they might all have been indicted. (*y*)

De Berenger's case. Conspiracy to raise the price of the public funds on a particular day by false rumours.

In a recent case it was holden to be an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased as the persons intended to be injured, and that the public government funds of this kingdom might mean either British or Irish funds, which since the Union were each a part of the United Kingdom. After the argument upon the motion in arrest of judgment, Lord Ellenborough, C. J., said, "I am perfectly clear that there is

(*x*) Rex *v.* Mawbey and others, 6 T. R. 619 to 638.

(*y*) Bloomfield *v.* Blake, 6 C. & P. 75.

not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours it is a fraud levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that particular day." Bayley, J., said, "It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so but to effect it by illegal means, because to raise the funds by false rumours is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation." And by Dampier, J., "I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." (z)

Conspiracy to impoverish the farmers of the excise.

In the argument upon the foregoing case an authority was cited where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence: but the Court held it well, because the information showed that the excise was parcel of the revenue of the Crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the Crown. (a)

To raise the price of oil.

It seems that parties may be guilty of a conspiracy to raise the price of oil by making fictitious sales. (b)

Pollman's case. Conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs.

A conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs is a misdemeanor at common law. The counsel for the defendant proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of a coast waiter, and that however reprehensible such a practice might be, it could only be made an indictable offence by act of Parliament. But Lord Ellenborough, C. J., said, "If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex* v. *Vaughan*, (c) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor." And Grose, J.,

(z) Rex v. De Berenger and others, 3 M. & S. 67.

(a) Rex v. Starling, 1 Sid. 174.

(b) Rex v. Hilbers, 2 Chitty Rep. 163. This was a motion for a criminal information for a conspiracy to raise the price of oil by making fictitious sales, and the Court held that it must appear that two combined together, as it was no offence for an individual separately to endeavour.

(c) 4 Burr. 2494. *Ante*, vol. 1, p. 147.

in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law. (*d*)

Conspiracies to commit riots.

Precedents are to be met with in the Books of indictments for conspiracies to commit riots. (*e*) And in one case, it was said by a learned Judge, with respect to premeditated and systematic tumults at a theatre, that "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." (*f*)

Conspiracies to excite discontent and disaffection.

Where some of the counts of an indictment charged the defendant with conspiring to cause a great number of persons to meet together for the purpose of exciting discontent and disaffection in the minds of the subjects of the Queen, and for the purpose of exciting the said subjects to hatred and contempt of the government and constitution, and it appeared that a large number of persons had assembled at meetings, at which violent speeches had been made respecting the government and constitution and the people's charter. Alderson, B., told the jury, "The purpose which the defendants had in view, as stated by the prosecutors, was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English Universities." And the learned Baron directed the jury to say whether they were satisfied that the defendants conspired to excite disaffection, and if they were to find them guilty of conspiracy. (*g*)

Conspiring to marry paupers, in order to charge a parish.

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it, have been considered as indictable offences. (*h*) It is observed respecting a conspiracy of this kind, that, considering the offence as a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, per-

(*d*) Rex *v.* Pollman and others, 2 Campb. 229.

(*e*) 2 Chit. Crim. L. 506, note (*a*). See Reg. *v.* Vincent, 9 C. & P. 91.

(*f*) By Mansfield, C. J., in Clifford *v.* Brandon, 2 Campb. 369.

(*g*) Reg. *v.* Vincent, 9 C. & P. 91.

(*h*) Rex *v.* Tarrant, 4 Burr. 2106. Rex *v.* Herbert and others, 1 East, P. C. c. 11, s. 11, p. 461. Rex *v.* Compton and others, Cald. 246. 8 Mod. 320.

sons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general, being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained. (*i*) But where, upon an indictment against parish officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man (who was of the age of 29), with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn, both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been taken up under a magistrate's warrant, and was in custody of the overseers. And that learned Judge held it necessary, in support of such an indictment, to shew that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means. (*j*)

In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was holden to be sufficient, without averring in terms, that the marriage was against the will or consent of the parties, though that must be proved. (*k*)

Rex *v.* Seward.

And it has since been held that an indictment does not lie for conspiracy merely to exonerate one parish from the charge of a pauper and to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threats, or fraud, or that it was so effected in pursuance of the conspiracy. (*l*) An allegation in such an indictment that a poor unmarried woman in a parish was with child is not equivalent to an allegation that she was chargeable to such parish. (*m*) And it has been doubted whether an allegation that the defendants conspired together for the purpose of exonerating, is equivalent to an allegation that they conspired to exonerate. (*n*)

(*i*) 1 East, P. C. c. 11, s. 11, p. 461.

(*j*) Rex *v.* Fowler and others, *cor.* Buller, J., Taunton Spr. Ass. 1788. 1 East, P. C. c. 11, s. 11, p. 461. And the learned Judge said that this point had been so ruled several times by several Judges.

(*k*) Rex *v.* Parkhouse and Tremlet, *cor.* Buller, J., Exeter Sum. Ass. 1792. 1 East, P. C. c. 11, s. 11, p. 462.

(*l*) Rex *v.* Seward, 1 A. & E. 706. 3 N. & M. 567.

(*m*) Per Lord Denman, C. J., and Taunton, J., ibid.

(*n*) Per Williams, J., ibid., citing Rex *v.* Nield, 6 East, 417. But see Rex *v.*

Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an *inhabitant* of B., in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (*o*) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A., provided that fact distinctly appeared. (*p*) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes, and also that the woman was chargeable to her own parish at the time, though this latter has never been adjudged to be necessary, nor seems to be required according to the general rules which govern the offence of conspiracy. (*q*) It should seem that in such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement is illegal. (*r*)

Conspiracy to charge a man with being the father of a bastard child.

Conspiring to charge a man with being the father of a bastard child, with intent to extort money from him, is indictable; and where the object is stated to be to extort money, it is immaterial whether the woman is or is not pregnant. (*s*) And conspiring to make such a charge, though without any intent to extort money, is indictable; and it is not necessary to state in the indictment that the charge was false, or that the child was likely to be chargeable. The Court doubted upon the objection that the charge was not stated to be false, but ultimately they held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was spiritual defamation, conspiring to do it was a temporal offence. (*t*)

Conspiracies to defraud.

Hevey's case.

Conspiring to make a fraudulent acceptance of a bill of exchange.

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case which has been mentioned in a former part of this Work, (*u*) where the prisoner had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that the defendants Hevey, Beatty, and M'Carty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c. (the tenor of which was set out) in order that Hevey might, by such acceptance, and by the name M'Carty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange, truly drawn at Bath, by one Jer. Connell, for Smith and Co., as partners in the business of bankers, under the style of Bath Bank, as persons well known to them the said defendants, and thereby fraudulently to obtain from the king's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing to

Ridgway, 5 B. & Ald. 527, where it was held that in a conviction for attending a meeting for carrying on a combination of journeymen for the purpose of obtaining an advance of wages, the words "for the purpose of obtaining," were synonymous with the words "to obtain," in the 39 & 40 Geo. 3, c. 106, s. 4, and Rex *v.* Nield doubted by Lord Tenterden, C. J.

(*o*) Rex *v.* Edwards and others, 8 Mod. 320.

(*p*) 1 East, P. C. c. 11, s. 11, p. 462.

(*q*) Id. ibid.

(*r*) Per *cur.* 8 Mod. 320.

(*s*) Rex *v.* Armstrong, 1 Ventr. 304. 1 Lev. 62. Sid. 68.

(*t*) Reg. *v.* Best, 2 Lord Raym. 1167.

(*u*) *Ante*, p. 326.

the tenor following, viz., "Accepted, 20 Nov.—81, R. B.," well knowing the firm of Smith and Co. to be fictitious; that the defendants procured the indorsement "B. M'Carty" to be written on the same, and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c., and accepted by the said Beatty as a person able to pay the said sum of 30*l.*, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and 7*l.* 8*s.* in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said 30*l.*, they, the defendants, well knowing the same, &c., whereby they defrauded the said S. Read of the said goods and monies. The facts so charged being fully proved the defendants were convicted. (*v*)

A conspiracy to raise money by means of a bill importing to be a country bank bill, where there is no such bank, and none of the parties are of ability to pay the bill, is indictable. (*w*)

Roberts's case. Conspiracy to defraud tradesmen.

In a case of later occurrence the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. (*x*)

Conspiracy of brokers attending sales by auction.

Where in an action for slander it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale they should have a meeting, consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price, at which the goods were bought at the auction, and the fair price at this private resale, should be shared among them; Gurney, B., was of opinion that, as owners of goods had a right to expect at an auction that there would be an open competition from the public, if a knot of men went to an auction upon an agreement among themselves of the kind that had been described, they were guilty of an indictable offence, and might be tried for a conspiracy. (*y*)

Conspiring to fabricate shares in addition to the limited number of which a joint stock company consists.

Where an indictment alleged that a certain joint-stock company had been established, the capital of which was to consist of 2000 shares, and charged the defendants with conspiring to fabricate a great number of other shares in addition to the said 2000, and it appeared that the company had not been legally established; Abbott, C. J., was of opinion that if, in point of fact, a combination to the effect stated in the indictment were made out, such conduct, in point of law, constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the company's formation. (*z*)

Conspiracy to

The selling unwholesome provisions is, as we have seen, an in-

(*v*) Rex *v.* Hevey, Beatty, and M'Carty, 1782. 2 East, P. C. c. 19, s. 5, p. 858, note (*a*).

(*w*) Anonymous, 1782, MSS. Bayley, J., Rosc. Cr. Evid. 368. *Quære* whether this be not a note to the preceding case.

(*x*) Rex *v.* Roberts and others, 1808, *cor.* Ellenborough, C. J., 1 Camph. 399.

(*y*) Levi *v.* Levi, 6 C. & P. 239.

(*z*) Rex *v.* Mott, 2 C. & P. 521.

dictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants falsely and deceitfully intending to defraud Thomas Chowne, of divers of his goods, &c., together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine of him the said Fordenbourgh, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c., the said Fordenbourgh pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said Mackarty, on such bartering, &c., pretended to be a broker of London, when, in fact, he was not, and that the said Chowne, giving credit to the said fictitious assumptions, personating and deceits, did barter, sell, and exchange, to Fordenbourgh, and did deliver to Mackarty, as the broker between the said Chowne and Fordenbourgh, for the use of Fordenbourgh, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenbourgh, on such bartering, &c., affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenbourgh, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenbourgh, to the great deceit and damage of the said Chowne, and against the peace, &c. (*a*) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants *conspired* eo nomine, yet it charged that they together, &c., did the acts imputed to them, which might be considered to be tantamount. (*b*) The case was considered as one of doubt and difficulty, but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy. (*c*)

barter unwholesome wine.

Mackarty and Fordenbourgh's case.

We have seen that all confederacies, wrongfully to prejudice a third person, are considered as highly criminal at common law. (*d*) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury was proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (*e*)

Conspiracy to solemnize a marriage.

And a conviction has taken place upon an indictment, which charged that M. A. Wrench was a person of ill-fame and bad character, and a common prostitute, and that W. B. Serjeant was an infant within the age of 21 years, and that M. A. W. and P. D. and S. J., intending to defraud the said W. B. S. of his property, conspired for the purpose aforesaid to procure a marriage to be solem-

Conspiracy to procure a marriage with a minor by a license obtained by a false oath.

(*a*) Reg. *v.* Mackarty and Fordenbourgh, 2 Lord Raym. 1179. 2 East, P. C. c. 18, s. 5, p. 823.

(*b*) 2 East, P. C. c. 18. s. 5, p. 824.

(*c*) 2 East, ibid. And see *ante*, p. 281.

(*d*) *Ante*, p. 674.

(*e*) Rex *v.* Taylor and Robinson, 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010. See Wade *v.* Broughton, 3 Ves. & B. 172, that persons conspiring to procure the marriage of a female for the sake of her fortune may be indicted for a conspiracy.

nized between the said W. B. S. and the said M. A. W., by means of a false oath to be taken by the said M. A. W., and by divers false pretences, and without the consent of the mother of the said W. B. S., his father being dead, and that the said M. A. W. and P. D., and S. J., in pursuance of the said conspiracy, did prevail on the said W. B. S. to consent to marry the said M. A. W., and by means of such persuasion, and by means of a false oath taken by the said M. A. W., in order to obtain a license for the solemnization of marriage between the said W. B. S. and the said M. A. W., did cause the said W. B. S. to marry the said M. A. W., and a marriage by such license was accordingly solemnized between them without the leave of the mother of the said W. B. S., who then was such infant as aforesaid. (*f*)

Conspiracy to seduce a young woman.

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and, further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. (*g*)

Conspiracy to carry away and marry a female under the age of twenty-one, without the consent of her parents.

An indictment has been held to lie against several persons for conspiring to carry away a young female under the age of twenty-one from the custody of her parents and instructors, and afterwards to marry her to one of the offenders, contrary to the provisions of the 4 & 5 Ph. & M., c. 8, ss. 3 & 4, and also for conspiring to commit the capital felony (under the 3 Hen. 7, c. 2, s. 1) of taking away an heiress against her will, and afterwards marrying her to one of the defendants. The young lady, who was the heiress of a gentleman of large fortune, and was only fifteen years of age, had been placed under the care of some ladies at Liverpool, for the purpose of finishing her education, and was induced to leave their house by

(*f*) Rex *v.* Serjeant, R. & M. N. P. R. 352.

(*g*) Rex *v.* Lord Grey and others, 3 St. Tri. 519. 1 East, P. C. c. 11, s. 10, p. 460. See also Rex *v.* Sir Francis Blake Delaval and others, 3 Burr. 1434.

means of a fictitious letter, fabricated by the defendants, who conveyed her to Gretna Green, where she was induced by means of false representations to go through the ceremony of a Scotch marriage, and to consent to become the wife of one of the defendants; and the defendants were convicted. (*h*)

Conspiracy to impoverish a man in his trade.

A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade. (*i*) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. (*j*)

But an indictment will not lie for conspiring to commit a civil trespass. Turner's case.

An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them, though it be alleged to be done in the night-time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the Court, said, "I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." (*k*) It may be observed that it was not stated in the indictment that the weapons were *dangerous*, nor that the defendants conspired to go, &c., *with strong hand*.

Nor will an indictment lie for a conspiracy to cheat and defraud a man by selling him an unsound horse. Pywell's case.

In a later case the defendants were charged with conspiring to cheat and defraud General Maclean, by selling him an unsound horse. It appeared that one of the defendants, named Pywell, had advertised the sale of horses, undertaking to warrant their soundness; and that, upon an application by General Maclean, at Pywell's stables, another of the defendants stated to him that he had lived with the owner of a horse which he then showed to the General; that he knew the horse to be perfectly sound, and, as the agent of Pywell, would warrant him to be sound. General Maclean purchased the horse, taking a receipt, in which the horse was mentioned as warranted sound, and to be returned if not approved of within a week. It was discovered very soon after the sale that the animal was nearly worthless. Lord Ellenborough, C. J., was of opinion, that the case did not assume the shape of a conspiracy, and that the evidence would not warrant any proceeding beyond that of an

(*h*) Rex *v.* Wakefield, 2 Lew. 1. The marriage being in Scotland, an indictment for felony under the 3 Hen. 7, c. 2, s. 1, could not have been supported, and there was no evidence to support an indictment under the 4 & 5 Ph. & M. c. 8, s. 4. See vol. 1, p. 703, 711. An indictment was preferred upon the 4 & 5 Ph. & M. c. 8. s. 3, but no judgment given upon it.

(*i*) Eccles' case, 1 Leach, 274.

(*j*) By Lord Ellenborough, C. J., in Rex *v.* Turner, 13 East, 228.

(*k*) Rex *v.* Turner, 13 East, 228, 231. But *qu.* as to that which is reported in this case, (p. 230,) to have been said by Lord Ellenborough in the course of the argument, viz., that "*all* the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity." The facts stated in this case would constitute an offence within the 9 Geo. 4, c. 69, *ante*, vol. 1, p. 471, and it is conceived that a conspiracy to commit an offence within that statute would be indictable, although not carried into effect. See Rex *v.* Wakefield, *supra*. See also the observations on this case in Deac. Game L. 175. C. S. G.

action on the warranty, for the breach of a civil contract. And if this were to be considered as an indictable offence, then, instead of the actions which had been brought on warranties, the defendants ought to have been indicted as cheats, and that no indictment, in a case like this, could be maintained, without evidence of concert between the parties to effectuate a fraud. (*l*)

An indictment will not lie for conspiring to deprive a man of the office of secretary to an illegal trading company.

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that, the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society instead of having an interest which the law would protect, he was guilty of a crime. (*m*)

Combinations amongst journeymen, workmen, &c., 6 Geo. 4. c. 129, repeals former acts.

The several statutes relating to the combinations of workmen were repealed by the 5 Geo. 4, c. 95. But the 6 Geo. 4, c. 129, recites that the provisions of the former act had not been found effectual, and that such combinations are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them, and that it was expedient to make further provision, as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of masters and employers, and for that purpose to repeal the said act, and to enact other provisions and regulations in lieu thereof, and then repeals the said act of 5 Geo. 4, c. 95. It then provides that various statutes therein mentioned, and all enactments in any other statutes or acts which immediately before the passing of the said recited act of the 5 Geo. 4, were in force throughout, or in any part of the United Kingdom of Great Britain and Ireland relative to combinations to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to regulate or control the mode of carrying on any manufacture, trade, or business, or the management thereof, or relative to combinations to lower the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate or control the mode of carrying on any manufacture, trade or business, or the management thereof, or relative to fixing the amount of the wages of labour, or relative to the obliging workmen not hired to enter into work, and every enactment enforcing or extending the application of any of the said several enactments so repealed shall, notwithstanding the repeal of the said recited act of the 5 Geo. 4, still be and remain repealed, except only so far as the same or any of them may have repealed any former act or enactment.

6 Geo. 4, c. 129, s. 3. Compelling journeymen to leave employment, or to return work unfinished,

The third section enacts, "that from and after the passing of this act, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to

(*l*) Rex *v.* Pywell and others, 1 Stark. R. 402.

(*m*) Rex *v.* Stratton and others, *cor.* Lord Ellenborough, C. J., 1 Camph. 549, in the notes. See Reg. *v.* Hunt, 8 C. & P. 642, *ante*, p. 177.

return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants: every person so offending, or aiding, abetting or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months."

preventing hiring themselves, compelling them to belong to clubs, &c., or to pay fines, or to alter the mode of carrying on business, punishable by imprisonment, &c.

By sec. 4, "this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding."

Sec. 4. Proviso for meetings for settling rates of wages to be received, or hours of work to be employed by the persons meeting.

By sec. 5, "this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business;

Sec. 5. Proviso for meetings for rates of wages, &c., to be paid by masters to journeymen, &c.

and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding."

This act further provides that offenders shall be compelled to give evidence, and shall be indemnified; and it also contains provisions for the summoning offenders before justices of peace, and for issuing warrants for their apprehension when they do not appear upon summons; regulates the proceedings before the justices, gives a form of conviction and an appeal to the quarter sessions. (*n*)

The 6 Geo. 4, c. 129, does not empower workmen to combine and dictate to their masters whom they shall employ.

The 6 Geo. 4, c. 129, was not intended to empower workmen to meet and combine for the purpose of dictating to their masters whom they should employ, and consequently a combination of workmen for such a purpose is indictable as a conspiracy. An indictment charged that the defendant with others did conspire to prevent the workmen of J. Garforth from continuing to work in a colliery, and it appeared that seven colliers had been summoned by Garforth before a magistrate for refusing to work, and that this was done at their own request, as they were afraid to work except under the appearance of being compelled to do so. The body of the other men met and agreed upon a letter addressed to Garforth, to the effect that all the workmen in Garforth's employ would strike in fourteen days, unless the seven men were discharged from the colliery. Patteson, J., held that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. (*o*)

Of the prosecution and proceedings in conspiracy. More than one person must have conspired.

We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only. (*p*) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife only because they are esteemed but one person in law, and presumed to have but one will. (*q*) So if all the defendants who are prosecuted for a conspiracy be acquitted but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also. (*r*) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded: (*s*) and this, although the other conspirator named in the indictment was dead before the indictment was preferred. (*t*)

Judgment passed on one defendant before the trial of another defendant.

Where to an indictment against four for a conspiracy, two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer; and the fourth never appeared; and before the argument of the demurrer the record was taken down for trial, and one of the defendants who had pleaded not guilty acquitted, and the other found guilty of conspiracy with him who had pleaded in abatement; and the demurrer was afterwards argued, and judgment of *respondeat ouster* given, whereupon a plea of not guilty was pleaded; the

(*n*) Sec. 6, *et seq.* And see Burn's Justice, tit. *Servants.*

(*o*) Rex *v.* Bykerdyke, 1 M. & Rob. 179.

(*p*) *Ante*, p. 674.

(*q*) 1 Hawk. P. C. c. 72, s. 8.

(*r*) Id. ibid., 3 Chit. Crim. L. 1141.

(*s*) Rex *v.* Kinnersley and Moore, 1 Str. 193.

(*t*) Rex *v.* Nicholls and Bygrave, 2 Str. 1227. But see the case as better reported in 13 East, 412, in the notes.

Court of King's Bench held that judgment might be pronounced upon the one that had been found guilty before the trial of the other defendant; for although it was possible that such defendant might be acquitted, yet the Court were not warranted in coming to the conclusion that that would be so against the verdict that had been found, or in forbearing to pronounce judgment upon the defendant who had been found guilty. (*u*)

Statements in the indictment.

With respect to the statement of the charge in the indictment it may be observed, that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. (*v*) And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Therefore an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently show the *corpus delicti*, or specify any overt act. (*w*) But this is only the case where the conspiracy is to commit some offence, and if it be not to commit some offence, the indictment must show some illegal act done in pursuance of the conspiracy, or it is insufficient. (*x*)

It need not be averred in the indictment that the prosecutor was innocent of the crime imputed to him by the conspirators. (*y*) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was not the father, especially when the words of the indictment were "did *falsely* conspire *falsely* to charge, &c.;" the principle being that innocence must be intended till the contrary appears. (*z*) And it should seem that even without those words the indictment would be sufficient, and need not state that the charge was false, nor that the child was likely to become chargeable, &c. (*a*) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom. (*b*) The conspiracy is the gist of the charge alleged in such an indictment.

Not necessary to state that the defendants knew, &c.

In a case where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of a justice of peace, it was holden not to be necessary

(*u*) Rex *v.* Cooke, 5 B. & C. 538. 7 D. & R. 673. Littledale, J., said, "If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed." *Sed quære*, for such acquittal would not *necessarily* show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant. C. S. G

(*v*) Reg. *v.* Best, 2 Ld. Raym. 1167. 1 Salk. 174. 3 Chit. Crim. L. 1143.

(*w*) Rex *v.* Gill, 2 B. & A. 204. See note (*e*), *post*, p. 692.

(*x*) Rex *v.* Seward, 1 A. & E. 706.

(*y*) Rex *v.* Kinnersley and Moore, 1 Str. 193.

(*z*) Reg. *v.* Best and another, 1 Salk. 174. 2 Lord Raym. 1167.

(*a*) 2 Lord Raym. 1167.

(*b*) Rex *v.* Spragg and another, 2 Burr. 993.

to set forth in the indictment that the defendants knew at the time of the conspiracy that the contents of the certificate were false, on the ground that if persons with intent to obstruct the course of justice, conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such. (*c*)

Not necessary to state the means by which the conspiracy was effected, where the thing intended is illegal. *Secus*, where it is legal.

Where the act is in itself illegal, it is not necessary to state the means by which the conspiracy was effected. Thus, where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose; Lord Mansfield, C. J., said, "The conspiracy is stated and its object; it is not necessary that any means should be stated:" and Buller, J., said, "If there be any objection it is that the indictment states too much; it would have been good certainly if it had not added 'by indirect means,' and that will not make it bad." (*d*) And in a late case, where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. Bayley, J., said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete. (*e*) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements, as in the cases which have been cited of conspiracies to marry paupers. (*f*)

Conspiring to defraud J. W. of divers goods.

Where an indictment charged the defendants with conspiring "to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of 100*l.*;" the Court of King's Bench refused to quash the indictment on motion: for although if this had been an indictment for stealing the prosecutor's goods, it would have been bad for uncertainty, yet in this case the gist of the indictment was the conspiracy, and it might be that there was so much uncertainty in the transaction, which was the subject of the indictment, that the allegation could not be made with greater certainty, as the conspiracy might be to defraud the prosecutor, not of any particular goods, but of any goods the prisoner could get hold of. (*g*)

(*c*) Rex *v.* Mawbey and others, 6 T. R. 619. *Ante*, p. 677, Lawrence, J., said that it was not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, p. 597.

(*d*) Eccles's case in note (*d*) to Rex *v.* Turner, 13 East, 230. *Ante*, p. 687.

(*e*) Rex *v.* Gill, 2 B. & A. 204. In this case the statements were of the most general kind that have ever been held sufficient. See Reg. *v.* Parker, 11 Law, J., N. S. 102, Mag. C. Williams, J., there said, "It has been always thought that in Rex *v.* Gill the extreme of laxity was allowed."

(*f*) *Ante*, p. 684. See also Rex *v.* Seward, *ante*, p. 685, note (*l*).

(*g*) Anonymous, 1 Chitty Rep. 698. In Reg. *v.* Parker, 11 Law. J. N. S. Mag. C. 102, it was said that the objection in this case was that the particular goods were not specified, and probably only so much as showed that was stated in the report.

And so where an indictment stated that the defendants conspired by false rumours to raise the funds, with "intention thereby to injure and aggrieve all the subjects of the king who should on the 21st of February purchase or buy" any shares in the funds; and it was objected that the persons to be affected by the conspiracy were not particularised, as they ought to be, it was held that the indictment was good, for it followed from the nature of the charge that the persons could not be named, because this was a charge of a conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers; and the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. (*h*)

Indictment for conspiring to injure all who should purchase shares in the funds.

So where the first count of an indictment stated that the defendants conspired to defraud "divers of her Majesty's liege subjects, who should bargain with the defendants for the sale of goods and merchandise of the said subjects" of great value, without making payment or other remuneration or satisfaction for the same, with intent to acquire to the said defendants divers sums of money and other profit and emolument; it was held that it was no valid objection that the count did not state what particular creditors the defendants meant to defraud; for if the offence went no further than the conspiracy, it could not be known what particular persons fell into the snare. But it was further held that the count was defective in not stating with sufficient particularity what the defendants conspired to do. For obtaining goods without making payment was not necessarily a fraud, as the words of the indictment might apply to the obtaining goods to sell on commission. (*i*)

Indictment for conspiring to obtain goods without making payment for them.

The second count in the same indictment alleged that the defendants being "indebted to divers persons in large sums of money," conspired to defraud the said creditors of them, the defendants, of payment of their said debts, and in pursuance of the said conspiracy unlawfully did execute a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures stock in trade and good will, of great value, belonging to the said defendants, from two of themselves to the third, for divers false and fraudulent considerations, with intent thereby to procure to the said defendants divers sums of money and other emoluments; and it was held that this count was bad for the same reasons as the first; it did not state in what respect the deed was false and fraudulent, and therefore the Court had only the prosecutor's general opinion upon this point, not the facts on which it was founded. (*j*)

Indictment for conspiring to obtain goods by a fraudulent deed.

Where an indictment alleged that an issue in an action between H. B. and G. C. was tried, and that the plaintiff recovered a verdict for the sum of 17*l.*, and that the Judge certified that execution ought to issue forthwith, and that the defendants "did conspire falsely and fraudulently to cheat and defraud the said H. B. of the fruits and advantages of the said verdict and certificate;" Lord Denman, C. J., held that the indictment was bad, as the allegation was too general, and did not convey any specific idea which the

Indictment for conspiring to defraud of the fruits of a verdict too general.

(*h*) Rex *v.* De Berenger, 3 M. & S. 68, *ante*, p. 679.

(*i*) Reg. *v.* Peck, 9 A. & E. 686. 1 P. & D. 508.

(*j*) Reg. *v.* Peck, *supra*.

mind could lay hold of, to judge whether any unlawful act had been done or attempted. The terms used did not import in what manner the plaintiff was to be deprived of the fruits and advantages of his verdict, and it was not even alleged that the verdict would lead to any fruits and advantages. (*k*)

So where a count of an indictment alleged that the defendants conspired "by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies;" the Court of King's Bench arrested the judgment on the ground that this count was in too general a form to be supported. (*l*) So where a count charged that the defendants did "conspire to cheat and defraud the just and lawful creditors" of F.; Lord Tenterden, C. J., thought that the count was much too general, as it did not state what was intended to be done, or the persons to be defrauded, but refused to stop the case on this point, as if an acquittal were directed, and the count should turn out to be good, the defendants might plead *autrefois acquit.* (*m*)

An indictment for conspiring to obtain goods and obtaining them held bad for not stating whose property the goods were.

An indictment for a conspiracy to obtain goods, which states that the goods were obtained, must state whose property the goods were, or it will be insufficient. The first count alleged that the defendants intending to cheat and defraud divers of the liege subjects of the Queen of their goods, &c., unlawfully conspired by divers false pretences to obtain from divers of the liege subjects, &c., then carrying on business in the city of London, to wit, T. Tam and D. Law, warehousemen and copartners, and E. Fennell and R. Fennell, cotton yarn manufacturers and copartners, &c., divers goods and merchandise of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise. The count then set out several overt acts as to the obtaining goods from the parties above named respectively, and concluded by averring that the defendants did by the means aforesaid obtain from the said T. Tam and D. Law, and E. Fennell and R. Fennell, &c., the goods and merchandise aforesaid, and did cheat and defraud them thereof. The second count was similar, but omitted to state the overt acts. The third count stated the conspiracy to be to cause it to be believed that one of the defendants, who was then an uncertificated bankrupt, was not B. P., but J. P., and that he carried on an extensive shipping business, and was a man of large property, and had a large capital in the business, and by means of the said belief to obtain from divers liege subjects (not naming them) divers goods, wares, and merchandise, and to cheat and defraud the said liege subjects of the said goods, &c. The fourth count charged that the defendants unlawfully combined by divers false pretences to obtain from divers liege subjects (not naming them) divers other goods and merchandise of great value, and to cheat and defraud the said liege subjects of the said goods, &c. The defendants having been convicted, a rule was obtained to arrest the judgment for the insufficiency of the indictment in not stating that the goods, &c., which the defendants were charged with conspiring to obtain, were the property of any

(*k*) Rex *v.* Richardson, 1 M. & Rob. 402.

(*l*) Rex *v.* Biers, 1 A. & E. 327.

(*m*) Rex *v.* Fowle, 4 C. & P. 592. The defendants were acquitted.

person, it being consistent with the statement that they were the goods, &c., of the defendants themselves: and the Court of Queen's Bench held that the indictment was bad for not stating to whom the goods belonged. That where the object charged was a conspiracy to obtain from certain persons named divers goods, and to cheat and defraud them of the same, and they were obtained, and the parties defrauded, no precedent was to be found to show that an indictment was good which omitted to state whose the goods were. The first count, therefore, was imperfect, and the objection applied more strongly to the fourth count, where the language was still more general. The conspiracy charged was to obtain divers goods and to cheat and defraud certain persons named, not with intent to cheat and defraud them of the same, though perhaps that would have made no difference, and as there was no statement to whom the goods belonged, the charge did not, of necessity, import any offence, as it was consistent with an attempt by the defendants to obtain by some means their own goods unlawfully detained from them; and to hold that the use of the words "to cheat and defraud" necessarily implied that the goods belonged to the parties who were stated to be defrauded, would be letting in a generality, which was not shown ever to be allowed. (*n*)

An indictment for a conspiracy to conceal and embezzle the personal estate of a bankrupt must state the petitioning creditor's debt, the trading, and the act of bankruptcy, and that the party had actually become bankrupt. (*o*)

Technical averment of conspiracy.

The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants "did conspire, combine, confederate, and agree together;" but it is

(*n*) Reg. *v.* Parker, 11 Law. J., N. S. Mag. C. 102. Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose, (*e. g.* to raise the funds) and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as the parties injured, the property obtained, and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried beyond the intention, whereas in the other case what was actually effected may easily be stated. The case may be compared to the cases of burglary with intent to steal, and burglary accompanied by an actual stealing; in the former it is sufficient to state that the prisoner broke and entered the house with intent to steal the goods (without describing them) of one A. B.; and in the latter the goods stolen must be particularised. So where a conspiracy has been detected before it is carried into execution, so far as to ascertain the parties to be injured by it, an indictment would be good without naming such parties. Rex *v.* De Berenger, *supra*, note (*h*). But where the conspiracy had proceeded so far as to fix the parties intended to be injured, such parties should be expressly named, and if the object was to defraud them of *their* goods, or their goods had been actually obtained thereby, the indictment should state in the one case the intent to defraud them of *their* goods, and in the other that they were defrauded of *their* goods. It may, perhaps, admit of some doubt whether the possibility of the goods belonging to the defendants in the principal case necessarily rendered the indictment bad; for as a party may be guilty of larceny in stealing his own goods, *ante*, p. 87, there seems no reason why parties who conspired to obtain their own goods from another, and thereby to cheat and defraud him, under such circumstances as did not amount to larceny, should not be indictable for a conspiracy. The better ground to rest the decision upon would seem to be that the indictment did not go to such a degree of particularity as the facts enabled the prosecutor to go, and the rules of criminal pleading require to be adopted where it is practicable. C. S. G.

(*o*) Rex *v.* Jones, 4 B. & Ad. 345. 1 N. & M. 78. See the case more fully stated, *ante*, p. 231, 232.

said that other words of the same import seem to be equally proper. (q) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require, (not charging a felony) though they do not include a charge of conspiracy. (r)

Place where the offence may be tried.

It has been holden that in an indictment for a conspiracy the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (s) But in a late case it was said by the Court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the King's death, or in conspiring to levy war. (t) And a case was cited in which the trial proceeded upon this principle; and in which, though no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (u)

Jurisdiction of the justices at quarter-sessions.

The offence of conspiracy might formerly be tried by justices of peace in their quarter sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the Court decided in favour of their jurisdiction, upon general principles, saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (v) But now by the 5 & 6 Vict. c. 38, s. 1, "neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons, for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person."

5 & 6 Vict. c. 38, s. 1.

Wife of one defendant no witness for the others.

On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (w) And so it has been held, upon an indictment

(q) 3 Chit. Crim. L. 1143.

(r) See the judgment of Lord Ellenborough, C. J., in Rex v. Johnson, 3 M. & S. 550. In Reg. v. Murphy, 8 C. & P. 297, counts for libel were joined.

(s) Reg. v. Best and another, 1 Salk. 174.

(t) Rex v. Brisac and Scott, 4 East. R. 171.

(u) Rex v. Bowes, K. B., Trin. T. 1787, cited by Grose, J., in pronouncing the opinion of the Court in Rex v. Brisac and Scott, *ante*, note (t).

(v) Rex v. Rispal, 3 Burr. 1320. 1 Black. R. 368. Burn's Just. tit. *Conspiracy*, sec. 1. The point was so decided in an earlier case, Rex v. Edwards and others, 8 Mod. 321.

(w) Rex v. Lockyer and others, cor. Lord Ellenborough, C. J., 5 Esp. N. P. R. 107. Rex v. Frederick and another, 2 Str. 1095. 1 Phill. Evid. 74.

against the wife of W. S. and others for a conspiracy in procuring W. S. to marry, that W. S. was not a competent witness in support of the prosecution. (*x*)

How far the acts or words of one conspirator are evidence against the others.

An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party, and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial, for the same offence. (*y*) And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (*z*) It is for the Court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus, where Stone was indicted for treason, and one of the overt acts charged was conspiring with Jackson and others to collect intelligence, and to communicate it to the King's enemies in France, &c., after evidence had been given to connect the prisoner with Jackson in the conspiracy as charged, the secretary of state for the foreign department was called to prove, that a letter of Jackson's, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated; and such letter was received in evidence. (*a*) So, in another case, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers, and although no absolute proof had been given of their existence previous to the prisoner's apprehension. (*b*) But it seems that if such papers had not been proved to have been inti-

Proof of concert before declarations of others admissible.

(*x*) Rex *v.* Serjeant, R. & M. N. P. R. 352. 1 Phill. Evid. 74.

(*y*) 1 Phill. on Evid. 94, 95, 7th Ed. See 9th Ed. 201.

(*z*) 1 East, P. C. c. 2, s. 37, p. 96. 2 Stark. Evid. 326, and 1 Phill. Evid. 477, citing the Queen's case, 2 Brod. & B. 302.

(*a*) Rex *v.* Stone, 6 T. R. 527.

(*b*) Rex *v.* Watson, 2 Stark. C. 140.

mately and immediately connected with the objects of the conspiracy, they would not have been admissible; as, in the same case, a paper containing seditious questions and answers, and found in the possession of a co-conspirator, was not read in evidence, the Court doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible. (*c*)

Declarations and acts in pursuance of the conspiracy.

Where, upon an indictment for conspiring to annoy a broker who distrained for church-rates, it was proved that one of the defendants, in the presence of the other, excited the persons assembled at a public meeting to go in a body to the broker's house; it was held that evidence was admissible to show that they did so go, although neither of the defendants went with them, but that evidence of what a person, who was at the meeting, said a few days after the meeting when he himself was distrained on for church-rates, was not admissible. (*d*) And where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that Jones was also a member, and that in the evening of the 3rd of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones in the forenoon of the same day to certain parties to meet on the race-course was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn; it was held that what Jones said at the New Inn was admissible, as it was all part of the same transaction. (*e*)

Proof of the conspiracy.

The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. (*f*) Although the common design is the root of the charge, yet it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, because in many cases of the most clearly-established conspiracies there are no means of proving any such thing. (*g*) If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. (*h*) In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card-maker, the evidence against them was, that they had at several times given money to the prosecutor's apprentices, to put grease into the paste, which

It is not necessary to prove the actual conspiracy, but it may be inferred from the acts of the parties.

(*c*) Rex *v.* Watson, *supra*. But they held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy it would clearly be admissible.

(*d*) Reg. *v.* Murphy, 8 C. & P. 297, Coleridge, J.

(*e*) Reg. *v.* Shellard, 9 C. & P. 277, Patteson, J.

(*f*) Rex *v.* Parsons and another, 1 Black. R. 392.

(*g*) Per Coleridge, J., Reg. *v.* Murphy, 8 C. & P. 297.

(*h*) Per Coleridge, J., ibid.

had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns; it was objected that this could not be a conspiracy, on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. (*i*) And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over, for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. (*j*)

Persons joining after the conspiracy is formed.

Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there be no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete. (*k*) So that if several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. (*l*) Where, therefore, upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected that in support of the prosecution evidence should be given of a *previous* meeting of the parties accused for the purpose of confederating to carry their object into execution; Lord Mansfield, C. J., overruled the objection, saying, that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the person intended to be injured. (*m*)

Persons meeting for one purpose afterwards conspiring for another.

General evidence of the nature of the conspiracy.

It appears to have been held that upon an indictment for a conspiracy, where, from the nature of the case, it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendants; but Lord Kenyon, C. J., said, that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged

(*i*) Rex *v.* Cope and others, 1 Str. 144.

(*j*) Rex *v.* Pollman and others, 2 Campb. 233.

(*k*) Rex *v.* Lord Grey and others, 9 St. Tri. 127. Reg. *v.* Murphy, 8 C. & P. 297, Coleridge, J.

(*l*) Rex *v.* Lee, 2 Stark. Evid. 324.

(*m*) Lee's case, 2 M'Nally, Evid. 634, as cited Rosc. Cr. Evid. 374. S. P. per Coleridge, J. Reg. *v.* Murphy, 8 C. & P. 297. See *ante*, p. 675, note (*i*).

with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on; and his Lordship, therefore, permitted a person, who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (*n*) And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken. (*o*)

Either course may be adopted.

It has recently been held that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within *Rex* v. *Hunt*, (*q*) where evidence of drilling at a different place two days before and hissing an obnoxious person was held receivable. (*r*)

But after such general evidence has been received the parties before the Court must be affected for their share of it. And it seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence to prove its existence, although consultations for the purpose, and letters written in prosecution of the design, but not sent, are admissible. (*s*) It results from the principles already stated, and it has been observed as a conclusion to which they lead, that it seems to make no difference as to the admissibility of the act or declaration of a co-conspirator against the party defendant before the Court, whether such co-conspirator be indicted or not, or tried or not with the defendant. (*t*) The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Cumulative instances of fraud permitted to be given in evidence.

In a case where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the

(*n*) Rex *v.* Hammond and Webb, 2 Esp. N. P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester and in France, Scotland, and Ireland, at the same time.

(*o*) Lord Stafford's case, 7 St. Tr. 1218. Lord W. Russell's case, 9 St. Tr. 578. Lord Lovat's case, 18 St. Tr. 530. Hardy's case, 24 St. Tr. 199. Horne Tooke's case, 25 St. Tr. 1.

(*q*) 3 B. & Ald. 566.

(*r*) Reg. *v.* Frost. 9 C. & P. 129, Tindal, C. J., Parke, B., and Williams, J.

(*s*) 2 Stark. Evid. 327.

(*t*) 2 Stark. Evid. 329. See *post*, book 6, c. 4, s. 2, for further points as to the evidence in cases of conspiracy.

ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J., said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." (*u*)

In an indictment for conspiring to defraud D. *and others*, which charges the obtaining the goods of D. *and others*, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D., is inadmissible.

But where a count alleged that the defendant and others did conspire to defraud J. Donkersley *and others* of certain goods, and that in pursuance of the said conspiracy the defendant did falsely pretend to the said J. D. that he was a merchant of the name of Grantham, carrying on business at Leeds and Huddersfield; and in further prosecution of the said conspiracy, and under colour of a pretended contract with the said J. D. for the purchase of certain cloth of the goods of the said J. D. *and others*, did obtain possession of a large quantity of cloth of the goods of the said J. D. *and others* from the said J. D., with intent to cheat the said J. D. *and others*, to the great damage of the said J. D. and others; and it appeared that J. D. had partners; and evidence was given to shew an intended fraud upon that firm; and it was also proposed to give evidence of attempts made by the defendant to defraud other persons, as well as the firm of J. D. and Co., of their goods: it was objected that the word "others" must be taken to mean others the partners of J. D.; that where the goods were stated to be the goods of J. D. and others, it could only mean others his partners, and the word could not have one meaning at one part of the count, and another at another part of the same count. The evidence was received; but, upon a case reserved, the Judges held the conviction wrong. (*v*)

The Court will take judicial notice of a war.

In the case mentioned in this Chapter, of a conspiracy to raise the price of the public funds by false rumours, it was holden that the Court will take judicial notice that a war exists between this country and a foreign state, such war having been recognised in different acts of Parliament; and, therefore, that an allegation to that effect need not be proved. (*w*)

Upon an indictment for conspiring to accuse of forging a cheque, held unnecessary to produce the cheque.

Where an indictment alleged that the defendants conspired falsely to accuse the prosecutor of having feloniously forged a cheque for the payment of 178*l.*, and that in execution of such conspiracy a letter was written by one of the defendants, in which he stated that he had been employed to investigate the circumstances attending the forging of a cheque for 178*l.*, and proof was given of the letter, and also of conversations referring in like manner to a cheque, which the defendants charged the prosecutor with having forged, but the cheque itself was not produced. It was objected that the cheque was so incorporated with the evidence, that the prosecutor was not entitled to prove the conversations without producing the cheque, to which they referred, which it appeared from the evidence was in existence, and in the possession of the defendants. Lord Tenterden, C. J., was, however, of opinion that it was not essential to prove the contents of the cheque or to produce it, but that it was

(*u*) Rex *v.* Roberts and others, 1 Campb. 399. *Ante*, p. 684.

(*v*) Reg. *v.* Steel, 1 C. & Mars. 337. No ground for the decision is stated, but Lord Abinger said at the close of the argument, "I think the counsel for the defendant is right in saying that the word 'others' must have the same meaning in the earlier part of the count as in the latter part of it; and with respect to the property of the goods it must mean that they were the goods of J. D. and his partners."

(*w*) Rex *v.* De Berenger, 3 M. & S. 67. *Ante*, p. 679.

enough to take the conversations as they passed. And the Court of King's Bench, upon a rule obtained to shew cause why there should not be a new trial, held that it was not necessary to produce the cheque. The whole of the charge against the defendants was founded on the letter set out in the indictment, which was written by one of the defendants upon the application of the other; and they having taken upon themselves to treat as an existing thing a cheque for 178*l.*, it was not necessary, on the part of the prosecutor to produce it in evidence, even although it appeared that it actually existed. But it might be a fabrication on their part, there might be no such cheque, and then it could not be necessary to produce it. (*x*)

Record of acquittal.

Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. (*y*)

Proof of bankruptcy.

Where in an indictment for conspiracy, the bankruptcy of one of the defendants was stated in a prefatory allegation, and to prove this allegation, the proceedings under the bankruptcy were put in; Lord Tenterden, C. J., held, that the assignment was not admissible, without calling the subscribing witness to prove the execution of it. (*z*)

Where an indictment charged that the defendant with divers others did conspire to prevent the workmen of one J. G. from continuing to work in a colliery; Patteson, J., held, that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen. (*a*)

Two persons were indicted for felony, in attempting to poison A. B., by administering certain poisonous ingredients, as set forth in the indictment. At the same time, an indictment was found against them for a conspiracy to poison the same individual by the same means. On the trial of the first indictment, the prisoners were acquitted, there being no proof that the ingredients were poisonous. Parke, J., thereupon directed an acquittal for the conspiracy also, there being no other proof of a conspiracy to poison than that by which it was attempted to establish the felony, *viz.*, that the ingredients were poisonous. (*b*)

Averment as to one of the conspirators not proved.

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, "*viz.*, to the use of them the said A., B., and C., and certain other persons, to the jurors unknown," a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured,) did not know that C. was to have any part of it, or was at all implicated in the transaction; it was holden, that the averment concerning the application of the money was material, though coming under a *viz.*; and that as to D., the conspiracy was not proved as laid. (*c*)

(*x*) Rex *v.* Aldridge, 1 N. & M. 776.
(*y*) Rex *v.* Horne Tooke, Old Bailey, 1794. 1 Chitty Burn. 823.
(*z*) Rex *v.* Pope, 5 C. & P. 208.
(*a*) Rex *v.* Bykerdyke, 1 M. & Rob. 179.
(*b*) Maudsley's case, 1 Lew. 51.
(*c*) Rex *v.* Pollman and others, 2 Campb. 231.

Variance.

Where an indictment for a conspiracy to procure false witnesses on the trial of an ejectment, at the great sessions for the county of Glamorgan, stated that at the *general* sessions of our Lord the King, holden, &c., an action of ejectment was depending, in which action J. Doe, on the demise of W. Rees and D. Terry, was the plaintiff, and R. Thomas and T. Beavan the defendants, and it appeared that the ejectment was brought on a joint and two several demises of Rees and Terry; it was held, first, that the description of the sessions was erroneous, as it should have been at the great sessions; secondly, that there was a variance between the action described in the indictment and the action proved to have been pending. (*d*)

Misdescription of a statute in an indictment for conspiracy.

Where an indictment for a conspiracy stated in the inducement that the defendants knew that the parties conspired against were the proprietors of certain licensed stage carriages, and as such proprietors liable to certain penalties, in which the drivers of such carriages should be convicted of any offence committed by the said drivers, against "a certain act of Parliament made and passed in the second and third years of the reign of his present Majesty, intituled, &c.," (setting out the title correctly); and that the defendants unlawfully conspired falsely to exhibit a certain information charging, &c., contrary to the form of the statute in such case made and provided; the judgment was arrested, on the ground that a statute cannot be pleaded as made in two years; for in law an act cannot be made in two years. (*e*)

Particulars of the charges intended to be relied upon.

Where the counts in an indictment for a conspiracy are framed in a general form, the Judge will order the prosecutor to furnish the defendants with a particular of the charges, upon which he means to rely, and such particular ought to be so framed as to give the defendants the same information as would be given by a special count: but it need not state the specific acts the defendants are charged with having done, or the times or places at which such acts are alleged to have taken place. (*f*)

Acquittal of some of the defendants.

Upon the trial of an indictment for a conspiracy, the counsel for the prosecution has a right, before opening his case, to have any of the defendants acquitted, in order that he may call them as witnesses, and the counsel for the other defendants has no power of objecting to this being done. (*g*)

Election.

Where an indictment contained counts for a conspiracy and counts for a libel contained in a hand-bill, and there was no evidence to affect one of the two defendants as to the libel; Coleridge, J., at the close of the case for the prosecution, put the prosecutor to elect upon which charge he would go, before the defendants' counsel entered upon the defence. (*h*)

(*d*) Rex *v.* Thomas, 1 C. & P. 472, Park, J. A. J.

(*e*) Rex *v.* Biers, 1 A. & E. 327. The correct statement is "a certain statute made and passed in a Session of Parliament, held in the first and second years of the reign of King William the Third." Per Patteson, J., ibid. Gibbs *v.* Pike, 8 M. & W. 223. S. P.

(*f*) Rex *v.* Hamilton, 7 C. & P. 448. Littledale, J., after consulting several of the other Judges. In Anonymous, 1 Chitty, 698, the Court of King's Bench refused to order such particulars to be given on motion, but intimated that the correct course was to apply to the prosecutor to give some information as to the particulars, upon which he meant to rely in support of the indictment, and if he refused then an application might be made to postpone the trial in order that the question might be more maturely discussed. From which it is to be inferred that the motion had been made without any previous application for particulars to the prosecutor. C. S. G.

(*g*) Rex *v.* Rowland, R. & M. N. P. R. 401, Abbott, C. J.

(*h*) Reg. *v.* Murphy, 8 C. & P. 297.

Change of venue.

The Court of King's Bench have refused to change the venue in an indictment for a conspiracy to destroy foxes and other vermin, on the ground that the gentlemen who were likely to serve on the jury to try the indictment were much addicted to fox-hunting. (*i*)

Point respecting cross-examination where one defendant only calls witnesses.

In a recent case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine such witness as to any other conversation between A. and C., although the evidence should tend chiefly to criminate A. (*k*)

If the jury convict of so much of a count, as amounts to an indictable offence, judgment may be passed on the defendants.

If upon an indictment for conspiracy, the jury find the defendants guilty of so much of the indictment as amounts to a misdemeanor, the Court may pass judgment upon the defendants. The defendants were indicted for conspiring falsely to indict A. B. for keeping a gaming-house, for the purpose of extorting money from the said A. B., and the jury found the defendants guilty of conspiring to indict A. B. for the purpose of extorting money, but not to indict him falsely; and it was held that enough of the indictment was found to enable the Court to give judgment; for in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law; and the jury had found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor whether the charge were or were not false. (*l*)

Punishment.

In former times, persons convicted of a conspiracy at the suit of the King, to accuse another person of a capital offence, were liable to receive what was called the *villanous* judgment, that is, to lose their *liberam legem*, whereby they were discredited and disabled as jurors, or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their bodies committed to prison. (*m*) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party: and for some time past it appears to have been the better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the Court. (*n*)

(*i*) Rex *v.* King, 2 Chitty Rep. 217.

(*k*) Rex *v.* Kroehl and others, 2 Stark. N. P. R. 343.

(*l*) Rex *v.* Hollingberry, 4 B. & C. 329. 6 D. & R. 345.

(*m*) 1 Hawk. P. C. c. 72, s. 9. 4 Black. Com. 136.

(*n*) Id. ibid. The pillory was also very commonly a part of the punishment until taken away by the 56 Geo. 3, c. 138. See also *ante*, p. 669, note (*d*). In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c., they received the following judgment: Richard Parsons, (the father of the child, who was the principal agent in the pretended communication,) to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons the mother, to be imprisoned one year; Mary Fraser, a servant who was aiding and assisting, was sent to the house of correction, to hard labour for six months; Moore, the curate of the parish, and one James, were discharged on paying the pro-

Incompetency as a witness.

A consequence of the attaint of conspiracy, where the party was subject to the villanous judgment, appears to have been incompetency as a witness. (*o*) A party, therefore, convicted of a conspiracy to bribe witnesses, on an information against the revenue laws, not to appear before the justices of the peace, is incompetent. (*p*) But this consequence seems not to have attached to other cases of conspiracy at the suit of the party. (*q*) And in a late case in the Admiralty Court, which underwent much discussion, Sir W. Scott determined, on great consideration, that a conviction for a conspiracy to commit a fraud would not render an affidavit of the convict inadmissible. (*r*)

All the defendants must be present in Court upon a motion in arrest of judgment, or for a new trial.

In conclusion of this chapter, it may be mentioned, that, after a conviction for a conspiracy, the defendants must be present in Court when a motion is made on their behalf, in arrest of judgment. (*s*) And also, that upon a motion for a new trial, after such conviction, all the defendants must be present. (*t*) And it is not a sufficient excuse for absence, that they are in custody on civil process; but if they were in custody on criminal process, the case would be different, for then they might be charged with the conspiracy also. (*u*) But where an indictment has been removed into the Court of King's Bench, after verdict, but before judgment, and set down for argument, it does not appear to be necessary, that the defendants should appear in Court upon the argument, the proceeding being in the nature of a special verdict, and the party not being considered as convicted, until after the Court have determined upon the verdict. (*v*)

secutor 300*l.* and his costs, which were nearly as much more. Brown, who had published a narrative, and one Day, the printer of a newspaper, had previously made their peace with the prosecutor.

(*o*) Co. Lit. 6 *b.* 2 Hale, 277. 1 Hawk. P. C. c. 72, s. 9. 1 Phil. Evid. 17.

(*p*) Bushel *v.* Barrett, R. & M. N. P. R. 434. Gaselee, J., and Littledale, J.

(*q*) 2 Hale, 277. Carth. 416. 1 Hawk. P. C. c. 72, s. 9.

(*r*) In the case of the Ville de Varsovie and others, 1817, 2 Dods. Adm. R. 174. 1 Phil. on Evid. 18.

(*s*) Rex *v.* Spragg and another, 2 Burr. 929. 1 Black. R. 209.

(*t*) Rex *v.* Teal and another, 11 East, 307. Rex *v.* Askew, 3 M. & S. 9. Rex *v.* Lord Cochrane, 3 M. & S. 10.

(*u*) Rex *v.* Hollingberry, 4 B. & C. 329. 6 D. & R. 345.

(*v*) Rex *v* Nichols, 2 Str. 1227.

CHAPTER THE THIRD.

OF THREATS, AND THREATENING LETTERS.

Threats at common law.

It is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (*a*) Threats directed against persons immediately under the protection of a Court are offences punishable by fine and imprisonment, as if a man threaten his adversary for suing him, a counseller or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (*b*) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (*c*)

Rex v. Southerton. Threatening to charge a party with penalties for selling medicines without a stamp, holden not to be indictable.

But where the threat is calculated to overcome a firm and prudent man, it is indictable.

But it was holden in a modern case, that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Friar's Balsam*, without a stamp, (which by the 42 Geo. 3, c. 56, is prohibited to be vended without a stamped label) for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist, and, therefore, was not in itself an indictable offence *at common law*, although it was alleged that the money was obtained, no reference being made to any *statute* which prohibits such attempt. In this case Lord Ellenborough, C. J., said, "To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not, and ought not, to have resisted. Then what authority is there for considering these as offences at common law? The principal case relied on is that of *Rex* v. *Woodward and others*, (*d*) which was where the defendants, having another man in their actual custody at the time, threatened to carry him to

(*a*) 1 Hawk P. C. c. 53, s. 1. Reference is made to 1 Hall, 567, but *qu.* the reference.

(*b*) 4 Black. Com. 126.

(*c*) 2 Chit. Crim. L. 149.

(*d*) 11 Mod. 137, more fully stated in 6 East. R. 133, 134.

gaol, upon a charge of perjury; and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted." (*e*)

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (*f*) there seems no reason to doubt but that it is indictable as a misdemeanor at common law. (*g*)

Offences by statutes.

Demanding property with menaces, with intent to steal; accusing, or threatening to accuse of an infamous crime with an intent to extort property, and by such accusation or threat actually extorting; the sending or delivering of a threatening letter, or writing to any person, thereby threatening to kill or murder, or to burn or destroy, or thereby with menaces demanding property; accusing, or threatening to accuse, or sending or delivering a letter, &c., accusing or threatening to accuse of certain crimes with intent to extort money, &c., are offences of the degree of felony by the provisions of recent statutes.

4 Geo. 4, c. 54, s. 3, recites 9 Geo. 1, c. 22.

The 4 Geo. 4, c. 54, s. 3, recites, that whereas by the 9 Geo. 1, c. 22, s. 1, it is enacted, "that if any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing, or shall forcibly rescue any person being lawfully in custody of any officer or other person for any such offence, or shall, by gift or promise of money or other reward, procure any of his Majesty's subjects to join him or them in any such unlawful act, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony without benefit of clergy;" and whereas by the 27 Geo. 2, c. 15, it is among other things enacted, "that if any person or persons shall knowingly send any letter, without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill

and 27 Geo. 2, c. 15.

(*e*) Rex *v.* Southerton, 6 East. R. 126, 140. And see vol. 1, p. 132.

(*f*) *Ante*, vol. 1, p. 884, *et seq.*

(*g*) See a precedent in 3 Chit. Crim. L. 841.

or murder any of his Majesty's subject or subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing shall be demanded in or by such letter or letters, or shall forcibly rescue any person being lawfully in custody of any officer or other person for the said offences, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy;" and whereas by the 30 Geo. 2, c. 24, s. 1, it is among other things enacted, "that all persons who shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandises from the person or persons so threatened to be accused, shall be deemed offenders against law, and the public peace, and the Court before whom such offender or offenders shall be tried, shall in case he, she, or they shall be convicted of any of the said offences, order such offender or offenders to be fined and imprisoned, or or be put in the pillory, or publicly whipped, or to be transported for the term of seven years, as the Court, in which any such offender or offenders shall be convicted, shall think fit and order; and whereas it is expedient that a lesser degree of punishment should be provided for the offence of sending threatening letters, in the cases mentioned in the two first recited acts, and that the same degree of punishment should be inflicted in the cases mentioned in the last recited act, and be extended to persons accessory to the said offences;" and then enacts, that so much of the said recited acts as relates to the sending and delivering letters in the cases therein respectively mentioned shall be repealed, and that "if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, (demanding money or other valuable thing,) or threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw, (or shall knowingly and wilfully send or deliver any such letter or writing threatening to accuse any of his Majesty's subjects of any crime punishable with death, transportation, or pillory, or of any infamous crime, with a view or intent to extort or gain money, security for money, goods or chattels, wares, or merchandise, from the person or persons so threatened,) or shall procure, counsel, aid or abet the commission of the said offences, or of any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person for any of the said offences; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term not less than seven years, as the Court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years." (*h*)

and 30 Geo. 2, c. 24.

And the expediency of a lesser punishment, &c.

And enacts that sending or delivering certain threatening letters or writing, shall be felonies punishable by transportation, &c.

(*h*) The 4 Geo. 4, c. 54, contains no express provision for the punishment of accessories after the fact to the offence of sending threatening letters, nor any for that of principals in the second degree, or of accessories before or after the fact to the

This statute contained other enactments, but the clause which provided for the punishment of persons who might send letters, &c., threatening to accuse of any *infamous crime*, received a construction which caused the 6 Geo. 4, c. 19, to be passed for the purpose of extending the signification of those words. (*i*) The latter statute was, however, repealed by the 7 & 8 Geo. 4, c. 27, which also repeals the 4 Geo. 4, c. 54, "except so far as it relates to any person who shall send or deliver any letter or writing threatening to kill or murder, or to burn or destroy as therein mentioned, or shall be accessory to any such offence, or shall forcibly rescue any person being lawfully in custody for any such offence."

The 7 & 8 Geo. 4, c. 29, contained several enactments relating to demands of property or money, accompanied with menaces or force, and obtaining the property or money by threatening to accuse of an infamous crime, but these provisions were repealed by the 1 Vict. c. 87, s. 1. (*j*)

7 & 8 Geo. 4, c. 29, s. 8. Sending letters containing menacing demands or threatening to accuse a party of an infamous crime to extort money, &c.

The 7 & 8 Geo. 4, c. 29, s. 8, which is still in force, enacts, "that if any person shall knowingly send or deliver any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, (*k*) or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or of any assault, with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as hereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment." (*l*)

Sec. 9. What shall be deemed an infamous crime.

The ninth section, for defining what shall be an infamous crime within the meaning of the act, enacts, "that the abominable crime of buggery, committed either with mankind or with beast, and every

offence of rescuing persons in custody for any such offence; the principals in the second degree, therefore, are punishable in the same manner as the principals in the first degree, and the accessories are punishable (under the 7 & 8 Geo. 4, c. 28, ss. 8 & 9, and the 1 Vict. c. 90, s. 5,) in the manner stated in note (*u*), *ante*, p. 448. C. S. G.

(*i*) See Rex *v.* Hickman, R. & M. C. C. R. 34, *post*, p. 716.

(*j*) This section repeals so much of the 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, (relating to Ireland) "as relates to any person who shall with menaces, or by force, demand any chattel, money, or valuable security of any person, with intent to steal the same, and so much of the same acts as relates to any person who shall accuse, or threaten to accuse, any other person of any infamous crime, with a view or intent to extort or gain from him, and who shall by intimidating him by such accusation or threat, extort or gain from him any chattel, money, or valuable security, and so much of the same acts as relates to the punishment of principals in the second degree, and of accessories before and after the fact respectively, to such of the felonies punishable under these acts as are hereinbefore referred to."

(*k*) See 7 & 8 Geo. 4, c. 29, s. 5, *ante*, p. 73.

(*l*) The 9 Geo. 4, c. 55, s. 8, relating to Ireland, is similar to this section. See the 7 & 8 Geo. 4, c. 29, s. 4, and the 1 Vict. c. 90, s. 5, *ante*, p. 128, as to hard labour and solitary confinement, and the 7 & 8 Geo. 4, c. 29, s. 61, *ante*, p. 128, as to the punishment of principals in the second degree and accessories.

assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, (*m*) persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act."

1 Vict. c. 87, s. 4. Obtaining property by threat of accusing of unnatural crimes.

The 1 Vict. c. 87, s. 4, enacts, "that whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery committed either with mankind or with beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid to extort or gain from such person, and shall by intimidating such person by such accusation or threat extort or gain from such person any property, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." (*n*)

Demanding money with menaces.

By sec. 7, "whosoever shall with menaces or by force demand any property of any person with intent to steal the same, shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years." (*o*)

Punishment of accessories.

By sec. 9, "in the case of every felony punishable under this act every principal in the second degree and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

Offences punishable by imprisonment.

By sec. 10, "where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

Construction of the word "property."

By sec. 12, "the word 'property' shall throughout this act be deemed to denote everything included under the words 'chattel, money, or valuable security,' used in the said acts of the seventh and eighth years and ninth years respectively of King George the Fourth." (*o*)

By sec. 13, "where any offence punishable under this act shall be committed within the jurisdiction of the Admiralty of England or of Ireland, the same shall be dealt with, inquired of, tried, and deter-

(*m*) These words were introduced into the 6 Geo. 4, c. 19, in consequence of the decision in Rex *v.* Hickman, R. & M. C. C. R. 34, *post*, p. 716.

(*n*) See the other sections of this statute, *ante*, vol 1, p. 867.

(*o*) See the 7 & 8 Geo. 4, c. 29, s. 5, *ante*, p. 73.

mined in the same manner as any other felony committed within that jurisdiction." (*p*)

Different kinds of offences.

The offences to which these statutes apply seem to be, 1. The sending or delivering any letter or writing threatening to kill or murder, or to burn or destroy houses, &c. II. Demanding property with menaces, with intent to steal. III. Accusing or threatening to accuse of an infamous crime, with an intent to extort or gain, and thereby extorting or gaining. IV. Sending or delivering any letter or writing demanding, with menaces, and without any reasonable cause, any chattel, &c. V. Accusing or threatening to accuse any person of any of the crimes mentioned in the acts, with an intent to extort, &c. VI. Sending or delivering any letter or writing, accusing or threatening to accuse any person of any such crimes, with a like intent. (*q*)

Some of the cases decided upon the repealed clauses of the 9 Geo. 1, c. 22, the 27 Geo. 2, c. 15, the 30 Geo. 2, c. 24, and the 4 Geo. 4, c. 54, may assist in the construction of the present statutes.

Robinson's case. As to the *demand* within the repealed clause of the 9 Geo. 1, c. 22.

The construction of the 9 Geo. 1, c. 22, was much considered, in a case where the prisoner, Michael Robinson, was indicted for sending a certain letter, dated, &c., without any name subscribed thereto, to one J. O. Oldham, demanding of him a certain valuable thing, namely, a bank note, against the form of the statute. The letter, on which the indictment proceeded, was as follows:—

"Sir,

"I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking: an understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one; I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals; and I have, therefore, uniformly resisted every overture that has been made me for such a purpose. My situation as a literary character has teemed with temptations, but a sacred principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant, and it was because I thought the attack of a most serious

(*p*) By sec. 14, the act does not extend to Scotland.

(*q*) The recited and repealed clauses of the 9 Geo. 1, c. 22, 27 Geo. 2, c. 15, and 30 Geo. 2, c. 24, created different offences. It was once submitted that the offence in the 30 Geo. 2, c. 24, was the same as that contained in the 9 Geo. 1, c. 22; but the Judges denied this, saying that the 9 Geo. 1, c. 22, extended to such cases only in which there was an *actual demand*, whereas the 30 Geo. 2, c. 24, applied to cases which fell short of a demand, and included letters sent *with a view or intent* to extort money, though no demand were made; and, therefore, that the 30 Geo. 2, c. 24, was no repeal of the 9 Geo. 1, c. 22. Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. There were in fact important differences between these recited and repealed clauses in respect of the *demand*. The 9 Geo. 1, c. 22, required that there should be a demand of money, venison, or other valuable thing. Under the 27 Geo. 2, c. 15, no demand of any thing was necessary. And the 30 Geo. 2, c. 24, applied only to cases where the letter or writing fell short of an actual demand, and was sent with a view or intent to extort or gain money, goods, wares, or merchandises. In 2 East, P. C. c. 23, s. 2, p. 1115, it is said that upon the conference in Robinson's case, it was agreed by all the Judges that if an indictment were framed upon the 30 Geo. 2, c. 24, and a demand proved, there must be an acquittal.

complexion that I hesitated for such a length of time in giving any countenance to it; not that I ever sought for any circumstance to influence my judgment or qualify my opinion, and for all that has ever come to my knowledge, it may be all *the moonshine of the moment:* I am, therefore, so far candid, and I trust, not indelicate; and it will at least be a satisfaction to you to be told, with a solemnity becoming the character I have professed myself, that not a soul but myself is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living since first I had it; so that when it is committed to the flames *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction; you will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, Sir, I am now only making my appeal to your *benevolence.* I am holding out no delusions to exact the involuntary tribute. I am asking you, as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a bank-note in a letter addressed to R. R., and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters; let it be placed there between the hours of eleven and one, on Thursday next; and at five o'clock on the same day a line shall be sent by a porter to your house to acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week on which it will suit you, in the evening, to take a bottle of wine at the King's-head-tavern, in Middle-row, Holborn, or elsewhere, I will with pleasure attend you. Our meeting, however, is to be private, and *tête à tête.* Thus, possibly, over the ashes of the MS. a phœnix may arise that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four, and I will venture to say that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence it is necessary, or at least reasonable, to expect that one should be reposed.

"I have the honour to remain, Sir,
"Your obedient humble servant,
"R. R."

"Tuesday, 12th January, 1796."
"J. O. OLDHAM, Esq.,
Brook-street,
(*Private.*) Holborn."

It appeared that the prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into part-

nership; that upon Dolly's death a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them; that, before the letter in question was sent, several other letters had been written by the prisoner to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode, in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person, who was a friend of the prisoner's, and who was in distress, had put certain MS. into his hands, containing a charge of the prosecutor's having murdered his former master, Dolly, and afterwards married the widow, his accomplice; but that the prisoner was unwilling to publish the MS. containing so serious a charge without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MS. in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned Judge before whom the prisoner was tried left the case to the jury to say whether the prisoner sent the letter above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note; and in case they were of that opinion they were directed to find the prisoner guilty. The jury found him guilty, and also found specially that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him. Several objections were taken to this conviction, and amongst others it was objected that the letter did not contain *a threat or demand*, so as to bring the case within the 9 Geo. 1, c. 22. But the twelve Judges, after hearing the point argued, all agreed in overruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute, (upon which the counsel for the prisoner had founded his argument, by contending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be subscribed and peremptorily accompanied with a threat of bodily harm) said:—" Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the Legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble the statute would apply only to cases where several persons had joined together in confederacy; where the letter was signed with a fictitious name only, and where venison or money was demanded; and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm

Other letters received in evidence to explain the letter on which the indictment was founded.

Direction to the jury.

Objections.

Judgment.

or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity without imposing any conditions would not come within the sense or meaning of the word '*demand*,' but here the demand was made under a threat that if it was not complied with, the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not is a question for the Judges to determine, upon reading it as it is stated in the record; and they are all clearly of opinion that this is *a demand* within the true intent and meaning of this statute. It is a demand of money or money's worth, (which a bank note is) by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity." (*r*)

Demand.

Girdwood's case. Question left to the jury, whether a letter contained an actual threatening to kill or murder, within the repealed clause of 27 Geo. 2, c. 15.

In the following case, upon the 27 Geo. 2, c. 15, it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill or murder, was properly left to the jury. The first count of the indictment charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. (*s*) In the second count the letter was set out in the following form:—

"Sir, "February 9, 1776.

"I am sorry to find a gentleman like you would be guilty of taking *Mac Allester's* life away for the sake of two or three guineas; but it will not be forgot by one who is just come home to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from *Mac Allester* before he died, for to seek revenge, I am come to town. I remain a true friend to *Mac Allester*."

"J. W."

The learned Judge before whom the prisoner was tried left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner if they thought that the words might import any thing less than to kill or murder. The jury found the prisoner guilty, but judgment was respited to take the opinion of the twelve Judges upon this point, (amongst others) viz., whether the letter purported to be a letter threatening to kill or murder? And ten Judges, who were present at the conference, were all clearly of opinion that the conviction was right, and that the construction of the letter was properly left to the jury. (*f*)

(*r*) Robinson's case, 1796, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110.

(*s*) See *post*, p. 721, as to the necessity of setting out the letter in the indictment.

(*t*) Girdwood's case, *cor.* Hotham, B., O. B. 1776, and East. T. 1776, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. The prisoner was executed.

It was holden, however, in a subsequent case, by the majority of the Judges, that as the letter in question did not, by *necessary construction*, import a threat to burn the prosecutor's farm-house and buildings, a conviction upon the 27 Geo. 2, c. 15, was wrong. The letter was as follows:—

Jepson and Springett's case, upon the same repealed statute. Holden that as the letter did not *by necessary construction*, import a threat to burn, &c., a conviction upon that statute was wrong.

"Mr. WOODGATE, Sir, "March 3d, 1798.

"I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*, (*u*) which you are in possession of, without you on next (*v*) day release that Ann Wood which you put in confinement. Sir, we mention in a few lines that we hope if you have any regard for your wife and family, you will take our meaning without any thing further; and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you until such time as you find the few lines a fact, with our respect. So no more at this time from me,

"R. R."

Upon the trial, Mr. Woodgate, the prosecutor, swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the act of Parliament; and the prisoner having been convicted, the point was submitted to the consideration of the Judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J., were of opinion that it must be understood as also importing a threat to burn the prosecutor's farm-house and buildings; but the other Judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended. (*w*)

On an indictment under the 4 Geo. 4, c. 54, s. 3, for sending a letter threatening to burn, &c., which is set out, it may be left to the jury to say whether the letter sent amounted to such threat.

It has since been held that upon the trial of an indictment for sending a letter to the prosecutor, threatening to burn his house, &c., it may be left to the jury to say whether the letter amounted to such a threat. The indictment charged that the prisoners feloniously did send to J. Belcher a writing, without name or signature, directed to the said J. Belcher, by the name and description of "Starve Gut Belcher," threatening to kill and murder him, which said writing is as follows, viz.:—"Starve Gut Belcher, if you dont go on better great will be the consequence; what do you think you must alter an (or) must be set fire; this came from London: i say your nose is as long rod gffg sharp as a flint, 1835. You ought to pay your men." A second count set out the letter as threatening to burn and destroy

(*u*) It is said that by this was understood "settings or lettings," and that the whole letter was evidently the production of an illiterate person, being falsely spelt nearly throughout. 2 East, P. C. c. 23, s. 2, p. 1115, note (*a*).

(*v*) In 2 East, ibid., the learned writer says, that the word at this part was unintelligible in his copy.

(*w*) Rex *v.* Jepson and Springett, *cor.* Lord Kenyon, C. J., Essex Sum. Ass. 1798, and considered by the Judges in Mich. T. 1798. 2 East, P. C. c. 23, s. 2, p. 1115.

his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., asked the jury in the terms of the statute, whether this was a letter threatening to put J. Belcher to death, or to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw? The jury negatived the threat to put him to death, but found that the letter threatened to fire his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., had some doubts whether this question ought to have been left to the jury, and whether the letter could be in point of law a threatening letter, to the effect found; but upon a case reserved, the Judges held the conviction good after verdict. (*x*)

Under the 4 Geo. 4, c. 54, s. 3, such crimes only were to be deemed infamous as subjected a man to infamous punishment or incapacitated him from being a witness.

A letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within the 4 Geo. 4, c. 54, s. 3. One count of an indictment charged that the prisoner feloniously did send to J. Fabling a certain letter threatening to accuse the said J. Fabling of the offence of making overtures to him, the prisoner, to commit sodomy with the said J. Fabling, being an infamous offence and crime, with a view to extort money from the said J. Fabling. The letter set out in this count contained the following passage:—"You well know you have several times made overtures to me, of which I can indite you of sodomy." The jury having found the prisoner guilty, Littledale, J., reserved for the consideration of the Judges the question, whether the count should not have averred that an overture by the prosecutor to commit sodomy with the prisoner was an infamous crime; and secondly, if it were necessary so to aver, whether the words "being an infamous offence and crime," must not be considered as relating to the words describing the complete offence which immediately preceded them, and not to the overtures to commit that crime. The Judges were of opinion that a charge of making overtures to commit sodomy was not an infamous crime within this act, and they held that they were bound to take the word "infamous" in its legal sense, and that such overtures, however they would disgrace and lead to detestation, would not subject the person making them to an infamous punishment, or prevent his being a witness, and therefore the conviction was wrong. (*y*)

A letter stating that the writer had overheard persons agree to injure the property of the prosecutor, and if he would lay thirty sovereigns at a certain place the writer would

A letter intimating that some persons had conspired to burn or otherwise destroy the property of the prosecutor, and offering to make a disclosure if a certain sum of money was placed in a certain spot for the writer, is not within the 7 & 8 Geo. 4, c. 29, s. 8, though it may create apprehension in the owner's mind, it does not contain a menace. (*yy*) The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 8, for sending the following letter to Mr. Young, demanding money with menaces:—

"Sir,

"As you are a gentleman and highly respected by all who know

(*x*) Rex *v.* Tyler, R. & M. C. C. R. 428.

(*y*) Rex *v.* Hickman, R. & M. C. C. R. 34. The word "solicitation" was introduced in the 6 Geo. 4, c. 19, the 7 & 8 Geo. 4, c. 29, s. 9, and the 1 Vict. c. 87. s. 4. to meet this case. Another point, on which the Judges were equally divided, was whether the letter supported a count for sending a letter demanding money from the prosecutor.

(*yy*) MSS. Bayley, J. 3 Burn. J. D. & Wms. 506.

you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to direct and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler's garden gate, I will leave a letter in the place, to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep all this quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December if I find the money. Sir, I am your unknown friend."

give information to frustrate the attempt.

It appeared that the prisoner had written the letter, and had done so with an intention of getting the thirty sovereigns to leave the country. For the prosecution it was contended that the letter contained a sufficient demand of money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act, and *Robinson's case* (*z*) was cited. And, with respect to the menaces, to hold that the letter contained none, would be equivalent to holding that, whenever the menaces came from one person, and the letter from another, neither could be indicted; and, at all events, it was a question for the jury whether the letter did contain menaces. *Girdwood's case.* (*a*) Bolland, B., thought that he ought to decide whether the letter contained menaces or not; but he consulted Littledale, J., who thought the question should be left to the jury; and Bolland, B., then left it to the jury to say, whether the letter contained menaces, and they convicted the prisoner; but, upon a case reserved, the Judges were of opinion that the conviction was wrong. (*b*)

An indictment on the 4 Geo. 4, c. 54, for sending a letter threatening to kill and murder R. Collier set out the letter as follows:—

Letter containing a threat to murder.

"Sir,

"You are a rogue, thief, and vagabond, and, if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it my banker. Have a care, old

(*z*) *Ante*, p. 711.
(*a*) *Ante*, p. 714.
(*b*) Rex *v.* Pickford, MSS C. S. G., and 4 C. & P. 227. S. C. 3 Burn. J. D. & Wms. 506. Tindal, C. J., Garrow, B., Park, J. A. J., and Bosanquet, J., thought this a letter demanding money with menaces. The other eight Judges inclined to a contrary opinion. MS. Bayley, J.

chap, or you shall disgorge some of your ill-gotten gains, watches, and cash that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. I am your

"CUT-THROAT."

"March 15th, 1831."

It was objected that there was nothing in the letter which imported a threat to kill and murder Mr. C.; it was all hypothetical, and the signature "Cut-throat" could not be called in aid, for by the statute the threat must be in the letter and not in the signature. And as the words were of ambiguous meaning there ought to have been an innuendo to explain them. But Patteson, J., held that the letter very plainly conveyed a threat to kill and murder, as no one who received it could have any doubt as to what the writer meant to threaten. (c)

Threatening to procure witnesses to support a charge already made was not a threatening to accuse within the 4 Geo. 4, c. 54, s. 5.

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 5, for having feloniously and maliciously, with intent to extort money, charged and accused A. B. with having committed the horrible and detestable crime, &c., and that he feloniously and maliciously did menace and threaten to prosecute the said A. B. The evidence was, that he had threatened to procure witnesses to support a charge already made. It was objected for the prisoner that the statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bailey, J., "Threatening to procure witnesses to support a charge already made is not within the act of Parliament, which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, but another to procure witnesses in support of an accusation already made." (d)

Sending a letter to A., threatening to burn a house of which he is the owner, but let by him to and occupied by a tenant, is not an offence within the 4 Geo. 4, c. 54, s. 3.

Sending a letter to A., threatening to burn the house of B.

The two first counts of the indictment charged the prisoner with feloniously sending a letter to one G. Ley, threatening to burn and destroy a certain house belonging to and the property of the said G. Ley. The third and fourth counts described the house as a certain house in the possession of one T. Elliot, and then belonging to and being the property of the said G. Ley. It appeared that the house was the property of G. Ley, and inhabited by T. Elliot as his tenant, and that the letter was received by G. Ley. It was objected that the two first counts were not proved, as the term "his" in the 4 Geo. 4, c. 54, s. 3, must have a possessory meaning, and according to the analogy of the rule of law in arson and burglary, the house must be laid as that of the party actually dwelling therein. And as to the two last counts the offence charged was the sending the letter to G. Ley, threatening to burn the house of T. Elliott, which was held not to be an offence within the repealed clause of the 27 Geo. 2, c. 15, *Rex* v. *Paddle*; (e) and Maule, J., was of opinion that the offence was not within the meaning of the statute. It must otherwise be admitted that if a party should have any interest whatever in a house, such as a reversion expectant on the determination of a particular estate, however remote or contingent, the house would be

(c) Rex v. Boucher, 4 C. & P. 562.

(d) Gill's case, 1 Lew. 305. The learned Judge seemed to think that a threat to prosecute would amount to a threat to accuse within the meaning of the act. See Rex v. Abgood, 2 C. & P. 436, *post*, p. 722.

(e) *Post*, p. 721.

sufficiently described as "his." As to the other counts, the offence charged was that of sending a letter to A. threatening to burn the house of B., which, according to the case cited, was not within the act. (*f*)

Meaning of the terms "*accuse*," and "*threaten to accuse*," in the 7 & 8 Geo. 4, c. 29, s. 7.

The word "accuse" in the 7 & 8 Geo. 4, c. 29, s. 7, meant to charge the prosecutor before any third person, and "threatening to accuse," meant threatening to accuse before any third person. The first count of the indictment was for extorting money by *threatening to accuse* the prosecutor of an unnatural offence; the second count for extorting it by *accusing, &c.* The prisoner accosted the prosecutor, and after intimating to him that he and another person had seen him in the act of committing the offence alluded to, added, "Well, Sir, we don't want to say anything about it; give us our allowance-money, and we will say nothing about it." The prosecutor gave him five shillings. It was objected that the words proved did not amount to a threat to accuse, or an accusation within the 7 & 8 Geo. 4, c. 29, s. 7. That the word "accuse" imported a charge made before a magistrate, or some judicial tribunal. But Patteson, J., was clearly of opinion that the words spoken by the prisoner did bring the case within the act. By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; and it was not necessary that the threat should be that of accusing by course of law; and the 7 & 8 Geo. 4, c. 29, s. 7, being declaratory of the former law could hardly be construed as less extensive in its operation; neither was it necessary to construe the term "accuse" in two different senses; the term "accuse," throughout the act, meant to charge the prosecutor before any third person; and "threatening to accuse" meant to charge before any third person. (*g*)

A letter signed with *initials* only, was considered as a letter without a name within the 9 Geo. 1, c. 22.

It was decided that the sending a letter signed with *initials* only, was sending a letter *without a name*, within the 9 Geo. 1, c. 22. Buller, J., in delivering the opinion of the Judges on this point said, "Whether the letter be with or without a name is a simple fact appearing on the face of the letter itself. It is signed with two letters, R. R., which are so far from being a name, that no man on looking at the letter only can tell whether it meant to refer to any name, or what that name was." (*h*)

A charge of an intent to extort *money*, not supported by proof of an intent to extort a bill of exchange.

In a case where the indictment, which was framed upon the 30 Geo. 2, c. 24, charged the prisoner with sending a threatening letter, intending "to extort and gain *money*," it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain *bill* drawn by the prisoner, and of which the prosecutor was the holder. (*i*)

Sending a letter, knowing the contents.

In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents, the facts were that the prosecutor proved the receipt of the letter, by the penny post, at his house, in a street near Berkeley-square, in the county of Middlesex; and his tracing it up to one Elizabeth Robinson, who swore that she was employed in

(*f*) Reg. *v.* Burridge, 2 M. & Rob. 296.

(*g*) Rex *v.* Robinson, 2 M. & Rob. 14. 2 Lew. 273.

(*h*) Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 711.

(*i*) Major's case, O. B. 1796, and Mich. T. 1796. 2 Leach, 772. 2 East, P. C. c. 23, s. 3, p. 1118.

going errands for the prisoners in Newgate, and that having received this letter from the prisoner's hands at the grate at Newgate she immediately carried it to the post-office in Newgate-street. And the servant of the office-keeper confirmed her account, and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the question was submitted to the consideration of the Judges, whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents? The Judges held that the conviction was right. (*j*)

Where the wife wrote a threatening letter, and the husband carried it to the party threatened, held that the husband, though privy to the writing, was not within the 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, nor could the wife alone be convicted unless she wrote and sent it without the husband being privy to the contents.

The prisoners, who were husband and wife, were indicted on the 9 Geo. 1, c. 22, and the 27 Geo. 2, c. 15, for feloniously sending a threatening letter to their master, demanding 10*l.* The wife wrote the letter, and it was delivered to the prosecutor by the husband, who said he found it in the prosecutor's garden; but there was no evidence that he had any knowledge of its contents. It was objected on behalf of the prisoners that the offence described by the statutes on which the indictment was founded, was "knowingly sending a threatening letter," whereas the evidence only showed that the wife had written the letter, and that the husband had delivered it, and that there was no proof of its having been sent to the prosecutor. The Court (Ashhurst, J., and Perryn, B.,) agreed that merely writing a threatening letter would not constitute the offence within these acts of Parliament; that carrying a letter could not be comprehended under the word "send," in the statutes; that the Legislature had it not in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived, and that the act of delivering a threatening letter was not the offence described in those statutes. That if any doubt could be entertained upon that point the Legislature itself had removed it, for by the subsequent act, 30 Geo. 2, c. 24, the offence of delivering as well as sending a threatening letter was made a misdemeanor, punishable at the discretion of the Court, according to the circumstances of the case. But the Court further observed, that there was still a question for the consideration of the jury, for though M. H. were the wife of the other prisoner, yet if the jury were of opinion that she wrote the letter itself without any intervention of her husband, and sent it by him, without his knowing anything of the contents, to the prosecutor, she alone might be found guilty; but that otherwise both the prisoners must be acquitted. (*k*)

Sending the letter by the post, or by indirect means.

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him. (*l*) And in another case the proof was that the letter in question was in the handwriting of the prisoner who sent it to the post-office from whence it was sent in

(*j*) Girdwood's case, O. B. 1776, Easter T. 1776. 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. *Ante*, p. 714.

(*k*) Rex *v.* John & Mary Hammond, 1 Leach, 444.

(*l*) Rex *v.* Jepson and Springett, *cor.* Lord Kenyon, C. J., Essex Sum. Ass. 1798, and Michaelmas T. 1798. 2 East, P. C. c. 23, s. 2, p. 1115. *Ante*, p. 715.

the usual manner to the prosecutor. (*m*) In another case, where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning, before service began, from whence the sexton had picked it up, and delivered it to him, the learned Judge said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. (*n*) And in a subsequent case it was holden that dropping a letter in a person's way, in order that such person might pick it up, was a *sending* of the letter to such person. (*o*) In a case upon the repealed clause of the 27 Geo. 2, c. 15, it was decided, that in order to bring the offence within that clause, it was necessary to prove that the letter was sent to the person threatened; and also that sending it to A., in order that he might deliver it to B., was a sending to B., if it were so delivered. A letter, threatening to burn the house of Rodwell, and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby. Upon a case reserved, the Judges held that a sending to Kirby, as Kirby was not threatened, was not within the statute; and upon that account the judgment was arrested; but they intimated, that if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. (*p*)

The letter must be sent to the person threatened.

Where a prisoner was indicted under the 4 Geo. 4, c. 54, for sending a threatening letter to the prosecutor, and the only evidence against him was his own statement that he should never have written the letter but for W. Goodes; Lord Abinger, C. B., held that there was no evidence of the prisoner having sent the letter; as upon this evidence Goodes might have taken the letter or might have sent it himself, having made the prisoner write it; and there was no evidence of the prisoner having directed Goodes to take it. (*q*)

Evidence of sending a letter.

It was decided, upon reference to the Judges, that it was necessary to set forth the threatening letter in the indictment, in order that the Court might see whether it fell within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the 9 Geo. 1, c. 22, (now repealed) that the defendant was charged with

The indictment must set forth the letter.

(*m*) Heming's case, *cor.* Chambre, J., Warwick Sum. Ass. 1799. 2 East, P. C. c. 23, s. 2, p. 1116.

(*n*) Lloyd's case, *cor.* Yates, J., Hereford Spr. Ass. 1767. 2 East, P. C. c. 23, s. 5, p. 1122. The case was submitted to the consideration of the Judges on another point, on which the indictment was holden to be defective (see *post*, p. 722), so that it became unnecessary for them to give any opinion on the point above stated. In 2 East, P. C. *ubi supra*, the learned writer in note (*a*) says, "Qu. whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended destination, this may not be said to be a sending to *such party*, supposing such an allegation to be necessary upon the true construction of the acts? The same sort of evidence was given in Springett's case, (*ante*, p. 720) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form."

(*o*) Rex *v.* Wagstaff, Mich. T. 1819, Russ. & R. 398.

(*p*) Rex *v.* Paddle, East. T. 1822, Russ. & Ry. 484. And it seems from this case, that it must appear upon the indictment that the letter was sent to the party threatened. See Reg. *v.* Burridge, *ante*, p. 719.

(*q*) Rex *v.* Howe, 7 C. & P. 268.

sending the letter "feloniously and contrary to the form of the statute;" and that those words imported that the letter was of such a nature as the statute had in view. But the Judges were of opinion that the indictment was bad in not setting forth the letter itself: and that if the words "feloniously and contrary to the form of the statute," were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (*r*)

Indictment for threatening to prosecute a charge already made, insufficient.

An indictment on the 4 Geo. 4, c. 54, s. 5, charged that the prisoners did feloniously with intent to extort money, charge and accuse J. N. with having committed the horrible and detestable crime, &c., and did feloniously, with intent to extort, &c., menace and threaten to prosecute the said J. N. for the said pretended offence; it was objected that the charge contained in the indictment was not within the terms of the 4 Geo. 4, c. 54, s. 5, which applied only to threatening to accuse prospectively, and not to a threat to prosecute a charge antecedently made; and Garrow, B., after consulting Burrough, J., held that the objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners had threatened to prosecute J. N., the case would have been left to the jury to say whether that was not a threatening to accuse him. But the offence laid in the indictment was not sufficiently charged under the statute. (*s*)

We have seen that it has been held that an indictment under the 4 Geo. 4, c. 54, s. 5, (now repealed) for demanding money with menaces, must have stated from whom the money was demanded, and that an indictment on the same section for threatening to accuse, &c., must have stated who was threatened. (*t*)

The intent of the writer should be alleged correctly.

It was also held to be necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. In a case already mentioned, where the indictment charged that the letter was sent to extort *money*, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the Judges held the allegation not to be sustained. (*u*)

Variance in the crime alleged to have been threatened.

If the indictment state the offence of which the prisoner threatened to accuse the prosecutor, it must state it correctly. There were several counts in an indictment, charging the prisoner with threatening to accuse the prosecutor of the crime of sodomy, and it appeared to Littledale, J., that the letter written by the prisoner only imputed to the prosecutor that he had solicited the prisoner to permit him to commit that crime, he therefore directed the jury to acquit the prisoner on those counts. (*v*)

Place where the offence may be tried.

The 9 Geo. 1, c. 22, provided that offences against that act might be tried in any county of England; but no such provision being made with respect to offences within the other repealed statutes, the trial of such offences was governed by the

(*r*) Lloyd's case, *ante*, note (*n*). And the law of this case was recognised by Grose, J., in delivering the opinion of the twelve Judges in Hunter's case, 2 Leach, 631.

(*s*) Rex *v.* Abgood, 2 C. & P. 436. See Gill's case, 1 Lew. 305, *ante*, p. 718.

(*t*) Rex *v.* Dunkley, R. & M. C. C. R. 90, *ante*, vol. 1, p. 768.

(*u*) Major's case, *ante*, p. 719.

(*v*) Rex *v.* Hickman, R. & M. C. C. R. 34.

general rule. Upon this rule the trial might be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (*w*) And it seems that the offender might be tried in the county in which he sent the letter, though the prosecutor received it in another county. The offence of *sending* a threatening letter, would seem to be complete, as far as depends on the offender, by his putting the letter into the post-office to go into another county; though the party to whom it is sent afterwards receives it in the latter county. (*x*) The post-office marks in town or country, proved to be such, are evidence that the letters on which they appear were in the office to which those marks belong at the dates which the marks specify; (*y*) but a mark of double postage paid on any such letter is not of itself evidence that the letter contained an inclosure. (*z*)

Post office marks.

The prisoner was tried for feloniously sending to J. S. Tucker the following letter, with intent to extort money from the said J. S. Tucker:—

On an indictment for sending a threatening letter, the prisoner's declarations of the meaning of the letter, are admissible in evidence. An indictment on the 4 Geo. 4, c. 54, for sending a letter, threatening to accuse of an infamous crime need not have specified such crime for the specific crime the prisoner threatened to charge might intentionally be left in doubt. (*a*)

"Sir

"You perhaps did not expect to hear from me so suddenly: but when you turned me away from Laytonstone for a mere trifle, (that too at a time when by the late failures many scores of clerks were out of employ) you forgot that I had you in my power through your transactions with me five nights following, (I have the dates and circumstances on paper written at the time) and that from your conduct to me before I went to live with you, you could expect no mercy from me. Did you not, however, let it pass? In a few words, I have taken advice upon the subject, and know that if you are obstinate, it is in my power to bring down *ruin* on your head, and infamy on your name. However, I will be merciful; allow me to return to L. in the same manner as before, I will never mention it again, as if I did I should lose everything, and gain nothing; but it is impossible for me to get any situation in town at present. It is not true that Mrs. T. advertised, as you said; she is in great distress, and she is my mother, therefore I would wish to afford her a little relief, if possible; so send me five pounds to my address; which, with the other you lent me, I will I. O. U. for, and pay when I get a place. If I do not hear from you by Saturday morning, you will hear of it (enclosing five pounds.) Now, consider ruin and beggary on one side, and wealth and comfort on the other; remember that, if you are obstinate, it will cost you *all;* do as I say, it will cost you

(*w*) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120, *ante*, p. 714, where the letter was *received* by the prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put into the office which was also in London. Esser's case, 2 East, P. C. c. 23, s. 7, p. 1125, where the offence was laid in Middlesex, though the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

(*x*) 2 East, P. C. c. 23, s. 7, p. 1125. Burn. Just. tit. *Letter*. And see now the 7 Geo. 4, c. 64, s. 12, *ante*, p. 120.

(*y*) Perkins's case, 1 Lew. 99, Park, J. A. J. Rex *v.* Burdett, 4 B. & A. 95.

(*z*) Rex *v.* Plumer, Russ. & Ry. 264.

(*a*) This is the marginal note to the case in R. & M. C. C. R., but it does not appear that any such point was reserved or decided, although such a point might have arisen on the third and sixth counts. C. S. G.

nothing. I wait your answer before I proceed. As yet, I have given Mr. Norris no names. On Saturday night (if you are silent) I will go too far to retract."

"Your's obediently,
(Signed) "JAMES TUCKER, Junr."

The second count charged the prisoner with threatening to accuse the said J. S. Tucker of a certain infamous crime, viz., with attempting and endeavouring to commit the abominable crime of sodomy with the said J. S. Tucker, with the same intent. The third count charged him with threatening to accuse the said J. S. Tucker of an infamous crime, with the same intent. The fourth, fifth, and sixth counts were the same as the former, except that the letter was called a paper-writing, and the direction omitted. The third and sixth counts did not describe the specific crime, but alleged, generally, an infamous crime. All the counts concluded against the statute, &c. The prosecutor, after proving the letter in question, said, that on the Saturday following the Thursday on which he received the letter, he saw the prisoner at a public-house in the Strand, and that he, the prosecutor, asked him what he meant by sending him that letter, and what he meant by "transactions five nights following." The prisoner said that the prosecutor knew what he meant. The prosecutor denied it; and the prisoner afterwards said, "I mean, by taking indecent liberties with my person." The prisoner, in cross-examination, asked the prosecutor whether on his oath he could deny that he did take indecent liberties with his (prisoner's) person. The prosecutor said he never did. Alexander, C. B., submitted the following question to the Judges, whether parol evidence to explain the letter was properly received? Adding, that without it, the prisoner could not have been convicted, and that by his cross-examination he in effect repeated the charge. And all the Judges (except Littledale, J., who was absent) were unanimously of opinion that such evidence was properly received, and that the conviction was proper. (*a*)

Prior and subsequent letters may be given in evidence.

From a case which was cited in a former part of this chapter, it appears that prior and subsequent letters from the prisoner to the party threatened, may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (*b*)

The Court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it. (*c*)

(*a*) Rex *v.* Tucker, R. & M. C. C. R. 134. We have seen that it has been held, on the trial of an indictment for threatening to accuse a person of an abominable crime, that the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when taken into custody. Reg. *v.* Kain, 8 C. & P. 187, *ante*, vol. 1, p. 898.

(*b*) Robinson's case, *ante*, p. 713.

(*c*) Rex *v.* Harris, 6 C. & P. 105, Littledale, J., and Bolland, B.

BOOK THE SIXTH.

OF EVIDENCE.

CHAPTER THE FIRST.

OF WHAT NATURE EVIDENCE MUST BE.—OF PRESUMPTIVE EVIDENCE.—OF THE RULE THAT THE BEST POSSIBLE EVIDENCE MUST BE PRODUCED,—AND OF HEARSAY EVIDENCE.

BEFORE entering upon the subject of Presumptive Evidence, to which the following section will be appropriated, it may be proper to pay attention to a few points applicable to the law of evidence in criminal prosecutions generally.

Rules of evidence the same in criminal as civil cases.

There is no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other: and what is rejected in the one ought to be rejected in the other. (*a*) A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence. (*b*)

Bill of exceptions to evidence.

It is doubtful whether a bill of exceptions lies in any criminal case. (*c*) In one case Lord Hardwicke mentioned it as a point not settled; and said that a bill of exceptions had never been determined to lie in mere criminal proceedings, though he had known it allowed in informations in the Court of Exchequer. (*d*)

Case reserved.

If the Judge who presides at the trial shall be of opinion that there is a doubt whether he may not have admitted some evidence or witness improperly, or whether the facts proved constitute the crime charged, he may, in his discretion, forbear to pass sentence, or he may respite the judgment, until the opinion of the fifteen judges be obtained upon a case reserved. (*e*) If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because some other evidence was given

(*a*) By Abbott, J., in Rex *v.* Watson, 2 Stark. R. 155.

(*b*) Lord Melville's case, 29 How. St. Tr. 763.

(*c*) Sir H. Vane's case, 1 Lev. 68. S. C. Kel. 15. 1 Sid. 85. Hawk. P. C. b. 2, c. 46, s. 210. Rex *v.* Lord Paget and others, 1 Leon. 5. Rex *v.* Nutt, 1 Barnardist. 307. 2 Phil. Ev. 465.

(*d*) Rex *v.* Inhabitants of Preston, Cas. temp. Hardw. 249.

(*e*) The proper course to raise objections to the insufficiency of the indictment is by demurrer, motion in arrest of judgment, or writ of error, and in recent cases the Judges seem strongly disposed not to allow cases to be reserved on such objections. Reg. *v.* Purchase, 1 C. & Mars. 617. Reg. *v.* Overton, ibid. 655.

which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. (*e*) But as it has since been determined, and seems now to be settled, that where evidence, objected to on the trial of a cause, is received by the judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial, on the ground that it is impossible for the Court to say what effect such evidence may have produced on the jury, (*f*) it may well be doubted whether if the judges were of opinion that any evidence had been improperly admitted or rejected in a criminal case, the conviction would be supported.

New Trial.

Where the defendant has been convicted on an indictment for felony, there can be no new trial; but after a conviction for a misdemeanor, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it: (*g*) though inferior jurisdictions cannot grant a new trial upon the merits, but only for an irregularity. (*h*) Where several defendants are tried at the same time for a misdemeanor, and some are acquitted, and others convicted, the Court may grant a new trial as to those convicted, if they think the conviction improper. (*i*) And it is a rule that all the defendants convicted upon an indictment for a misdemeanor, must be present in Court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. (*k*) No new trial can be had, when the defendant is acquitted, although the acquittal was founded on the misdirection of the Judge; (*l*) or where a verdict is found for a defendant on a plea of *auterfois acquit*, although that raises a collateral issue, which may have been found in favour of the defendant on insufficient evidence. (*m*)

SECTION I.

Of Presumptive Evidence.

Presumptive or circumstantial evidence.

WHEN a fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the con-

(*e*) Rex *v.* Ball, Russ. & Ry. C. C. R. 132. Rex *v.* Oldroyd, *ibid.* 88, but see Rex *v.* Harling, R. & M. C. C. R. 39.

(*f*) Crease *v.* Barrett, 5 Tyrw. 458. Wright *v.* Doe d. Tatham, 7 A. & E. 313. De Rutzen *v.* Farr, 4 A. & E. 53.

(*g*) Rex *v.* Mawbey, 6 T. R. 638. Tidd, 942, 943. As to the grounds on which the application may be made, see 1 Chit. Cr. L. 654.

(*h*) See the cases collected on this point in note (*b*) to Rex *v.* Inhabitants of Oxford, 13 East, 416. The Court of King's Bench in that case refused a *certiorari* to remove an indictment for a misdemeanor and proceedings thereon at the assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the judge's report of the evidence, on the ground of the verdict being against evidence and the Judge's direction.

(*i*) Rex *v.* Mawbey, 6 T. R. 619.

(*k*) Rex. *v.* Teal, 11 East, 307. Rex *v.* Askew, 3 M. & S. 9.

(*l*) Rex *v.* Cohen and Jacob, 1 Stark. N. P. C. 516. Rex *v.* Sutton, 5 B. & Ad. 52. In a prosecution for not repairing a highway judgment has been suspended under very special circumstances after an acquittal, see vol. 1, p. 371, in the notes.

(*m*) Rex v. Lea, 2 Moo. C. C. R. 9, S. C. 7 C. & P. 836.

trary be proved. (*n*) In criminal cases, from the secret manner in which guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged, *i. e.* to produce a witness who saw the act committed; and, therefore, recourse must necessarily be had to presumptive (or, as it is often called, circumstantial) evidence, *i. e.* the direct evidence of circumstances, from which the commission of the act may be presumed by the jury. (*o*)

What circumstantial evidence is sufficient to warrant a conviction.

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt; Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person;" and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort the facts, in order to establish such a proposition, forgetting that a single circumstance, which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (*p*)

There is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter, which affect life and liberty. (*q*)

Instances of presumptions.

One of the most usual presumptions in criminal prosecutions occurs in cases of larceny, where upon proof of the felony having

(*n*) Gilb. Ev. 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact. Ibid. Unless the wound was in such a part of the body that the deceased could not have inflicted it himself, and it was shown that no other person had been in the room, it is conceived that such a presumption ought not to be considered as conclusive. In Ashford *v.* Thornton, 1 B. & Ald. 428, where the subject of presumption in cases of murder was much discussed, Abbott, J., said, "A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should in assisting the wounded man wrench the knife out of the murderer's hand; then if the murderer escaped, leaving him with the body, according to this law [Bracton], he would be considered guilty of the murder, and be immediately hanged without trial." And, "in the history of the law several presumptions which were at one time deemed conclusive by the Courts, have, by the opinions of later Judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as wholly within the discretion of juries." 1 Phill. Ev. 441. C. S. G.

(*o*) Presumptions are often divided into three sorts,—violent, probable, and light. Co. Lit. 6 *b.* 3 Black. Com. 371. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak.

(*p*) Hodge's case, 2 Lew. 227. See the very able observations on this subject, 1 Stark. Ev. 558, *et seq.*

(*q*) 1 Phil. Ev. 166, 7 Edit. Perhaps strong circumstantial evidence in cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen, that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East, P. C. c. 5, s. 9, p. 223.

been committed, and of the property stolen having been shortly afterwards found in the possession of the prisoner, it is presumed that he actually stole it, unless he proves how he came by it. (r) So also on an indictment for the crime of arson, proof that property, which was taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson. (s) So also proof that clothes, weapons, or implements, which are shown to have been previously in the possession of the prisoner, were found at or near to the spot where a felony was committed, is frequently adduced in order to raise a presumption that the prisoner was present at the time when the felony was committed. (t) The buying goods at an under value is said to be presumptive evidence, that the buyer knew they were stolen. (u) Upon an indictment for perjury, in falsely taking the freeholder's oath, at the election of a knight of the shire, in the name of J. W., it appearing by competent evidence, that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; and that there was no such person, and that the defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W.; it was

(r) Where two prisoners were indicted for stealing two horses, and the case against them consisted entirely of evidence to show that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places; Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his Lordship observed that the possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances. Rex *v.* Smith, Ry. & Mood. N. P. C. 295. Where the only evidence against the prisoner was that three sheets were found upon his bed in his house, three calendar months after they had been stolen, and it was urged that this was too long a time after the larceny to call on the prisoner to give any account how he had become possessed of them; and Rex *v.* Adams, *ante*, p. 123, was relied upon; Wightman, J., held that the case must go to the jury, as it seemed to him that it was impossible to lay down any definite rule as to the precise time, which was too great to call upon the prisoner to give an account of the possession, and that in this case there was *some* evidence, although *very slight*, for the jury to consider. The prisoner was acquitted. Reg. *v.* Hewlett, Salop Spr. Ass. 1843, MS. C. S. G. Mr. Starkie observes that "the recent possession of stolen goods is recognised by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still in effect a mere natural presumption; for although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is, therefore, essentially different from the legal presumptions in fact where a jury are to infer that a bond has or has not been satisfied, as a few days or even hours, more or less, have elapsed, when the twenty years are expiring." 3 Stark. Evid. 933.

(s) Rex *v.* Rickman, 2 East, P. C. 1035.

(t) In Reg. *v.* Stonyer and others, Stafford Spr. Ass. 1843, *cor.* Wightman, J., on an indictment for burglary in the house of Keeling, evidence was given of the finding of a crow-bar in the house of one Bladon, which was near Keeling's, and was broken into the same night, it being proved that the crow-bar had been previously seen in the possession of the prisoners, and a chest of drawers in Keeling's house having been broken open by such an instrument. Such is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered. Greenl. Ev. 49.

(u) *Ante*, p. 251.

held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently, to find him guilty of the charge as alleged in the indictment. (*v*)

A very common presumption is made by a jury in favour of a defendant from the goodness of his character; which subject, together with the presumption as to the intent of a prisoner, or his guilty knowledge, respecting the act which is the subject of the indictment, raised upon the proof of prior acts unconnected with it, will be considered in a subsequent Chapter, where the rule as to evidence being confined to the points in issue is discussed. (*w*) **From good character.**

Most important presumptions are derivable from the conduct of the parties, as well in civil as in criminal proceedings. If circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him. (*x*) **Conduct.**

Presumptions from a man's conduct operate in the nature of admissions; for as against himself it is to be presumed, that a man's actions and representations correspond with the truth. (*y*) And admissions may be presumed, not only from the declarations or acts of a party accused, but even from his acquiescence or silence. (*z*)

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. (*a*) **Suppression of evidence.**

So the fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. Legal experience, however, has shown that false evidence has sometimes been resorted to, for proving facts that are true. (*b*) **Falsification of evidence.**

(*v*) Rex *v.* Price, 6 East, 323. The following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the Judges thought the evidence too slight to convict him. Rex *v.* Isaacs, MS. Bayley, J., *ante*, Vol. I., p. 61. See also *ante*, Vol. I., p. 209, as to presuming consent of parents to a minor's marriage, on a prosecution for bigamy.

(*w*) See also as to the presumption that a ship never heard of has foundered, Green *v.* Brown, 2 Str. 1199. Twemlow *v.* Oswin, 2 Campb. 85. Houstman *v.* Thornton, Holt, 242. Koster *v.* Reed, 6 B. & C. 19. So where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of delivery to the hands of that person; because it is a safe and reasonable presumption that it reaches its destination. Per Lord Tenterden, Walter *v.* Haynes, 1 R. & M. N. P. C. 149.

(*x*) 3 Stark. Evid. 937.

(*y*) Ibid.

(*z*) 3 Stark. Evid. 26.

(*a*) 1 Phill. Evid. 447, citing Harwood *v.* Goodright, Cowp. 87.

(*b*) 1 Phill. Ev. 448. Referring to 3 Institute, 232, where a case is mentioned of an uncle, who was hanged for the murder of his niece, and who produced on the trial a child as like unto her, both in person and years, as he could find, but which upon examination was found not to be the true child; and it afterwards appeared that the niece had run away, and was alive. And

Presumption of continuance.

Other presumptions are founded on the experienced continuance or permanency, of longer or shorter duration, in human affairs. When, therefore, the existence of a person, a personal relation, or state of things, is once established by proof, the law presumes, that the person, relation, or state of things, continues to exist as before, till the contrary is shown, or till a different presumption is raised from the nature of the subject in question. Thus, where the issue is upon the life or death of a person, once shown to have been living, the burden of proof lies upon the party, who asserts the death. (*c*) But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party. (*d*) But there is no legal presumption as to the time of the death within the seven years, and the fact of the party having been alive or dead at any particular period during the seven years must be proved by the party relying on it. (*e*) In one case, where the presumption of life conflicted with that of innocence, the Court seem to have considered that the presumption of law was, that the party was not alive, when the consequence of his being so was that another person had committed a criminal act. (*f*) But in a subsequent case, the Court held that there was no rigid presumption of law on such questions of fact without reference to the accompanying circumstances; such, for instance, as the age or health of the party; and that the proper question in such cases was what inference might fairly be drawn from the evidence. (*g*)

Of life and death.

On the same ground, a partnership or other similar relation, once shown to exist, is presumed to continue till it is proved to have been dissolved. (*h*) So where an indictment alleged that the defendant made his warrant of attorney directed to A. and B., "then and still being attornies of the King's Bench," it was held that as the defendant, by executing the warrant, admitted them to be attornies at that time, it must be presumed that they continued to be so at the time when the indictment was found. (*i*)

also the Douglas Peerage case, Appendix to Evans' Pothier. "The fabrication of evidence does not, however, furnish of itself any presumption *of law* against the innocence of the party; but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts." Greenl. Ev. 43.

(*c*) Greenl. Ev. 46, 47, citing Throgmorton *v.* Walton, 2 Roll. R. 461. Wilson *v.* Hodges, 2 East. R. 312. Battin *v.* Bigelow, 1 Pet. C. C. R. 452. See 3 Stark. Ev. 937.

(*d*) Greenl. Ev. 47, citing Hopewell *v.* De Pinna, 2 Campb. 113. See 1 Phill. Ev. 449. Doe *d.* George *v.* Jesson, 6 East. R. 80. Doe *d.* Lloyd. *v.* Deakin, 4 B. & Ald. 433. Watson *v.* King, 1 Stark. R. 121. It has been held in America not to be necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from. Greenl. Ev. 47, note 5, citing Newman *v.* Jenkins, 10 Pick. 515. Innis *v.* Campbell, 1 Rawle, 373. Spurr *v.* Trimble, 1 A. K. Marsh, 278. Wambough *v.* Skenk, 1 Penningt. 167. Woods *v.* Woods, 2 Bay. 476. 1 New York Rev. Stat. 749, s. 6.

(*e*) Doe *d.* Knight *v.* Nepean, 5 B. & Ad. 86. 2 M. & W. 894.

(*f*) Rex *v.* Twyning, 2 B. & Ald. 386, *post*, p. 732, note (*v*).

(*g*) Rex *v.* Harborne, 2 A. & E. 540, *ante*, vol. 1, p. 219. Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years if other circumstances concur: as if the party sailed on a voyage, which should long since have been accomplished, and the vessel has not been heard of. Greenl. Ev. 47, referring to In re Hutton, 1 Curt. 595.

(*h*) Greenl. Ev. 48. 3 Stark. Ev. 937. Alderson *v.* Clay, 1 Stark. R. 405.

(*i*) Rex *v.* Cooke, 7 C. & P. 559, Patteson, J.

So where a thing is proved to have been in a particular state at one time, it is presumed to have been in that state at a former time, unless there be evidence that at some previous time it was in a different state. (*j*)

Opinions and state of mind.

The *opinions* also of individuals once entertained and expressed, and *the state of mind*, once proved to exist, are presumed to remain unchanged till the contrary appears. Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God, till it is shown from his own declarations. In like manner, every man is presumed to be of sane mind, till the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue, till disproved. (*k*)

Presumptions of law.

Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice till the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. (*l*)

Of malice.

Of the probable consequence of an act.

Indeed, it is a universal principle, as Lord Ellenborough observed, in the case of *Rex* v. *Dixon*, (*m*) that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. In the case of *Rex* v. *Sheppard*, (*n*) uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person: and it was further held, that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted (under the repealed statute, 43 Geo. 3, c. 58) for setting fire to a mill, with intent to injure the occupiers thereof, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act. (*o*) So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (*p*)

(*j*) Rex *v.* Burdett, 4 B. & Ald. 124, per Best, J. In this case a letter was delivered to a person, unsealed, in Middlesex, and it was held that it must be presumed that it was sent in that state from Leicestershire, there being no evidence to the contrary.

(*k*) Greenl. Ev. 48. Attorney-General *v.* Parnther, 3 Bro. Ch. C. 443.

(*l*) Fost. 255. 1 East, P. C. c. 5, s. 106, p. 340.

(*m*) 3 M. & S. 15. See also *ante*, p. 362, 545.

(*n*) Russ. & Ry. C. C. R. 169. *Ante*, p. 362.

(*o*) Rex *v.* Farrington, Russ. & Ry. C. C. R. 207. *Ante*, p. 563.

(*p*) Rex *v.* Mazagora, Russ. & Ry. C. C. R. 291. *Ante*, p. 366.

In the case of *Rex* v. *Fuller* and another, (*q*) the twelve Judges were of opinion, that the having in possession a large quantity of counterfeit coin unaccounted for, and that without any circumstance to induce a belief that the defendants were the makers, was evidence of having procured it with intent to utter it. (*r*)

Presumptions with respect to age.

It seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape; (*s*) and also that an infant under the age of seven cannot be guilty of felony; (*t*) and it is a *primâ facie* presumption of law that a person under the age of fourteen is not guilty of a felonious intention, until evidence be produced to show that he is *doli capax;* for then it is said, *malitia supplet ætatem.* (*u*)

Presumption of innocence.

In general, however, a presumption of law arises in favour of innocence until the contrary is proved; (*v*) and it arises not only in matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. (*w*) So it is a legal maxim, that "*omnia præsumuntur esse rite et solemniter acta donec probetur in contrarium;*" and, therefore, it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c., is duly authorized to do so; (*x*) and that even in a case of murder. (*y*)

Omnia esse rite acta.

Caution of Lord Hale as to presumptions.

It may be proper here to mention the two well known cautions of Lord Hale respecting presumptive evidence, *viz.*, 1. That a person should never be convicted for stealing the goods *cujusdam ignoti*, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead. (*a*)

(*q*) Russ. & Ry. C. C. R. 308. *Ante*, vol. 1, p. 48.

(*r*) See further as to the primary intention, including the collateral one imputed in the indictment, and the necessary proof of the particular intent laid. *Ante*, vol. 1, p. 735, *et seq.* 2 Stark. Ev. 573.

(*s*) 1 Hale, P. C. 630. Rex *v.* Groombridge, 7 C. & P. 582. Rex *v.* Eldershaw, 3 C. & P. 396, *ante*, vol. 1, p. 3.

(*t*) 1 Hale, P. C. 27, *ante*, vol. 1, p. 2.

(*u*) 1 Phill. Evid. 443, citing Rex *v.* Owen, 4 C. & P. 236.

(*v*) Rex *v.* Twyning, 2 B. & A. 386, in which case, a woman having married again within the space of twelve months after her husband had left the country, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the continuance of life. But see Rex *v.* Harborne, *ante*, p. 730, note (*g*).

(*w*) Sissons *v.* Dixon, 5 B. & C. 758. See also Bennett *v.* Clough, 1 B. & A. 461, which was an action against a carrier for losing a parcel, containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 Geo. 3, c. 81, s. 5, made it illegal to send a letter in a parcel, and that the plaintiff therefore could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates; and the Court held, that as illegality is never presumed, the defendant should have given *primâ facie* evidence that the letter did not concern the stamps with which it was sent. See also Rodwell *v.* Redge, 1 C. & P. 220.

(*x*) Rex *v.* Verelst, 3 Camph. 432. Gordon's case, 1 Leach, 515. S. C. 1 East, P. C. p. 312, 315.

(*y*) By Buller, J., in Berryman *v.* Wise, 4 T. R. 366. See also Rex *v.* Rees, 6 C. & P. 606. Rex *v.* Borrett, 6 C. & P. 124. Butler *v.* Ford, 3 Tyrw. 677; 1 C., M. & R. 662. Reg. *v.* Murphy, 8 C. P 297.

(*a*) 2 Hale, P. C. 290.

SECTION II.

The best possible Evidence must be produced.

General rule that best possible evidence must be produced.

It is a general rule that you must give the best evidence that the nature of the thing is capable of: (*b*) the true meaning of which rule is, not that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence; but that no such evidence shall be brought that *ex naturâ rei* supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and, therefore, the proof of a copy in this case is not evidence: (*c*) but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof. (*d*)

Hence it appears that evidence of an inferior quality, or as it is called, secondary evidence, cannot be received until it be shewn that no evidence of a superior quality, or as it is termed, primary evidence, can be produced. It becomes necessary, therefore, to consider, 1st, What is primary evidence. 2ndly, What is a sufficient ground for the admission of secondary evidence. 3rdly, What is good secondary evidence.

What is primary evidence.

1. What is primary evidence. It has already appeared that it is the quality and not the quantity which the rule requiring the best possible evidence regards. Thus, if a will of lands is to be proved, the primary proof of the contents is the will itself; and neither an exemplification under the great seal, nor the probate in the Spiritual Court will be admissible: (*e*) but one of the three subscribing witnesses will be sufficient, without calling the others to prove the execution, if he can speak to all the requisites of attestation, and the jury believe him. (*f*) So if there are several subscribing witnesses to a deed, and all are proved to be dead, proof of the signature of one will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be

Contents of will.

Execution of will proved by one of three witnesses.

(*b*) Bull. N. P. 293.
(*c*) Bull. N. P. 293. Gilb. Ev. 13.
(*d*) Bull. N. P. 293.
(*e*) Bull. N. P. 246. But the probate is the best evidence as to personalty.
(*f*) Bull. N. P. 264. So the execution of a will has been held to be proved by evidence of the testimony of one of the subscribing witnesses, who was dead, given on a trial between the same parties, although another attesting witness was present and not called. Wright *v.* Doe *d.* Tatham, 1 A. & E. 3. See also Doe *d.* Spilsbury *v.* Burdett, 4 A. & E. 1.

The distinction seems to be this:
If a person make an oral statement which is also committed to writing; a witness shall be heard, notwithstanding the writing; because his evidence is independent of the writing. But if a person make a statement in writing: its contents shall not be proved by a witness who has read it; because his knowledge has acquired, and is substituted for the writing.

Primary evidence of handwriting.

produced. (*g*) So for the purpose of proving handwriting, where it happens to be a case where there would be no objection to the competency of the writer himself, it is not necessary to call him: it is sufficient to prove it by the evidence of some one acquainted with the general character of his writing, who, on inspection, can say he believes it to be the handwriting of the party. Thus, where the signature of a magistrate to a deposition is to be proved, it is usually done by a witness acquainted with the general character of his writing, without calling the magistrate himself. The evidence of such a witness is not in its nature inferior or secondary; and though it may generally be true that the writer is best acquainted with his own handwriting, and therefore, his evidence will in general be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write. (*h*) And it seems, that on the same principle, the evidence of such persons is as much primary evidence to disprove his handwriting as to prove it. (*i*) On an indictment for unlawfully assembling, it was held, that a paper which had been delivered by Hunt to the witness at a meeting, as a copy of certain resolutions about to be proposed and read, and which corresponded with what the witness heard read from a written paper, was admissible as evidence of those resolutions, without giving the defendant notice to produce the original. (*j*) And in the same case, it was decided that parol evidence of inscriptions, or devices on banners and flags displayed at the meeting was admissible without producing the originals, though it appeared that they had been seized by the police officers, and therefore, might have been produced on the part of the prosecution. (*k*)

Of disproving handwriting.

Other instances of primary evidence.

Written instruments.

The contents of a written instrument can only be proved by the instrument itself, unless it be lost, or in the hands of the other party: and the declarations of the party against whom it is to be proved were once held inadmissible for this purpose, unless the non-production of the instrument were accounted for. (*l*) And generally speaking, parol evidence is secondary in its nature to written evidence: and where a written instrument is required by law, or made by a private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence. (*m*) Thus, when an agreement has been reduced into writing, the writing itself must be produced; (*n*) and if not properly stamped, the plaintiff must be nonsuited. But, in many instances, the mere existence of written evidence will not exclude independent parol evidence to prove the same fact. Thus, where upon letting premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was

Parol evidence not always secondary to written.

(*g*) 1 Phill. Ev. 418.

(*h*) 1 Phill. Ev. 223, 7th Edit. *Ante*, p. 393.

(*i*) *Ante*, p. 392.

(*j*) Rex *v.* Hunt, 3 B. & A. 566. *Ante*, vol. 1, p. 288.

(*k*) Ibid. Abbott, C. J., said, "If we were to hold that what was inscribed on a banner could not be proved without the production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of the banner, or even to say he saw the banner displayed; for the banner itself may be said to be the best possible evidence of its existence and of its colour."

(*l*) Bloxam *v.* Elsie, 1 R. & M. N. P. C. 187, Abbott, C. J. But see *post*, p. 749.

(*m*) 1 Stark. Ev. 504.

(*n*) Brewer *v.* Palmer, 3 Esp. 213, *cor.* Lord Eldon, C. J. Sinclair *v.* Stevenson, 1 C. & P. 582, *cor.* Best, C. J.

then agreed that he should on a future day bring a surety, and sign the agreement, it was held that the existence of this memorandum did not preclude parol evidence of the terms of the letting. (*o*) So where a verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, the terms of the contract may be given in evidence on the part of the vendor, without producing the writing. (*p*) Where a party paying money has taken a receipt, the circumstance of the payment having been acknowledged in writing does not make such writing exclusively primary evidence of the fact; but he may shew the payment by a person who saw the money paid, or by the admission of the other party to that effect. (*q*) If several persons be witnesses of the same fact, and one of them to assist his memory makes a memorandum of it, this circumstance would not exclude the testimony of the other witnesses. (*r*) So parol evidence of what a person said on the hearing of an information for a trespass in pursuit of game, under the 1 & 2 Wm. 4, c. 32, is admissible, although there be a deposition which is not produced, as there is no act of Parliament requiring the magistrates to take down the evidence in such a case; but it is otherwise in the case of felony, where the depositions must be produced, because, by statute, magistrates are bound to take down what the witnesses say. (*s*) So though an entry of a marriage may have been made in the parish register according to the Marriage Act, such entry does not become the only primary evidence of the marriage, but it may also be proved by any one who witnessed it; and, indeed, in all cases except actions for criminal conversation, and indictments for bigamy, by reputation. (*t*) Where, in order to prove a demand, for the purpose of bringing an action of trover for a lease, a witness stated that he had verbally required the defendant to deliver up the lease, and at the same time served a notice in writing on him to the same effect; Lord Ellenborough, C. J., held that the written notice need not be produced; for the notices being concurrent and independent, either might be proved as evidence of the conversion. (*u*)

Instances of what is not the best possible evidence.

The above are instances of modes of proof which, notwithstanding the existence of other evidence which might be more satisfactory, are yet in their nature primary, and consequently, available. It may be useful to mention also some examples of what is not the best possible evidence, and therefore inadmissible. Upon an

(*o*) Doe *v.* Cartwright, 3 B. & A. 326. See also Wilson *v.* Bowie, 1 C. & P. 8.

(*p*) Dalison *v.* Stark. 4 Esp. 163.

(*q*) Rambert *v.* Cohen, 4 Esp. 213. Jacob *v.* Lindsay, 1 East, R. 460. And if the receipt were on unstamped paper, it may be used by a witness, who saw it given, to refresh his memory, 4 Esp. 213.

(*r*) 1 Stark. Ev. 504. So in Layer's case for high treason, Mr. Stanley, an under secretary of state, gave evidence of L.'s confessions, upon his examination before the council, which though taken in writing was not produced. 12 Vin. Abr. 96, tit. *Evidence*, A. *b*. 623, pl. 7.

(*s*) Robinson *v.* Vaughton, 8 C. & P. 252, Alderson, B.

(*t*) Morris *v.* Miller, 1 W. Bl. 632. It may also be observed that in order to make the production of the writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection, that there is some written agreement relative to the holding, unless it should also appear that it was made between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. Doe *v.* Morris, 12 East, 237. Doe *v.* Pearson, 12 East, 239 *n.*

(*u*) Smith *v.* Young, 1 Campb. 439.

Insurance.

indictment for having set fire to a house, with intent to defraud an insurance company, the policy is the best evidence to prove that the house was insured, and an entry to that effect in the books of the insurance office is but secondary evidence. (*u*) To prove the oaths required by the Toleration Act, parol evidence was held secondary, and inadmissible; because they were matters of record in the court where they were sworn. (*v*) Courts of record speak by means of their records only; and, therefore, the acts of a Court can be proved in no other manner. Thus, parol evidence is inadmissible to shew the day on which a trial at nisi prius took place; for it should be proved by the production of the nisi prius record. (*w*) So if it be necessary to prove that a trial took place, as in the case of a prosecution for perjury committed on the trial of a cause at nisi prius, that cannot be done by parol evidence, but the record should be produced, or at least, the postea. (*x*) And even where the transactions of Courts, which are not technically speaking, of record, are to be proved, if such Courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognises. (*y*) On an indictment on the 8 & 9 Wm. 3, c. 26, (for high treason by having a mint die in possession) it was incumbent on the prosecutor to shew that the prosecution was commenced within three months, and parol evidence that the prisoner was apprehended for treason respecting the coin within three months, (the offence appearing to have been committed above three months before the indictment preferred) was held by the twelve Judges to be insufficient, the warrant to apprehend or to commit not being produced. (*z*) Parol evidence is not admissible of the declaration of a prisoner before a magistrate, where the examination has, conformably to the statute, been taken in writing. (*a*) In the case of *Williams* v. *the East India Company*, (*b*) the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers, of the inflammable and dangerous nature of a quantity of roghan which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them; the chief mate was dead, and no evidence was given of what had passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited by Lord Ellenborough, C. J., on the ground that the best evidence possible of the want of notice had not been produced, *viz.*, the evidence of the conductor of stores. The Court afterwards affirmed the nonsuit; and Lord Ellenborough,

Matters of record.

Acts of a Court.

Commencement of prosecution.

Examination before a magistrate.

Negative proof of notice.

(*u*) Rex *v.* Doran, 1 Esp. 127, *ante*, p. 567. And therefore, if the policy cannot be received in evidence for want of a proper stamp, the indictment cannot be supported, Rex *v.* Gilson, Russ. & Ry. 138, *ante*, p. 567.

(*v*) Rex *v.* Hube, Peake, N. P. C. 132. *Ante*, vol. 1, p. 302.

(*w*) Thomas *v.* Ansley, 6 Esp. 80, by Lord Ellenborough. Rex *v.* Page, 6 Esp. 83, by Lord Kenyon. Tidd. Prac. 869.

(*x*) *Ante*, p. 662. But see Rex *v.* Coppard, *ante*, p. 624.

(*y*) 3 Stark. Ev. 786.

(*z*) Rex *v.* Phillips and another, Russ. & Ry. 369.

(*a*) Jacobs' case, 1 Leach, 309.

(*b*) 3 East, R. 192.

in delivering their opinion said, "The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, (namely, the presumption and inference arising from a non-communication to the other persons on board,) as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case." In a case on an indictment on the 42 Geo. 3, c. 107, s. 1, (repealed by the 7 & 8 Geo. 4, c. 27,) which made it felony to course a deer in an enclosed ground, without the consent of the owner of the deer, Lawrence, J., thought it necessary to call the owner of the deer, for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. (*c*) But this decision has been overruled by subsequent authorities of the greatest weight: and the rule may now be considered settled, that in cases where it is necessary to prove the non-consent of the owner of the property which is the subject of the charge in the indictment, the testimony of the owner himself is not exclusively primary evidence of the non-consent; but it may be inferred from the conduct of the prisoner, and the circumstances under which the act was done. Where the prisoners were indicted on the 6 Geo. 3, c. 36, (repealed and re-enacted with alterations by the 7 & 8 Geo. 4, c. 27 and c. 29,) for lopping and topping an ash timber tree, "without the consent of the owner," the owner, Sir J. Aubrey, had died before the trial. The offence was committed at eleven o'clock at night, on the 18th of February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove, that he himself never gave any consent, and from all he had heard his master say, he believed that he never did. Bayley, J., told the jury that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, namely, Sir J. Aubrey, that they might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to shew that in fact he had not given any such permission. His Lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to shew that the consent required had not in fact been given. (*d*) And in three cases, reserved at once for the opinion of the twelve Judges, it was held, that though there must be some evidence to negative the owner's consent, his non-consent may be inferred from the circumstances, or proved by his agents. The first of the three cases was *Rex* v. *Allen*, an indictment for killing a fallow deer in the park of the forest of Waltham,

Negative proof of consent.

(*c*) Rex v. Rogers, 2 Campb. 654. (*d*) Rex v. Hazy, 2 C. & P. 458.

without the consent of the owner, the King; the second, *Rex* v. *Argent*, for entering a yard adjoining and belonging to the dwelling-house of John Greenwood, a Quaker, and taking fish out of a pond there without the consent of the owner; and the third, *Rex* v. *Chamberlain*, for taking fish in Claremont Park, belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned Judge, who tried it, thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-consent to lie on the prosecutor; but in consequence of the decision in *Rex* v. *Rogers*, above-mentioned, further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The Judges held the conviction in each of the cases right. (*e*)

2. What is sufficient ground for the admission of secondary evidence.

2dly, What is a sufficient ground for the admission of secondary evidence. If the primary evidence be lost or destroyed, or if it be in the hands of the adverse party, then upon proof of the loss or destruction in the former case, and of the fact of its being in such possession, and of reasonable notice to produce it at the trial having been given to the other party, in the latter case, secondary evidence is admissible. (*f*) Where secondary evidence is offered, in consequence of the loss of the primary evidence, in order to establish such loss, it must be proved that diligent search has been made in those quarters from which the primary evidence was likely to be procured. The case of *Kensington* v. *Inglis* (*g*) affords an example of what is considered a sufficient search for such a purpose. There it was incumbent on the plaintiff to prove the loss of a license to trade; and a witness, who had been secretary to the governor of a colony, said it was his practice to destroy, or put aside such licenses among the waste papers of his office, as not being of further use, and he supposed he had disposed of the license in question, (which after having been granted by the governor, was returned to the witness,) in the same manner as other licenses for ships whose voyages had been performed: but he was not sure it was destroyed. He further stated, that he had been applied to for the license, and had searched for it: but he did not recollect whether he found it

Where the primary evidence is lost.

What is sufficient proof of loss.

(*e*) R. & M. C. C. R. 154.

(*f*) Besides these two instances of the loss or destruction of the primary evidence, and its being in the hands of the adverse party, it should seem that secondary evidence is admissible in all cases where it is apparent that such secondary evidence is the best, which the party, without any default, has it in his power to produce; for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, if an attesting witness to a written instrument after his attestation becomes incompetent from interest, proof of his handwriting is admissible, Godfrey *v.* Norris, 1 Str. 34. So if he becomes incompetent from infamy, Jones *v.* Mason, 2 Stra. 833. The defendant, in an action of trespass for breaking hatches, offered in evidence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed the defendant's attorney was called, who said he had received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient; then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon Holroyd, J., held, that as the father was objected to, the next best evidence had been given, and admitted the deed. Card *v.* Jeans, Dorchester, 11th March, 1819, Manning's Dig. 375. If a deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, secondary evidence is admissible, for the original is then unattainable by the party offering such evidence. Doe *v.* Ross, 7 M. & W. 102.

(*g*) 8 East, 273.

or not; though he did not think that he had found it. Lord Ellenborough, C. J., in delivering the judgment of the Court, (*h*) said, "We are of opinion, that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the license being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it." So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved, that a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description; it was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy. In this case, Abbott, C. J., observed, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient. (*i*)

Brewster *v.* Sewell.

Where a tithing-man went to a house to execute a warrant, and read the warrant under the window of the house, where the party who was to be apprehended under the warrant then was, and an affray then took place between the tithing-man and the inhabitants of the house, during which the tithing-man stated that he lost it; that he had it in his hand when he read it under the window; and that he never saw it afterwards; that he searched his pocket for it after he had gone about a mile and a half from the house, and could not find it; and that he directed a boy to look carefully for it, on the road between the house and the place where he first missed it; and the boy swore that he had made careful search, and could not find it; it was held, on a case reserved, that secondary evidence of the warrant was properly received, although notice had not been given to the prisoner to produce it. (*j*)

Loss of a warrant to apprehend.

But if it be proposed to give secondary evidence of a written instrument, and such instrument is traced into the possession of a particular person, the loss cannot be established without calling him as a witness; for it will not be enough to prove that he was applied to for the instrument, and upon such application, said that he could not find the same, nor did he know where it was. Thus, where it was proved that an indenture of apprenticeship was of two parts, that one had been destroyed, and that the other had come to the hands of a Miss Taylor, who when asked for it, said she could not find it; but she was not subpœnaed: this was held insufficient evidence of the loss. (*k*) The same principle applies

What is not sufficient proof of loss.

(*h*) 8 East, 289.

(*i*) Brewster *v.* Sewell, 3 B. & A. 296. See also Freeman *v.* Arkell, 2 B. & C. 494, where Bayley, J., expressed himself to the same effect. And for further examples of sufficient searches, see Rex *v.* North Bedburn, Cald, 452. Rex *v.* Johnson, 7 East, 65. Rex *v.* Morton, 4 M. & S. 48. Bligh *v.* Wellesley, 2 Carr. & P. 400. Rex *v.* East Farleigh, 6 D. & R. 147. Rex *v.* Stourbridge, 8 B. & C. 96.

(*j*) Rex *v.* Hood, R. & M. C. C. R. 281.

(*k*) Rex *v.* Castleton, 6 T. R. 236. See also Williams *v.* Younghusband, 1 Stark. R. 139, and Parkins *v.* Cobbett, 1 C. & P. 282. In Rex *v.* Denio, 7 B. & C. 620, the pauper, who had served as an appren-

So should the person who has the legal custody.

with respect to the person who has the legal custody of an instrument: if it is proposed to establish its loss for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible. (*l*) And where the instrument in question is the appointment to an office, the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts, which he may be called upon to do under its authority. (*m*) If the individual to whose possession the instrument is traced be dead, an inquiry should be made of his executors, or such persons as must be presumed to have it in their possession. (*n*) But if the papers of the deceased were searched during his lifetime, it is unnecessary to apply to the executors or other persons to whose possession such papers may have come. (*o*) If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents. (*p*)

Where two parts have been executed.

What is due search.

The Court must be satisfied that due diligence has been used to find the document in question; but it is not necessary to negative every possibility, it is enough to negative every reasonable probability, of anything being kept back. Where an officer or an attorney is applied to for the inspection of documents, the Court

tice, proved that the indenture was kept by his master, and when the apprenticeship expired, he asked his master for the indenture, who said he had not got it, but that it was with the overseer of the parish by which the pauper was bound apprentice, and proof was given of search among the papers of the parish for the indenture, and that it could not be found; and that all the books and papers about that date were missing; and it was held, that as the master was living, and might have been called as a witness, and his declarations were clearly not admissible in evidence, there was not sufficient evidence to shew that a due search had been made so as to let in parol evidence of the indenture. In Rex *v.* Rawden, 2 A. & E. 156, the widow of an apprentice stated that, a short time before her husband died she asked him what had become of his indentures, and he said that he had got them away from his master after the end of his apprenticeship, and had worn them in his pocket till they were all to pieces, and it was held that evidence of this conversation was inadmissible, there being no further proof either of the indenture having been in the possession of the apprentice, or of other inquiry after it. But where, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it, it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. Rex *v.* Morton, 4 M. & S. 48. The Court distinguished this case from Rex *v.* Castleton, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration were taken as evidence, and if it was, in the same breath he declared it no longer existed; whereas the evidence in Rex *v.* Castleton shewed that a further search was necessary.

(*l*) Rex *v.* Stoke Golding, 1 B. & A. 173.

(*m*) Rex *v.* Stoke Golding, *supra*. The law presumes the appointment of overseers to be in the custody of some of the overseers, per Holroyd, J., ibid.

(*n*) 1 Phill. Ev. 456, 7th edit.

(*o*) Rex *v.* Piddlehinton, 3 B. & Ad. 460. The master of an apprentice took away the indenture after it was executed, and failed in business after the apprentice had served about a year. Upon the failure, an attorney had the custody of *all* the papers and books of the master, and looked over them after the failure, and did not find any indenture, and it was held that this was sufficient to allow the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her; for, after the evidence of the attorney it was useless to inquire as to her possession of the indenture. In Fitz *v.* Rabbits, 2 M. & Rob. 60, Patteson, J., held that it was not necessary that the search should be recent, or for the purpose of the cause; and that a search for the paper three years before the trial was sufficient.

(*p*) Bull. N. P. 254. Doxon *v.* Haigh, 1 Esp. 409. Alivon *v.* Furnival, 4 Tyr. 751.

will assume, until the contrary appears, that the officer or attorney produces all the documents relating to the subject. (*q*)

2. Where the primary evidence is in the possession of the other party.

There is no distinction between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant. It has been solemnly determined, that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and in case he neglects to produce it, other evidence may be given of it. (*r*) Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence, which may be necessary to prove that fact, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down a general rule on the subject. (*s*) Where an original instrument belongs exclusively to a party, or regularly ought to be in his possession according to the course of business, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that on looking at his entry of charges, he had no doubt the certificate was allowed, this was held sufficient proof of the certificate having come to the defendant's possession. (*t*)

Possession of privy.

Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privy is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, in an action against the owner of a vessel, for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods which he had given to the captain, was held sufficient to let the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; on account of the privity between the owner and the captain. (*u*) So in an action of trover against the sheriff, a notice to the sheriff's attorney was, on account of the privity between him and his under-sheriff, held sufficient to let in secondary evidence of a writ, which was proved to have come to the possession of the under-sheriff, by having been returned to him during the time the sheriff remained in office. (*v*) So notice to a defendant to produce a check drawn by him, and paid by his banker, is sufficient to entitle the

(*q*) M'Gahey *v.* Alston, 2 M. & W. 206. In this case a cheque, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and the bankers of the parish on the same day paid a cheque of the same amount, and their custom was to return the cheques when paid to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose, and application was made to the succeeding paying clerk for an inspection of the cheques he had in his office, and the paying clerk handed to the witness several bundles, which the witness looked through without finding the cheque in question, but looked at no other. The paying clerk was not called, and it was held that this was such reasonable search for the cheque as to render parol evidence of it admissible.

(*r*) Per Buller, J., Rex *v.* Watson, 2 T. R. 201. Attorney-General *v.* Le Merchant, 2 T. R. 201, note (*a*). Cates *v.* Winter, 3 T. R. 306.

(*s*) 2 Phill. Ev. 216.

(*t*) Henry *v.* Leigh, 3 Camph. 502.

(*u*) Baldney *v.* Ritchie, 1 Stark. N. P. C. 338.

(*v*) Taplin *v.* Atty, 3 Bing. 164.

plaintiff to give secondary evidence of its contents, though the check remains in the banker's hands, for the possession of the banker is the possession of his customer. (*w*) So where a forged deed was produced by the prisoner's attorney on the trial of an ejectment, in which the prisoner was the lessor of the plaintiff, and after the trial it was returned to the prisoner's attorney, it was held that secondary evidence might be given of it, after notice to the prisoner to produce it, without calling the attorney to prove what he had done with the deed. (*x*)

In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be if it were in the hands of a party, in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain it. Where, therefore, a written contract had been deposited in the hands of the common agent of the defendant and the person with whom he had contracted, and notice to produce had been given to the defendant, it was held that secondary evidence was not admissible, because even if the document were given to the defendant for the purpose of the cause, it must be returned. (*y*) And where a paper is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient: and this is so, although the party justifies under the authority of that person. (*z*)

Instrument once in the party's possession, but since parted with.

A letter which had been in the possession of the defendant was proved on the part of the defendant to be then filed in Chancery, pursuant to an order of that Court; Abbott, C. J., was of opinion, that the plaintiff, upon proof of notice to produce, was not entitled to give secondary evidence of the contents; for the letter was as much in the possession of the one party as the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it. (*a*) But where a document was traced to the possession of the defendant, upon whom notice to produce it had been served, but he proved that it was then in the stamp-office, (where it had been delivered to have some duties allowed,) Best, C. J., held, that as he had not informed the plaintiff of that

(*w*) Partridge *v.* Coates, Ry. & Mood. N. P. C. 156, per Abbott, C. J., S. P. Burton *v.* Payne, 2 Carr. & P. 520, per Bayley, J. See also Sinclair *v.* Stevenson, 1 Carr. & P. 582, where Best, C. J., held it was enough to trace the primary evidence to the possession of an agent. But there is no such privity between the defendant, and a third person under whom he justifies, so as to make proof of the possession of such third party equivalent to the possession of the defendant. Evans *v.* Sweet, Ry. & Mood. N. P. C. 83, per Best, C. J. And Lord Kenyon held, on the trial of an information for a libel, that proof of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of its contents, upon notice to the defendant to produce it. Rex *v.* Pearce, Peake, N. P. C. 76; but see *contra*, Pritchard *v.* Symonds, Bull. N. P. 254. Rosc. Ev. 7, and Colonel's Gordon's case, 1 Leach, 300, note (*a*) to Aickles's case.

(*x*) Rex *v.* Hunter, 4 C. & P. 128, Vaughan, B. Some counts of the indictment charged that certain persons made the deed, and that the prisoner fraudulently altered it, and it was objected that previously to the receiving secondary evidence the attesting witness ought to be called, but Vaughan, B., overruled the objection.

(*y*) Parry *v.* May, 1 M. & Rob. 279, Littledale, J.

(*z*) 2 Phill. Ev. 218, citing Evans *v.* Sweet, R. & M. 83. Rex *v.* Pearce, Peake, 76. Pritchard *v* Symonds, B. N. P. 254. Whitford *v.* Tutin, 10 Bing. R. 395.

(*a*) Williams *v.* Munnings, 1 R. & M. N. P. C. 18.

circumstance when serving the notice, secondary evidence was allowable. (*b*)

Notice to produce; its form.

After the possession of the primary evidence is proved to be in the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. (*c*) It should be properly entitled; (*d*) and must not be general, but should specify the document to be produced. Thus, a notice "to produce all letters, papers, and documents touching a bill of exchange mentioned in the declaration, and the debt sought to be recovered," was held too vague. (*e*) So a notice "to produce letters and copies of letters, also all books relating to the cause," was held insufficient to let in secondary evidence of a letter alleged to have been written nine years before. (*f*) It should also be served in reasonable time. (*g*) In civil cases, the rule is, that notice to produce should be served before the commission day, when the party lives away from the assize town, in order that he may have an opportunity of bringing the paper required. (*h*) And, *à fortiori*, in a criminal case, where the party is in prison at a distance from his home, ought the notice to be served before the commission day. (*i*) In town causes, service of notice on the attorney in the evening before the trial is in general sufficient. (*j*)

When and upon whom to be served.

(*b*) Sinclair *v.* Stevenson, 1 C. & P. 582.

(*c*) Smith *v.* Young, 1 Campb. 440. Rosc. Ev. 7.

(*d*) Harvey *v.* Morgan, 2 Stark. R. 17, where in an action by the plaintiffs as the assignees of C. *v.* E., a notice to produce was entitled A. and B., assignees of C. and D. *v.* E., and held insufficient by Lord Ellenborough, though A. and B. were in fact the assignees of C. and D.

(*e*) France *v.* Lucy, Ry. & Mood. N. P. C. 341.

(*f*) Jones *v.* Edwards, M'Clel. & Y. 139. In Morris *v.* Hauser, 2 M. & Rob. 392, Lord Denman, C. J., held a notice to produce "all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf," sufficient to let in secondary evidence of a letter. And in Jacob *v.* Lee, 2 M. & Rob. 33, Patteson, J., held a notice to produce "all and every letters written by the plaintiff to the defendant relating to the matters in dispute in this action," sufficient, and distinguished the case from France *v.* Lucy, and Jones *v.* Edwards, *supra*, on the ground that the notice mentioned the parties by whom and to whom the letters were addressed.

(*g*) As to what is considered a reasonable notice, see Doe *v.* Grey, 1 Stark. R. 283, Bryan *v.* Wagstaff. Ry. & Mood. N. P. C. 327. Drabble *v.* Donner, ibid. 47.

(*h*) Trist *v.* Johnson, 1 M. & Rob. 259, Park, J. A. J. S. P. George *v.* Thompson, 4 Dowl. P. R. 656, where it was served on the commission day, at 5 p. m., at the attorney's residence after he had left home for the assize town. Doe *d.* Curtis *v.* Spitty, 3 B. & Ad. 182. Hargest *v.* Fothergill, 5 C. & P. 303, Taunton, J. In Howard *v.* Williams, 9 M. & W. 725, a notice was served on the defendant's attorney at his residence, twenty miles from the place of trial before the under-sheriff, at 8 p. m., on the night before the trial; the defendant resided in the same town with the attorney, but was not at home until 12 that night; and the notice was held insufficient.

(*i*) Rex *v.* Ellicombe, 1 M. & Rob. 260, Littledale, J. This was an indictment for setting fire to a house with intent to defraud an insurance company, and notice was served on the prisoner in gaol on Monday, the assizes having commenced on the Friday previous, and the trial being on the Wednesday following. The prisoner's residence was ten miles from the assize town. The notice was held insufficient.

(*j*) Per Gurney, B., Atkins *v.* Meredith, 4 Dowl. P. R. 658. 2 Phill. Ev. 219. Gibbons *v.* Powell, 9 C. & P. 634, Gurney, B. Leaf *v.* Butt, 1 C. & Mars. 451. Meyrick *v.* Woods, ibid. 452. But where notice to produce a receipt was served on the defendant on Saturday, the cause coming on for trial on the Monday, Gurney, B., held the service too late, and that the notice should have been served on the attorney. Houseman *v.* Roberts, 5 C. & P. 394. Where the party and his attorney both lived in Worcester, Williams, J., held that service on the Saturday during the assizes for the Monday following was sufficient. Firkin *v.* Edwards, 9 C. & P. 478.

But where in a town cause the service was at seven o'clock the evening before the trial, upon the attorney, who resided in London, between two and three miles from the tradesman, whose books were required to be produced, the Court of Exchequer held the notice insufficient, as the books could not be presumed to be in the possession of the attorney. (*k*) The notice may be served either on the party himself or his attorney. There is no difference in this respect between criminal and civil cases. (*l*)

Notice to produce, when unnecessary.

Notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has notice that he is charged with the possession of it, as in actions of trover, for bonds or bills of exchange. (*m*) So in a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. On an indictment for stealing a bill of exchange, all the Judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negociation, in the hands of a third person, who had been served with a subpœna, and did not appear: (*n*) and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce. (*o*) So in *Spragge's case*, who was tried before Buller, J., on an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given. (*p*) But there it might be said, that such a notice would be nugatory, as the thing itself was destroyed. (*q*) And it has since been held, on an indictment for forging a deed of release, that notice to produce the deed must be proved to have been given; but it appearing that the prisoner had stated that after he had obtained possession of the deed he had burnt it, it was held that secondary evidence of its contents was admissible. (*r*) In

(*k*) Atkins *v.* Meredith, 4 Dowl. P. R. 658. In Rex *v.* Haworth, 4 C. & P. 254, Parke, J., held a notice to produce a forged deed served on the prisoner after the commencement of the assizes too late, saying it should have been served a reasonable time before the assizes; but it does not appear whether the prisoner resided in the assize town or not. In Royston's case, 1 Lew. 267, Bolland, B., held a notice to produce a note served on Monday, the trial being on the Wednesday following, insufficient, but the report does not state on what ground.

(*l*) The Attorney-General *v.* Le Merchant, 2 T. R. 201, in note (*a*) to Rex *v.* Watson.

(*m*) How *v.* Hall, 14 East, 274. Scott *v.* Jones, 4 Taunt. 865. Tidd's Pract. 853. The practice used to be otherwise, per Gibbs, J., 4 Taunt. 868.

(*n*) Aickles's case, 1 Leach, 294.

(*o*) 1 Leach, 297, per Heath, J.

(*p*) Cited by Lord Ellenborough, C. J., in How *v.* Hall, 14 East, 276.

(*q*) Per Lord Ellenborough, C. J., ibid.

(*r*) Rex *v.* Haworth, 4 C. & P. 254, Parke, J. See Foster *v.* Pointer, 9 C. & P. 718, where Gurney, B., held that a statement by the defendant's attorney that a paper was not in existence made secondary evidence admissible, although a notice to produce had been served too late. In Doe *d.* Phillips *v.* Morris, 3 A. & E. 46, the Court seem to have been of opinion that notice to produce was necessary, although there might be some evidence that the instrument was destroyed, "for although a witness might be called to say that it had been destroyed, it might be in the hands of the adverse party notwithstanding," per Lord Denman, C. J., and the defendant might dispute the fact of its destruction, and say, "I have the document, but will not produce it, because I have not been served with notice," per Patteson, J. Mr. Starkie, Ev., vol. 1, 398, after citing this case, adds, "*tamen quære*, for after destruction of the instrument it is no longer in the possession of any one." It is conceived, however, that the observations of the Court are perfectly accurate with reference to a case where the destruction of the document is disputed. C. S. G.

Layer's case, (*s*) on an indictment for high treason, where it was proved, that the prisoner had shown a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of *De la Motte,* (*t*) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence; the Court held, that they might be admitted, after proof that the originals were in the handwriting of the prisoner. So on the trial of an indictment for administering an unlawful oath, it was held that a witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it. (*u*) But an indictment for setting fire to a house, with intent to defraud an insurance office, does not convey such a notice that the policy of insurance will be required upon the trial, as to dispense with the necessity of a notice to produce it. (*v*) So where on an indictment for stealing iron out of a canal boat, it appeared that the boat had been weighed at a lock, and a ticket of the weight given to the prisoner, and it was proposed to give secondary evidence of its contents, although no notice to produce it had been given; Parke, J., held, that this was not allowable, because the rule which requires notice to be given extends to criminal as well as civil cases, except where the nature of the indictment itself expressly shows the prisoner that the deed or paper in question will be wanted at the trial. (*w*)

Necessary though document is in Court.

It seems to be the better opinion, that neither party will be allowed, either in an examination in chief, or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession in Court, at the time of the trial; and that the opposite party may object to parol evidence of the contents, on account of his not having received a notice to produce the original. (*x*)

(*s*) 6 St. Tr. 263.

(*t*) Coram, Buller and Heath, J., 1 East, P. C. c. 2, s. 58, p. 124.

(*u*) Rex *v.* Moors, 6 East, 419, note to Rex *v.* Nield. See also Rex *v.* Hunt, 3 B. & A. 566, *ante*, p. 734. And see the same case as to proving inscriptions on banners, &c., without notice to produce, *ibid.* So the principle of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpœna. Leeds *v.* Cook, 4 Esp. N. P. C. 256. Tidd. Pr. 853.

(*v*) Rex *v.* Ellicombe, 5 C. & P. 522. 1 M. & Rob. 260, Littledale, J. There were other counts laying the intent differently. In ordinary cases of felony it is not only the very nature of the indictment, but the charge before the magistrate which gives notice to the prisoner at a sufficient time before the trial to be prepared with the particular document, and that is always the case in civil suits. But if an indictment were preferred without any previous examination before a magistrate, it may be questionable whether such indictment ought to be considered as giving sufficient notice to the prisoner, unless, indeed, he had information of the precise nature of the charge contained in it at such a period before the trial as would be sufficient for the service of a notice to produce. C. S. G.

(*w*) Rex *v.* Humphries, Stafford Spr. Ass. 1829. MS. C. S. G.

(*x*) 2 Phil. Ev. 226. 1 Stark. Ev. 404. And see Doe *v.* Grey, 1 Stark. 283. Roe *v.* Harvey, 4 Burr. 2484. Rosc. Ev. 6.

A party called upon to produce a paper, must either produce it when called upon, or not at all: he cannot avail himself of it in a subsequent stage of the case. (*y*) Where, therefore, notice had been given to the defendant to produce certain receipts for rent, which the defendant refused to produce; it was held, that the defendant could not afterwards, as part of his case, put in the receipts for the purpose of showing that the rent was paid to the lessor of the plaintiff and another jointly. (*z*)

Time to call for production.

The regular time of calling for the production of papers and books, is not until the party who requires them has entered into his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted. (*a*)

Consequences of giving notice to produce.

If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instruments required, it has been held that no inference is to be drawn from such refusal; but that the only consequence is, that the other party who has done all in his power to supply the best evidence will be allowed to go into secondary evidence. (*aa*) If the party, giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party, (*b*) though it is otherwise when the papers are inspected. (*c*) Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. (*d*) Where a party, after notice, refuses to produce an agreement, it is to be presumed as against him that it is properly stamped. (*e*)

3. What is good secondary evidence.

Of a deed: Original in-

3. It remains to be considered what is good secondary evidence. (*f*) It must be observed, that previous to giving any such evidence of the contents of a deed, the original deed ought to be proved to have been duly executed. (*g*) So where an original note of hand is lost, a copy cannot be read in evidence unless the note

(*y*) 2 Phill. Ev. 220. Doe *d.* Higgs *v.* Cockell, 6 C. & P. 525. Jackson *v.* Allen, 3 Stark. R. 74. Lewis *v.* Hartley, 7 C. & P. 405.

(*z*) Doe *d.* Thompson *v.* Hodgson, 12 A. & E. 135.

(*a*) 2 Phill. Ev. 222. Graham *v.* Dyster, 2 Stark. R. 23. Sideways *v.* Dyson, ibid., 49. 1 Stark. Ev. 403.

(*aa*) Cooper and another *v.* Gibbons, 3 Campb. 363. That was an action for the value of a pipe of wine: notice had been given by the defendant to the plaintiffs to produce their books, but they were not produced. It was insisted for the defendant, that the jury were bound to draw an inference against the plaintiffs from such non-production. But Gibbs, C. J., said, "I have considered this subject a good deal, and am of opinion, that the jury are not authorized to draw any such inference from the circumstance relied on. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendants to give parol evidence of their contents." See the observations of Mr. Phillipps, 2 vol. 222.

(*b*) Sayer *v.* Kitchen, 1 Esp. N. P. C. 210.

(*c*) Wharam *v.* Routledge, 5 Esp. N. P. C. 235. Rosc. Ev. 9, S. P. if they are at all material to the case, Wilson *v.* Bowie, 1 C. & P. 10, *cor.* Park, J. A. J. Calvert *v.* Flower, 7 C. & P. 386.

(*d*) Graham *v.* Dyster, 2 Stark. 23. Rosc. Ev. 9.

(*e*) Crisp *v.* Anderson, 1 Stark. N. P. C. 35, but the party refusing is at liberty to prove the contrary, ibid.

(*f*) Where secondary evidence is let in, it is subject to the same rules as the best evidence which the case admits of: the evidence as to the contents of written instruments, when they cannot be produced themselves, must be of a nature which the law would receive in other instances. Per Lord Ellenborough, in Fisher *v.* Samuda, 1 Campb. 193.

(*g*) Bull. N. P. 254. Rex *v.* Culpepper, Skin. 673.

is first proved to be genuine. (*h*) In secondary evidence there are no degrees, that is no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior order of proof to an examined copy, nor is an examined copy superior to parol evidence of the contents. (*j*) As soon, therefore, as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. (*k*) The evidence of any one who recollects the contents of a letter, is good secondary evidence of them, (*l*) although it is in the party's power to produce the clerk who wrote the letter. (*m*) If it be necessary to prove the contents of a license to trade granted from the crown, proof of its loss is not enough to let in parol evidence of them, because there must be some register of it at the Secretary of State's Office, and that register would be better than parol evidence. (*n*) So where it was proposed to prove that defendant was owner of a ship, by means of his affidavit, sworn for the purpose of obtaining a certificate of register, and a proper ground for the reception of secondary evidence had been laid, Lord Ellenborough held, that an entry in the register-book at the Custon-house, stating that the certificate had been granted on an affidavit of the defendant that he was owner, was not admissible as secondary evidence. The collector's clerk, or some person who had seen the affidavit, and knew that it was made by the defendant, ought to have been called. (*o*) Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. (*p*) So where there was a properly stamped agreement under seal, and a counterpart of it unstamped, and the plaintiff proved the loss of the deed itself, and proposed to read a draft copy in evidence, it was held that the unstamped counterpart, which was produced after notice by the defendant, might be read as secondary evidence of the contents of the lost deed. (*q*)

strument must be proved to have been duly executed.

No degrees of secondary evidence.

Of a letter.

Of a license to trade.

Of an affidavit of ownership of ship.

Of lost agreement, &c., by unstamped counterpart.

A copy of a copy of a document in the possession of the defendant, who had received notice to produce the document, was offered as secondary evidence of the contents, being produced by a witness,

(*h*) By Lord Hardwicke, C. J., in Goodier *v.* Lake, 1 Atk. 246.

(*j*) 2 Phill. Ev. 236. It was formerly thought that the next best evidence of a deed was a counterpart. Bull. N. P. 254, and see Munn *v.* Godbold, 3 Bing. 292, and if there were no counterpart, an examined copy, 1 Phill. Ev. 438, 6th ed.

(*k*) Per Parke, B., Doe *d.* Gilbert *v.* Ross, 7 M. & W. 102. In that case on the trial of an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and it was held that the short hand writer's notes of the contents of the deed were admissible in evidence, although there was an attested copy, which being unstamped was rejected. In Brown *v.* Woodman, 6 C. & P. 206, Parke, J., held that parol evidence of the contents of a letter was admissible, although a copy of the letter existed. In Doe *d.* Morse *v.* Williams, 1 C. & Mars. 615, Patteson, J., held that parol evidence of the contents of a notice to quit was admissible, although no notice had been served to produce the copy of the notice served on the defendant. In Hall *v.* Ball, 3 M. & Gr. 242, in trover for an expired lease by the lessor, the lease or counterpart executed by the lessor not being produced by the defendant upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee.

(*l*) Liebman *v.* Pooley, 1 Stark. N. P. C. 167, by Lord Ellenborough. But a copy of the original copy of a letter, is not good secondary evidence, ibid.

(*m*) Rex *v.* Chadwick, 6 C. & P. 181, Tindal, C. J.

(*n*) Rhind *v.* Wilkinson, 2 Taunt. 237. Eyre *v.* Palsgrave, 2 Campb. 605.

(*o*) Teed *v.* Martin, 4 Campb. 90.

(*p*) Waller *v.* Horsfall, 1 Campb. 501.

(*q*) Munn *v.* Godbold, 3 Bing. 292. See also Garnons *v.* Swift, 1 Taunt. 507.

who stated that he had compared it with the first copy, which he had compared with the original document, Alderson, B., rejected the proposed proof. (*r*)

Cases where the rule is relaxed.

Public books.

There are some particular cases, where the rule that the best possible evidence must be produced, has been relaxed. Where it is necessary to prove an entry in a public book, the original book need not be shewn; but from a principle of general convenience, an examined copy will be admitted. (*s*)

Post-office marks.

The post-office marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong at the dates those marks specify; (*t*) but a mark of double postage on such a letter is not in itself evidence that the letter contained an enclosure, (*u*) and it has been held that the post-mark is not evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (*v*)

Muster-books.

The muster-books of the King's ships, documented in the Navy Office, to which returns are regularly made by the commanders, of the names, &c. of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacity there mentioned. (*w*)

Persons acting in a public capacity.

So in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments; (*x*) and that even in a case of murder. (*y*)

On the *voire dire*.

A witness may be examined on the *voire dire* as to the contents of a written instrument, without notice having been given to produce it. (*z*)

On cross-examination to impeach a witness's credit.

And where a witness is cross-examined for the purpose of impeaching his credit, such cross-examination is sometimes allowed to be conducted without regard to the rule under consideration. Thus, an accomplice or other witness, who appears for the crown on a criminal prosecution, is often asked on the part of the prisoner, without any objection, whether he has not himself been tried for some offence, although, if the rule were strictly applied, that fact could only be proved by the best possible evidence, *viz.*, the record. (*a*) So it has been argued by a very eminent writer, that a witness may be asked on cross-examination, for the purpose of trying his credit and veracity, whether he has not given an account in a letter different from his present testimony, without regard to the objection that the letter itself is the best evidence, and therefore, the parol evidence of the witness inadmissible; (*b*) for the general rule, that the best evidence is to be produced which the nature of the thing admits, is to be understood as applying only to the proof of the issue, or of some fact material to the issue. (*c*)

Rule applied only to proof of the issue, or of some fact material to the issue.

(*r*) Everingham *v.* Roundell, 2 M. & Rob. 138, as cited 2 Phill. Ev. 239. "This evidence was manifestly defective; it did not appear that the witness had compared the copy produced with the original document. After the rejection of this second copy, parol evidence of the contents of the original document would have been admissible." Ibid.

(*s*) 1 Phil. Ev. 432.

(*t*) Rex *v.* Plumer, Russ. & Ry. 264. *Ante*, vol. 1, p. 259.

(*u*) Ibid.

(*v*) Rex *v.* Watson, 1 Campb. 215. *Ante*, vol. 1, p. 259, and Fletcher *v.* Braddyll, 3 Stark. N. P. C. 64.

(*w*) *Ante*, p. 483, Rhodes's case, 1 Leach, 24. And see Aicles's case, 1 Leach, 390, where it was held that the daily book of a prison is good evidence to prove the time of a prisoner's discharge.

(*x*) 1 Phil. Ev. 432. *Ante*, p. 732.

(*y*) By Buller, J., in Berryman *v.* Wise, 4 T. R. 366.

(*z*) Howell *v.* Locke, 2 Campb. 15.

(*a*) 2 Phil. Ev. 428, *et seq.*

(*b*) 1 Phil. Ev. 299, 7 Ed.

(*c*) 1 Phill. Ev. 301, 7 Ed.

Statements respecting writings.

Whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. (*d*) The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so. (*e*)

Fact of tenancy.

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. (*f*) But if any of the terms of the tenancy, as for example, who is the lessor, or what is the rent, are in issue, and it appears that there was a written contract for the tenancy, such contract must be produced. (*g*)

Inscriptions on walls, &c.

Inscriptions on walls, and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, as they cannot be conveniently produced in Court, may be proved by secondary evidence. (*h*) Such exceptions are in cases where the material on which the document is written is not easily removed; as in the case of things fixed to the ground or to the freehold, for the law does not expect a man to break up his freehold for the purpose of bringing a notice into Court. But that ground of exception does not apply to the case of a notice painted on a board, fastened by a string to a nail in a wall, as there could be no difficulty or inconvenience in removing the board from the nail on which it was hung, and producing it in Court. (*i*)

(*d*) Per Parke, B., Slatterie *v.* Pooley, 6 M. & W. 664.

(*e*) Per Parke, B., ibid. In Earle *v.* Picken, 5 C. & P. 542, Parke, B., held that a witness might be asked whether he had not heard the defendant say that a person had agreed to give a certain sum for an estate. In Slatterie *v.* Pooley, after a composition deed and schedule had been produced and the latter not being duly stamped rejected, evidence of a verbal admission by the defendant that the debt mentioned in the declaration was the same with one entered in the schedule, was held admissible, for the purpose of proving the third issue in the cause. Bloxam *v.* Elsie, R. & M. N. P. R. 187, was expressly overruled in this case. In Howard *v.* Smith, 3 M. & Gr. 254, the question in an action of replevin was, whether the plaintiff held under a demise at the rent of 20*l.*, payable quarterly, and evidence of verbal statements of the plaintiff that he so held were held sufficient, although it appeared that the tenancy was created by adopting the terms of a former demise in writing, which was not produced.

(*f*) Greenl. Ev. 100. Rex *v.* The Holy Trinity, Kingston upon Hull, 7 B. & C. 611; 1 M. & R. 444.

(*g*) Rex *v.* Rawden, 8 B. & C. 708. Rex *v.* Merthyr Tidvil, 1 B. & Ad. 29. Doe *v.* Harvey, 8 Bing. R. 239.

(*h*) Greenl. Ev. 106, citing Doe *d.* Coyle *v.* Cole, 6 C. & P. 359, Patteson, J. Rex *v.* Fursey, 6 C. & P. 81, Parke, J., and Gaselee, J.; where the contents of a paper notice affixed to a wall were proved by a copy. Parol evidence however, is admissible in such cases. Doe *v.* Cole.

(*i*) Jones *v.* Tarleton, 1 Dowl. P. R. (N. S.) 625, 9 M. & W. 675.

SECTION III.

Of Hearsay Evidence.

General rule that hearsay evidence is inadmissible.

THERE is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. (*j*) There are, however, certain instances, which it will be the object of this section to point out, where hearsay evidence is admissible, because either the objection does not apply, or from the necessity of the case the rule is relaxed.

Hearsay part of the transaction, or *res gestæ*.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. (*k*) Thus in *Lord George Gordon's* case, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction. (*l*) And generally speaking, declarations accompanying acts are admissible in evidence as shewing the nature, character, and object of such acts. Thus where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; (*m*) or changes his actual residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does any other act material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts indicating a present purpose and intention," and are therefore admitted in proof like any other material facts. They are part of the *res gestæ*. (*n*) Thus, where a constable, who was indicted for a forcible entry into a house, had searched the house, having a warrant in his hand, Lord Tenterden, C. J., held that what he said at the time as to who he was searching for, was admissible, although the question was asked by his counsel, and the answer might be in his favour. (*o*)

(*j*) 1 Phil. Ev. 229, 7 ed.; 206, 9 ed.

(*k*) Rosc. Ev. 30.

(*l*) 21 How. St. Tr. 535.

(*m*) Co. Litt. 49 *b*, 245 *b*. Robinson *v.* Swett, 3 Greenl. 316. 3 Bl. Com. 174, 175.

(*n*) Greenl. Ev. 120, citing Bateman *v.* Bailey, 5 T. R. 512. Rawson *v.* Haigh, 2 Bingh. R. 99. Newman *v.* Stretch, M. & M. 338. Ridley *v.* Gyde, 9 Bing. 349. Smith *v.* Cramer, 1 Bing. N. C. 585. Gorham *v.* Canton, 5 Greenl. 266. Fellowes *v.* Williamson, M. & M. 306. Vacher *v.* Cocks, M. & M. 353, 1 B. & Ad. 145.

(*o*) Rex *v.* Smyth, 5 C. & P. 201. And see 1 Stark. Ev. 62, 350, 351. Walters *v.* Lewis, 7 C. & P. 344. Where an agent paid money into a bank, Littledale, J., held that what he said about the money at the time he paid the money into the bank was admissible. Reg. *v.* Hall, 8 C. & P. 358. The learned Judge admitted the evidence, on the ground that it was a declaration by an agent acting within the scope of his authority; but it seems equally admissible as a declaration accompanying the act of payment, and explanatory of the purpose of the payment. C. S. G.

Complaints of injuries.

In an action by a husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as part of the *res gestæ*. (*p*) So on an indictment for manslaughter, in killing a party by driving a cabriolet over him, it has been held that a statement made by the deceased immediately after the accident, as to the cause of the accident, is admissible. (*q*) And Lawrence, J., said, in *Aveson* v. *Lord Kinnaird*, (*r*) that it is in every day's experience, in actions of assault, that what a man has said of himself to his surgeon is evidence, to show what he suffered by the assault. Inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. (*s*) So, on a prosecution for robbery, it has been held, that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of a person, as the name of one of the persons who had robbed him, is admissible, but not the name so mentioned. (*t*) So, on a prosecution for a rape, it has been held, that the prosecutor may prove that the woman made a complaint recently after the injury: (*u*) so it has also been considered allowable, on an indictment for an assault on an infant of five years old, with intent to ravish her, to give evidence of the child's having complained of the injury recently after it was received. (*v*) But the particulars of such a complaint are not admissible in evidence on the part of the prosecution. (*w*) It is not, therefore, competent, on the part of the prosecution, to ask what name the prosecutrix mentioned at the time she made such a complaint. (*x*) And although what the prosecutrix said at the time of the committing the offence would be receivable in evidence, on the ground that the prisoner was present, and the violence going on, yet, if the violence was over, and the prisoner had

Robbery and rape.

(*p*) Thompson *v.* Trevanion, Skin. 402, cited by Lord Ellenborough, C. J., in Aveson *v.* Lord Kinnaird, 6 East, 193.

(*q*) Rex *v.* Foster, 6 C. & P. 325, Park, J. A. J. Patteson, J., and Gurney, B.

(*r*) 6 East, 193. 1 Phill. Ev. 191.

(*s*) By Lord Ellenborough, 6 East, 195. "When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he (so) says ought not to be received in evidence." 1 Phill. Ev. 191, and "although it is now settled that what a patient says to a medical man about his sufferings is receivable in evidence, it should seem that a statement by him respecting the particular cause of his sufferings (as, for example, the circumstance of an assault which he had received,) would be open to greater objection." 1 Phill. Ev. 192.

(*t*) Rex *v.* Wink, 6 C. & P. 397, Patteson, J. It was also held that the constable might be asked whether in consequence of the prosecutor mentioning a name to him, he went in search of any person, and who that person was; but in Reg. *v.* Osborne, 1 C. & Mars. 622, this point was questioned by Cresswell, J., who said, "it seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked whether in consequence of what was said the witness apprehended a particular person. I think you ought not to go so far as that."

(*u*) Rex *v.* Clarke, 2 Stark. N. P. C. 242. Such evidence is now considered quite essential in order to support the statement of the prosecutrix. C. S. G.

(*v*) 1 East, P. C. c. 10, s. 5, p. 444. *Ante*, vol. 1, p. 695.

(*w*) 1 Phill. Ev. 193, *ante*, vol. 1, p. 689, note (*c*)

(*x*) Reg. *v.* Osborne, 1 C. & Mars. 622, Cresswell, J. But the counsel for the prisoner may, if he thinks fit, ask the prosecutrix as to the terms of the complaint, and if he does so the counsel for the prosecution has a right to examine as to all that was said by her in the same conversation. C. S. G.

departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. (*y*)

The fact of the prosecutrix having made a complaint is only admissible for the purpose of confirming her testimony; in case, therefore, of her death, or absence from any cause, neither the particulars of the complaint, nor the fact of such complaint having been made, are admissible in evidence. (*z*)

On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to show, on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards; for it is material in such a case to inquire under what circumstances the prisoner first had possession of the property. (*a*)

Testimony of a deceased witness at a former trial.

If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness given upon oath at the former trial is admissible on the subsequent trial, and may be proved by one who heard him give evidence; (*b*) but the witness must speak to the very words, and not merely swear to the effect of them. (*c*) "He ought," said Lord Kenyon, "to recollect the very words; for the jury alone can judge of the effect of words." (*d*) In what cases the depositions of a witness before a committing magistrate may be read in evidence at the trial, will be hereafter considered.

Depositions.

Dying declarations.

Besides the usual evidence of guilt in general in cases of felony, there is one kind of evidence peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed. (*e*) The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. (*f*) It is therefore evident that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. (*g*) "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were

Deceased must be conscious of approaching death.

The declarations must be

(*y*) Per Cresswell, J. Reg. *v.* Osborne, *supra.*

(*z*) Reg. *v.* Megson, 9 C. & P. 420, Rolfe, B. Reg. *v.* Guttridges, 9 C. & P. 471, Parke, B., *ante*, vol. 1, p. 690; 1 Phill. Ev. 193.

(*a*) 1 Phil. Ev. 234, 7th ed.

(*b*) Rex *v.* Carpenter, 2 Show. 47; 2 Hawk. P. C. c. 46, s. 29; 1 Phil. Ev. 337, and Mr. Starkie's note to Rex *v.* Smith, in the second volume of his Reports, p. 211.

(*c*) Lord Palmerston's case, cited by Lord Kenyon in Rex *v.* Jolliffe, 4 T. R. 290.

(*d*) Ennis *v.* Donisthorne, MS., 1 Phil. Ev. 231, 7th ed. By this it is conceived his Lordship meant, not that the witness's testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and no other: but that the present witness ought to say, "To the best of my recollection these were the very words used."

(*e*) 1 East P. C. c. 5, s. 124, p. 353.

(*f*) Per Eyre, C. B., in Woodcock's case, 1 Leach, 500.

(*g*) Per Eyre, C. B., ibid.

made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief that his dissolution was or was not impending. It is *the impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible." (*g*)

made under a sense of impending death.

"With respect to the interval of time which may have elapsed between the dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone, nor is it consistent with the principle upon which dying declarations are received in evidence, (which, as we have seen, depends on the state of the declarant's mind,) that such declarations should be excluded, if not made within any precise limit of time. It ought, however, to appear that the deceased believed his dissolution impending. And unquestionably the length of time may be a material consideration in forming an inference as to the state of the mind of the deceased with respect to his expectation of death at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation." (*h*)

As to the interval of time between the declaration and the death.

Upon the trial of *Welbourn* (*i*) for the murder of Page by poison, a witness deposed that the deceased and the prisoner lived with her as her servants; that perceiving the deceased alter and appear very ill, she taxed her with being with child, which she owned, and the next day continuing very ill, she confessed she had taken something, at which time the witness believed that the deceased was sensible of her situation and danger, though she did not say so. But when the apothecary came to see her the same evening, she said that she was very bad, and did not know if she should get the better of it. The apothecary deposed, that when he first saw the deceased she was then apparently dying, but he believed that she was not sensible of her danger; that after he had been with her some time he made her sensible of her danger, in order that he might get from her what she had done. She desired him to give her something to ease her pain. He told her he must first know what she had done; and

Welbourn's case.

Where it did not sufficiently appear that the deceased knew she was in a dying state.

(*g*) Greenl. Ev. 189.

(*h*) 1 Phill. Ev. 285. In Woodcock's case, *ante*, p. 752, the declarations were made forty-eight hours before the death. In Tinkler's case, 1 East, P. C. 354, some of them were made ten days before the death. In Rex *v.* Mosley, *post*, p. 757, they were made eleven days before the death. In Rex *v.* Bonner, *post*, p. 758, they were made three days before death; and were all received. In Rex *v.* Van Butchell, *post*, p. 755, they were made seven days before the death and rejected.

(*i*) 1 East, P. C. c. 5, s. 124, p. 358.

that she would not live twenty-four hours unless proper relief were afforded (she did not in fact live above an hour afterwards.) The witness had no other reason for thinking that she knew her danger from anything that she said, except that on his telling her of her danger, she told him what was the cause, which she had before refused to do. She then described to him the symptoms of pain which she had felt, and again repeated that she wished he would give her something to compose her. The witness then again urged the necessity of knowing the cause of those symptoms, and she told him with reluctance, that she had been three or four months gone with child, and that during the last fortnight she had been constantly prevailed upon to take bitter apple in order to procure an abortion, but that not producing the desired effect, the person had prevailed on her to take a white powder, (which was the day before she was taken ill,) and that the symptoms came on in about three or four hours after. The witness then urged her to say by whom she had been prevailed upon, when with increased reluctance and hesitation she told him, it was by her fellow-servant Welbourn, and that he had prevailed upon her by assuring her that there was no crime in procuring an abortion whilst the child was so young. At this moment she was free from pain, and the witness thought that a mortification had taken place. From the deceased's description of the white powder, and from the inspection of the body afterwards, the witness believed it to be arsenic. On his cross-examination he said, that at the time she made this declaration he believed that she thought she was getting well, from the being so free from pain. The declaration was received, and the prisoner was found guilty. But a doubt afterwards occurring to the learned Judge, whether, though in the first part of the apothecary's evidence he swore that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said, that at the time she made the declaration, she believed that she was getting better from the pain ceasing, he should not have rejected the evidence; the prisoner was respited to take the opinion of the Judges on the case, a majority of whom were of opinion, that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration; on the contrary, she had reason to think that if she told what was the matter with her, she might have relief and recover. But as to what the apothecary had said on his cross-examination, they laid no stress on it, being mere opinion, unwarranted by fact. So in the case of *Rex* v. *Christie*, (*j*) O. B. 1821, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, "I am satisfied;" and after this he made a statement; this statement was held by Abbott, C. J., and Park, J. A. J., to be inadmissible as a declaration in *articulo mortis*, as it did not appear that the deceased thought himself at the point of death, for, being told that the wound was not necessarily mortal, he might still have had a hope of recovery.

Christie's case.

Any hope of

Any hope of recovery, however slight, existing in the mind at the

(*j*) MS. Carr. Supp. 202.

time of the declarations made will render the declarations inadmissible. Upon an indictment for murder, it was proposed to give in evidence a declaration of the deceased, and a surgeon proved that he had told the deceased that she would not recover, and that she was perfectly aware of her danger. She said she hoped the surgeon would do what he could for her for the sake of her family; he told her there was no chance of her recovery. Bosanquet, J., "This shows a degree of hope in her mind. To render a declaration of this kind admissible, the deceased must have had the impression on her mind of an almost immediate dissolution. This will not do." (*k*) So where upon an indictment for murder it appeared that after the surgeon had examined the wound, the deceased inquired whether he was in danger, to which the surgeon answered that he was, and the only chance of his living was keeping himself quite quiet; upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements, but that upon the surgeon's statement he must be taken to have had some hope of recovery. On which Tindal, C. J., observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, would undoubtedly render the evidence of such declarations inadmissible. But upon further examination of the surgeon it appeared, that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previous to his receiving his declarations, desired him as a dying man to tell the truth, and that the deceased replied that he would. Upon this further evidence the declarations were held admissible. (*l*) So where upon an indictment for manslaughter, it was proposed to give in evidence a declaration of the deceased, and a surgeon was called, who stated that he saw the deceased on the evening of the day on which the injury was inflicted, and that the deceased appeared to think that he should never recover. He said, "I feel that I have had such an injury in the bowel that I think I shall never recover;" the surgeon endeavoured to encourage him, as his symptoms were not then such as to lead the surgeon to consider him in danger of dying; but his expression was, that he felt satisfied that he should never recover. This was on the 10th of May, and the deceased died on the 17th. Hullock, B., "The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately "never recover," but still that would not be sufficient to dispense with an oath. I must reject the evidence." (*m*)

recovery, however slight, renders a declaration inadmissible.

Hayward's case.

Van Butchell's case. Belief that he will not recover.

(*k*) Rex *v.* Crockett, 4 C. & P. 544.

(*l*) Rex *v.* Hayward, 6 C. & P. 157. It is not stated in this case when the deceased died. Where the deceased said, "I never thought I should recover; I have no great hopes of it now." Littledale, J., thought that it expressed some hope, though not a very great one, and inclined to disallow the reading of the declaration; but before he decided, the prosecutor's counsel waived it as a dying declaration. Wilson's case, 1 Lew. 78.

(*m*) Rex *v.* Van Butchell, 3 C. & P. 629. The learned Baron also said, "I must hear all that the deceased said, and I must judge from what he said, whether he had that impression on his mind, which will make his declarations admissible in evidence."

Every hope of recovery must necessarily be excluded.

In order to render a dying declaration admissible, it must be shown to have been made under such circumstances as necessarily exclude the supposition that the deceased might at the time entertain *some* hope of recovery. On an indictment for murder the clerk of the magistrates, who had taken down a statement made by the deceased while at an infirmary, a short time previous to his death, proved that he asked the deceased how he was, and he answered, "I think myself in great danger;" and *Simpson's case* (*n*) being cited, Patteson, J., said, "No man can have a higher respect for the opinion of Mr. J. Bayley than I have, but I have always considered that in order to a statement being received as a dying declaration, it must be shown that at the time the deceased made it, not merely that he considered himself in danger, but that he was without hopes of recovery. It does not appear to me that the words "I think myself in danger," necessarily exclude the supposition that the deceased might have, nevertheless, entertained some hope." (*o*)

Absence of settling affairs taking leave of relations and friends, &c.

The absence of any settlement of affairs—of directions as to his funeral—of taking leave of his friends and relations, and such like, tends to show that all hope of recovery is not vanished from the mind, and may sometimes exclude a dying declaration. Upon an indictment for murder, it was proposed to give in evidence a declaration of the deceased, and his widow stated that she went to fetch the deceased home after he was hurt. He took to his bed the day after, and on that evening she asked him how he was, and he said he was worse, and that he should die this time. He died on Sunday, seven days after that. He was at some times light-headed, and some times not. He several times had his children in to take leave of them before the Saturday. The brother proved that the deceased at times thought that he should recover, and at other times thought he should not. Another witness proved that on the day before he died he said he thought he should not recover; he was delirious at times on that day. On the Wednesday before his death he said he thought he should recover; he was then very ill, but sensible; on the day before he died, he was not sensible when the witness first saw him; he became sensible at twelve, and remained so for an hour. The witness asked him if he thought he should recover, and how he was; he said he thought he should not recover; he was so very ill. He did not take leave of his wife or give any orders about his funeral or his will, nor did he say any prayers. The surgeon proved that he was delirious from Thursday, but was sensible on Friday. The surgeon considered him in danger on the Thursday, but his opinion was not communicated to the deceased. Coleridge, J., "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence of the witness that the

(*n*) 1 Lew. 78. In this case the doctor said, "You are in great danger;" the deceased said, "I fear I am." He soon recovered so much as to be out of danger, or to think himself so. Bayley, J., admitted the declaration under the above circumstances without a question. This is the whole report. C. S. G.

(*o*) Errington's case, 2 Lew. 148.

deceased said that he thought he should not recover. Now, people often make use of expressions of that kind, who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow importing that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed that he was convinced that his death was at hand. As nothing of this sort appears I think that there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence." (*p*) So where on an indictment for murder it was proposed to give in evidence a declaration made by the deceased, and the surgeon proved that on the day but one before her death she complained of her chest, and was suffering from inflammation of the lungs; she was extremely ill, and he then told her she was in a very precarious state; and on the day before her death she was much worse, and in his judgment in imminent danger; she then made a statement to him; immediately before she made the statement she said that she found herself growing worse, and that she had been in hopes she should have got better, but as she was getting worse, she thought it her duty to mention what had taken place. She died the next day. Rolfe, B., "I think that it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence." (*q*)

Megson's case.

The case of *Rex* v. *Mosley* (*r*) affords an example of what is such a consciousness of danger as will render a declaration admissible; and further shows, that if it sufficiently appear that such a consciousness existed, it is immaterial that death did not ensue until a considerable time after the declarations were made. Upon an indictment for murder, a question arose respecting the admissiblity of certain declarations, which were received in evidence, as the dying declarations of the deceased, as to the circumstances attending the commission of the crime, and as to the number of persons by whom he had been attacked. The injury that caused the death was done on the 30th of September, in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. When the surgeon arrived, the deceased immediately complained to him of great pain in his chest, and particularly of his side, and of great difficulty of breathing. The surgeon continued to attend him until his death on the evening of the 10th of October following. The surgeon in his evidence said, "I think the deceased did not speak to me of his prospects of dying during that time; I thought his state dangerous; I thought his complaint was of that nature that it might terminate in death. The last day that I saw him, the 10th of October, I was certain he would die that forenoon; I communicated to him his state, I told him the case was hopeless; I made no communication to him till then; I did not consider the

Mosley's case. If it sufficiently appear that the deceased was impressed with the conviction that he should soon die, the declarations are admissible, though the death does not take place till some days afterwards, and though the surgeon does not think the case hopeless, and continues to tell the deceased so until the day of his death.

(*p*) Rex *v.* Spilsbury, 7 C. & P. 187. The report does not state at what time the proposed declaration was made.

(*q*) Reg. *v.* Megson, 9 C. & P. 418.

(*r*) R. & M. C. C. R. 97.

case quite hopeless till then; I always told him there was danger, but I hoped he would be better; I held out hopes to him of his recovery; I do not know whether he entertained hopes or not; he never expressed any opinion either of hope or apprehension to me; I thought there was a probability of his recovering the day before he died; I at first thought the probabilities were against him; I did not communicate that to him." In consequence of this evidence of the surgeon, the learned Judge confined the counsel for the prosecution, in their examination of the witnesses, to inquiries whether any and what declarations were made by the deceased on this subject, after the time the surgeon made the above communication to him of his hopeless state; but no such subsequent declarations could be proved. This failing, it became material to inquire further as to the prior hopeless state of the deceased, and his consciousness of it from the commencement of, or during his illness, in order to ascertain whether declarations alleged to have been made by him during his illness, but prior to the above communication to him by the surgeon, were admissible in evidence or not. To this point a witness, of the name of Anne Newton, stated, "That she was sent for to the deceased on the evening of the 30th of September, near eight o'clock; that he was in a very ill state indeed; that he said he was robbed and killed; that he should not get the better of it; that she assisted in putting him to bed, and continued to attend him till his death; that during that time he spoke of dying, and said he would not continue long, a few days would finish him; this he said about Tuesday; that he complained all along he was sure he would not get better; that he all along said he never would get better; that he never missed saying so one day before the latter end." This witness also stated, "That the deceased was sixty-eight years of age, and was in a very good state of health considering his years; that she was a nurse accustomed to attend sick people, and very often found them low spirited, and had known many persons say they should never get better, who have got better; that the deceased talked in that way; that about the Tuesday before his death he said he should not continue many days; that it was before that he told her all about it; that the first night he said he should not get better, and he continued to say so till the last day." The learned Judge was not disposed to receive on this evidence the declarations of the deceased, made previous to the surgeon's notifying to him his hopeless state as above mentioned; but on its being intimated that the proof would be otherwise insufficient for the conviction of the prisoners, he allowed them to be given in evidence, and reserved the question as to the propriety of his doing so for the consideration of the Judges. Accordingly evidence was received of the deceased's declarations made by him after he was on the Thursday evening brought home, and had said that he was robbed and killed, and should not get the better of it; and also at different times afterwards during his illness, and previous to the surgeon's communications to him of his hopeless state, as above mentioned; and upon that and other evidence the prisoners were convicted of the murder. The Judges, upon considering the case reserved, were unanimously of opinion that the dying declarations of the deceased were properly received in evidence.

Bonner's case. Upon an indictment for manslaughter it appeared that the acci-

dent which occasioned the death, occurred early on Sunday morning, and the surgeon stated that he saw the deceased on Sunday, when he found him with six ribs broken, and other injuries; he explained to him the nature of the case and the danger he was in, and that he could not expect to recover; the deceased said he was perfectly convinced of the state he was in, and said he thought it would soon be over with him, and that he must go out of the world *unless he was relieved by medicine.* He was better on Monday, but worse that evening, and continued to get worse till the Saturday following when he died. After the Sunday he frequently told the surgeon that he thought it would soon be over with him, *without any qualification;* and the surgeon never heard him after Sunday express any hope that his skill would do anything for him. A brother and son-in-law of the deceased proved that they were sent for by him, and saw him on the Wednesday, and that he told them he could not live long, and could not recover. On that day the deceased told his brother that he wished to see him on account of his family, as he could not live long; and he said he wished his brother to take the management of his affairs and family, for he could not stop in this world long. A clergyman also proved that he saw the deceased on the Wednesday, and told him he thought he would not recover, the deceased shook his head and said it was a bad job. The clergyman said, "Remember you are a dying, I hope you will state nothing but the truth." He said "I freely forgive the man. I fear I am dying." After that the deceased made a declaration. The deceased had previously asked the clergyman to make his will, and he had done so. It was objected that the declaration made on the Wednesday was not admissible. The observation made on the Sunday showed that the deceased entertained *some* hope, and therefore the declaration was inadmissible, and such declaration must be made under the firm belief of almost immediate death, which was not the case here, as he lived till the Saturday. (*t*) Patteson, J., "I am of opinion that the declaration is admissible. The surgeon states that he told the deceased, on the Sunday, that he had no chance of recovery, and he then said he thought he had not, unless he could be relieved by the surgeon; but on the Wednesday, it appears from the evidence of the brother and son-in-law, that he wanted to see his brother on account of his family, and said he could not live long, and had no hopes of recovery. The clergyman says he told him he was a dying man, and he shook his head, and said he feared he was dying. Now it has been held that it is not necessary that the deceased should express any apprehension that he is a dying man, but that you may gather it from the circumstances. That was held in *John's case.* (*u*) It has also been held that it is not necessary to prove expressions of apprehension of immediate danger. *Rex* v. *Mosley* (*v*) seems to me to go the whole length of this case. Taking all the circumstances together, and the deceased being told that he was a dying man, and assenting to it, I think the evidence is admissible." (*w*) So where a wound was inflicted on Tuesday, and the surgeon stated that he

Declaration held admissible upon consideration of all the circumstances, the deceased being told he was in a dying state, and assenting to it.

Smith's case.

(*t*) Rex *v.* Woodcock, *ante*, p. 752; Rex *v.* Welbourn, *ante*, p. 753; Rex *v.* Christie, *ante*, p. 754; and Rex *v.* Van Butchell, *ante*, p. 755, were cited.

(*u*) *Post*, p. 761.

(*v*) *Ante*, p. 757.

(*w*) Rex *v.* Bonner, MSS. C. S. G. Hereford Spr. 1834, S. C. but not so fully reported, 6 C. & P. 386.

thought it mortal from the first, and that the deceased became aware of his great danger on the Sunday; but he had no conversation with the deceased on the subject of his danger; and his widow stated that the morning after the injury, he thought he should recover; but after dinner he thought he should not, and should not live; and on the Thursday morning he said that he thought he should not get better; and appeared, from all that passed between them, to believe that he should die. A statement was made by the deceased after his wife left him, on the Thursday, and he died on the Sunday following. Gurney, B., said that upon the evidence of the surgeon alone he should have doubted; but taking it in conjunction with that of the widow, he thought, and Alderson, B., agreed with him, that enough had been shown to render the evidence admissible. (*x*)

Ashton's case. So where on an indictment for manslaughter, it appeared that the deceased said to the surgeon, "Shall I recover?" the surgeon said "No;" and at that time he thought as he said. The patient grew better; the surgeon changed his opinion, and thought she might. The patient then had a relapse, and again asked the surgeon if she should recover; the surgeon said, "I think you will not recover." The patient replied, "I think so too." After this conversation, but not immediately, a declaration, which was proposed to be given in evidence, was made. The surgeon had in the meantime attended the deceased, but not regularly. The question was not repeated by the patient on any of his subsequent visits. Alderson, B., after consulting Patteson, J., held the declaration admissible as a dying declaration. (*y*)

Fagent's case. So where upon an indictment for manslaughter, it appeared that on the Saturday of the week preceding the death of the deceased, she expressed an opinion that she should not recover, and that she made a declaration; but it also appeared that after she had made this declaration, she, on the same day, asked her nephew if he thought she would "rise again;" but it was proved that, on a subsequent day, she made other declarations, at times when she was convinced that she was dying. Gaselee, J., after conferring with Lord Denman, C. J., held that the declaration made on the Saturday was not admissible, but that the other declarations, made when she believed her recovery hopeless, might be received. (*z*)

Minton's case. And so where the prisoner was tried for the rape and murder of a girl of sixteen, who lived only a few days after the perpetration of the offence, the particulars of which she communicated to her aunt, but did not intimate that she considered herself in a dying state, or that she had any apprehension of immediate death. It appeared, however, that previous to making this declaration, she had confessed, been absolved, and had received extreme unction from a priest, and that these are considered the last rites administered in the Catholic Church, and are esteemed sacraments by its disciples. Lord Kilwarden, C. J., with the concurrence of Kelly, J., admitted these declarations in evidence. (*a*)

(*x*) Smith's case, 1 Lew. 81. In Craven's case, 1 Lew. 77, a person who had been confined to his bed for weeks, said to the surgeon, "I am afraid, doctor, I shall never get better," and shortly afterwards died. Hullock, B., held that an account given by the deceased to the doctor after this declaration was receivable as a dying declaration, although several weeks before his death, and stated that the subject had been lately before the Judges, and his mind was made up about it.

(*y*) Ashton's case, 2 Lew. 147.

(*z*) Rex *v.* Fagent, 7 C. & P. 238.

(*a*) Minton's case, 1 M'Nally Ev. 386. Rosc. Cr. Ev. 30.

It is not necessary that the deceased should *express* any apprehension of danger; for his consciousness of approaching death may be inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case. And if it may reasonably be inferred from the nature of the wound, the state of illness, and other circumstances, that the deceased was sensible of his danger, his declarations are admissible. (*b*) All the Judges agreed at a conference in Easter Term 1790, that it ought not to be left to the jury to say, whether the deceased thought he was dying or not; for that must be decided by the Judge before he receives the evidence. (*c*) And such has been the uniform practice in all the recent cases. "The question whether any particular piece of evidence be admissible is, upon principle, always to be determined by the Judge. But in the case under consideration that question depends on a difficult preliminary investigation of fact, much more within the province of juries than of Judges; and where the evidence is admitted, it is scarcely to be expected that juries will pay implicit obedience to the decision of the Judge, founded as it is on a conclusion of fact, a subject upon which the constitution regards them as peculiarly competent to form a right opinion." (*d*)

The deceased need not express apprehension of danger.

His consciousness is a question for the judge.

The circumstances, under which the declarations were made, are to be shown to the Judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs; in making his will; giving directions as to his funeral or family; and whether he had recourse to those consolations and rites of religion, which are appropriate to the last sad hours of departing mortality; in a word, into every fact and circumstance, which may tend to throw light upon the state of mind of the deceased at the time when the declaration was made; in order the better to enable him to arrive at a satisfactory determination as to whether the evidence be admissible or not. (*e*)

As to what matters the Judge will inquire.

It is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declara-

Only admissible when the death of deceased is the subject of the

(*b*) John's case, 1 East, P. C. c. 5, s. 124, p. 357, by the decision of all the Judges in 1790. Woodcock's case, 1 Leach, 500. Dingler's case, 2 Leach, 561. Rex *v.* Bonner, 6 C. & P. 386, Patteson, J. Reg. *v.* Perkins, 2 Moo. C. C. R. 135, *post*, p. 766.

(*c*) John's case, 1 East, P. C. c. 124, p. 357. Welbourn's case, ibid., 358. S. P. resolved by all the Judges in Mich. Term. 1792. Rex *v.* Hucks, 1 Stark. N. P. C. 523. In Woodcock's case, tried in 1789, Eyre, C. B., left it to the jury to consider whether the deceased thought she was dying or not.

(*d*) 1 Phill. Ev. 291. It has frequently occurred to the Editor that in this and similar cases where a particular independent fact is to be ascertained, it would be an expedient course to take the opinion of the jury separately as to that fact alone. At one time it was the practice in cases of indictments for a subsequent felony first to leave the question of the subsequent felony to the jury, and afterwards that as to the identity of the party. This practice might afford a precedent for establishing such a practice as that suggested; which it is submitted would be advantageous, as it would relieve the Judge from the painful responsibility of deciding on a question of fact; and the more so as it is conceived the jury are not bound by the decision of the Judge that the declarations are admissible to give credit to the testimony of the witness who proves them. C. S. G.

(*e*) See Rex *v.* Van Butchell, *ante*. p. 755, per Bolland, B. Rex *v.* Spilsbury, *ante*, p. 757, per Coleridge, J.

charge, and the circumstances of the death the subject of the declaration.

tion. (*f*) In a late case the defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor: and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose. It was held according to the rule above stated that the affidavit could not be read. (*g*) In the case of *Rex* v. *Hutchinson*, (*h*) tried before Bayley, J., the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned Judge rejected the evidence, observing that although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry.

Declaration of one of two persons dying from the same act.

But where two persons died from the same act of poisoning, the declaration of one was held admissible on the trial of the prisoner for the murder of the other. On an indictment for poisoning King, it appeared that the poison was administered in a cake, which the deceased eat for breakfast, immediately after which he was taken ill, and his maid servant, who was present, and had made the cake, said that she was not afraid of it, and thereupon eat of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death, and was conscious of her own approaching death,) as to the manner in which she had made the cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of inquiry at the trial; and the preceding case was relied upon. But Coltman, J., after consulting Parke, B., expressed himself of opinion that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury; but he said he would reserve the point for the opinion of the Judges. (*i*)

The declarations of the deceased are admissible only to those things to which he would have been competent to testify, if sworn in the case. They must, therefore, in general speak to facts only, and not

(*f*) By Abbott, C. J., Rex *v.* Mead, 2 B. & C. 605. In trials for robbery the dying declarations of the party robbed were held inadmissible by Mr. Justice Bayley, on the Northern Spring Circuit, 1822, and by Mr. Justice Best on the Midland Spring Circuit, 1822. And in Rex *v.* Lloyd, 4 C. & P. 233, by Bolland, B. In Rex *v.* Mead, *infra*, in the argument for the admissibility of the evidence, the counsel cited the case of Wright *v.* Littler, 3 Burr. 1244, in which evidence of a dying confession of the subscribing witness to a deed was held admissible, and a case mentioned by Lord Ellenborough, C. J., in 6 East, 195, in which Heath, J., received the confession of an attesting witness to a bond, who in his dying moments begged pardon of Heaven for having been concerned in forging the bond: Abbott, C. J., remarked that these cases were peculiar, inasmuch as the declarations amounted to a confession by the parties themselves of heinous offences which they had committed. See the observations of the Court of Exchequer in Stobart *v.* Dryden, 1 M. & W. 615, which render it at least very doubtful whether dying declarations would at the present day be admissible in any civil suit. 1 Phill. Ev. 280.

(*g*) Rex *v.* Mead, 2 B. & C. 605.

(*h*) 2 B. & C. 608, in note to Rex *v.* Mead.

(*i*) Rex *v.* Baker, 2 M. & Rob. 53. The prisoner was acquitted.

to mere matters of opinion, and must be confined to what is relevant to the issue. (*j*)

Dying declaration of a convict.

The declaration of a convict at the moment of execution cannot be given in evidence as a dying declaration: for as an attainted convict he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. (*k*) The dying declaration of an accomplice is admissible; (*l*) but this can only happen where the prisoner is charged with assisting in the self-destruction of the accomplice: for it has already appeared that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment.

Of an accomplice.

A parol dying declaration is admissible, though a subsequent one was made and reduced to writing.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. In the case of *Rex* v. *Reason and Tranter*, (*m*) three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate, was not produced, and a copy of it was rejected. A question then arose, whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted. (*n*)

When in writing.

But if the statement of the deceased was committed to writing, and *signed by him* at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission. (*o*)

When taken on oath.

If the statement of the deceased has been taken on oath before a magistrate, but is inadmissible as a deposition, in consequence of the prisoner not having been present when it was taken; it is admissible as a declaration in *articulo mortis*, if taken under such circumstances, as would render such a declaration receivable in evidence. (*p*)

As to the mode of eliciting the statements.

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the

(*j*) Greenl. Ev. 190. 1 Phill. Ev. 291. Rex v. Sellers, Carr. Supp. 233.

(*k*) Drummond's case, 1 Leach, 337, *cor.* Eyre, B., and Gould, J.

(*l*) Tinkler's case, 1 East, P. C. 354.

(*m*) 1 Stra. 499. 6 St. Tr. 502. 2 Stark. Ev. 366.

(*n*) According to the report in the State Trials, the Chief Justice and Mr. Justice Powys, deemed the evidence inadmissible. At all events it appears the evidence was received. Sir John Strange was one of the counsel in the cause.

(*o*) Greenl. Ev. 190, citing Rex v. Gay, 7 C. & P. 230. Trowter's case, 12 Vin. Abr. 118, 119. Leach v. Simpson, in Scac. Pasch. 1839, 1 Law & Eq. Rep. 58.

(*p*) Rex v. Dingler, 2 Leach, 561. Rex v. Callaghan, M'Nally Ev. 385, Rosc. Cr. Ev. 33.

case; though any departure from this mode may affect the value and credibility of the declarations. Therefore, it is no objection to their admissibility, that they were made in answer to leading questions, or obtained by pressing and earnest solicitation. (*q*) Where a surgeon, in a case of murder, was called to prove a dying declaration, and stated that he put questions to the deceased for the purpose of ascertaining whether it would be necessary for a magistrate to come to her house to take her examination, and it was objected that the statement being in answer to questions, and not a connected continuous statement flowing from herself, could not be received; it was held that the declaration was admissible. (*r*)

But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received. (*s*)

In favour of the prisoner.

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favour. Upon an indictment for manslaughter, a surgeon stated, that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better, and afterwards said, "I don't think he would have struck me if I had not provoked him;" Coleridge, J., at first expressed some doubt whether he ought to receive the statement; but afterwards received the evidence; observing that it might have an influence on the amount of punishment. (*t*)

Prisoner in his defence may show the state of mind or character of the deceased.

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world, he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party against whom they are produced in evidence, may enter into the particulars of his state of mind and of his behaviour in his last moments, or may be allowed to shew, that the deceased was not of such a character, as was likely to be impressed by a religious sense of his approaching dissolution. (*u*)

(*q*) Greenl. Ev. 190, citing Rex *v.* Fagent, *infra*, Commonwealth *v.* Vass, 3 Leigh R. 786. Rex *v.* Reason, 1 Str. 499. Rex *v.* Woodcock, 2 Leach, 561, and see Rex *v.* Welbourn, *ante*, p. 753.

(*r*) Rex *v.* Fagent, 7 C. & P. 238, Gaselee, J.

(*s*) Greenl. Ev. 190, citing Commonwealth *v.* Vass, 3 Leigh R. 797.

(*t*) Rex *v.* Scaife, 1 M. & Rob. 551. The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed almost every case of manslaughter, in which such declarations have been admitted is an authority to that effect, as the *primâ facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true; as it is not probable that a person should make a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary. C. S. G.

(*u*) 1 Phil. Ev. 289. In Reg. *v.* Macarthy, Gloucester Sum. Ass. 1842, the case on the part of the prosecution was that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police; and Erskine, J., permitted the counsel for the prisoner to cross-examine the witnesses for the prosecution as to the bad character of the deceased, in order to show that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him. C. S. G.

If a child be too young to be capable of feeling the religious obligation of an oath, his declarations are inadmissible. Upon an indictment for the murder of a child aged four years, a statement made by the child to her mother shortly before her death, as to the manner in which she had been treated by the prisoners was offered in evidence. Park, J. A. J., "We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under a deep impression that he was soon to render an account to his Maker. Now, as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state, which is necessary to make such a declaration admissible. In the deposition of the mother, I find it stated, that the deceased asked the deponent to lie down by her, which she did, and that on the child's asking her how long she would lie by her, the mother replied that she would lie by her till she got up; and that upon her saying this, the deceased said that she should never get up any more; and then went on to tell her mother of something that had happened. Now, this, though it shows that the deceased thought she was dying, does not show that she had any idea of a future state; indeed, I think, that from her age we must take it that she could not have had any idea of that kind." (*v*)

If a child be too young to be capable of understanding the religious obligation of an oath, his declarations are inadmissible.

But if a child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences, in a future state, of telling a falsehood, his declarations, made under the apprehension and expectation of immediate death, are admissible in evidence. Thus, where upon a trial for murder, it appeared that the deceased, who was a little more than ten years old, received a severe wound from a gun on one day, of which he died the following morning; and in order to show his state when certain declarations were made on the evening after he was wounded, a surgeon was examined, who said, "I was of opinion the boy could not survive many days. I said to him, 'My good boy, you must know you are labouring now under a very severe injury, which in all probability you will not recover from, and the effects of it will most likely kill you.' My father asked him if he was perfectly conscious where he should go if he told a lie, and where he should expect to go if he told the truth on the subject. In answer to the first he said he should expect to go to hell; and to the latter that he should go to Heaven. My father said nearly similar words to what I said myself. When he was told that he was not likely to recover, I could see a change in the expression of his countenance. The appearances of tears came into his eyes, and an appearance, such as it is difficult to describe,—an appearance of distress; but he said nothing, that I can remember, expressing either assent or dissent. My father said to him, 'You may recover, though in all probability you will not.'" The father, also a surgeon, said, "I said to the deceased, after feeling his pulse and examining the wound, 'My little man, you appear to me to be much more sensible than, from the nature of the accident you have received, I should have expected. It is impossible for me to say

But if a child does fully understand the nature of an oath his declarations are admissible, if made under the apprehension of immediate death.

(*v*) Rex *v.* Pike, 3 C. & P. 598. Park, J. A. J., had consulted Parke, J., before the case was tried, and he quite agreed with the view of the case stated in the text.

whether you may survive the injury or not. I think it more than probable that you will not, and that you may be dead before morning.' I then asked him if he was aware of the nature of an oath. He made no reply. I then said, 'If you don't tell the truth, and how this accident occurred, where do you expect to go?' He then said, 'to hell.' 'If you do speak the truth, I suppose you expect to go to Heaven.' He made no reply. I then told him, 'I put these questions to you, that, in case of your death, the truth of the accident may be ascertained,' or words to that effect. I don't think he made any reply. He expressed no opinion as to his state." On cross-examination he said, "I said you may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The child appeared at the time in a very debilitated state from the injury, but he appeared to be a very quick intelligent child. Upon a case reserved, it was contended, that there was not sufficiently strong proof to show that there was a perfect belief in the mind of the deceased of approaching death, and that the apprehensions of death in a child were not enough to render his declarations admissible, unless he was shown to be aware of the nature of an oath; but the Judges were unanimously of opinion that the statements were receivable if made under the apprehension and expectation of immediate death, and they all, (except Bosanquet, J., Patteson, J., and Coleridge, J.) thought they were so made and receivable. (*w*)

Of the effect of dying declarations.

With respect to the effect of dying declarations, it is to be observed, that though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight (*x*) if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of cross-examination—a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken, were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth of the narrative. (*y*) When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a Court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to

(*w*) Reg. *v.* Perkins, 2 Moo. C. C. R. 135. 9 C. & P. 395. S. C.

(*x*) See per Coleridge, J., Rex *v.* Spilsbury, *ante*, p. 757.

(*y*) Greenl. Ev. 192. 1 Phill. Ev. 292.

observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination. (*z*) It may be added also, that the deceased in many cases is labouring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful consciousness that he must almost immediately render an account to an all-knowing Creator.

Hearsay in proof of public rights, boundaries of parishes, &c.

Hearsay evidence is also admissible for the purpose of proving public rights, and rights in the nature of public rights. (*a*) Thus in questions concerning the boundary of parishes or manors traditionary reputation is evidence: (*b*) and the declarations of old persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes which their evidence had a tendency to enlarge. (*c*) But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact, (as that turf was dug or a post put down in a particular spot) is not admissible. (*d*)

Hearsay of deceased persons making statements against their own interest.

Declarations or statements made by deceased persons, where they appear to be against their own interests, have in many cases been admitted: as entries in their books charging themselves with the receipt of money on account of a third person, (*e*) or acknowledging the payment of money due to themselves. (*f*) Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (*g*) So where the point in issue was whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses

(*z*) Ashton's case, 2 Lew. 147, per Alderson, B. A striking instance of the danger of trusting to statements made after a mortal wound has been inflicted occurred in Reg. *v.* Macarthy, Gloucester Sum. Ass. 1842. The prisoner was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. C. S. G.

(*a*) 1 Phill. Ev. 238. But to prove prescriptive rights strictly private, it is doubtful whether hearsay evidence is admissible, see 1 Phill. Ev. 241. 1 Stark. Ev. 33. Rosc. Ev. 28.

(*b*) Nicholls *v.* Parker, 14 East, 331, in note to Outram *v.* Morewood.

(*c*) Ibid. But such declarations must not have been made *post litem motam*, that is, after the very same point or question has become the subject of controversy. Rex *v.* Cotton, 3 Campb. 444. 1 Phill. Ev. 260.

(*d*) Weeks *v.* Sparke, 1 M. & S. 680. Ireland *v.* Powell, Peake's Ev. 15 *cor.* Chambre, J. Chatfield *v.* Frier, 1 Price, 256. 1 Phill. Ev. 245.

(*e*) 1 Phill. Ev. 293. Middleton *v.* Melton, 10 B. & C. 317.

(*f*) Ibid.

(*g*) Higham *v.* Ridgway, 10 East, 109. Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by Abbott, C. J., admissible evidence to show that A. B. was in the occupation of the premises at the time mentioned. Doe *v.* Cartwright, Ry. & Mood. N. P. C. 62.

committed on the waste were admitted in evidence, to show that the right to the soil was in his master, under whom the plaintiff claimed. (*h*) On the same principle, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge. (*i*) But where the effect of the entry is not to charge the servant, it is not evidence. Thus, in an action for the hire of horses, an entry by the plaintiff's servant since dead, stating the terms of the agreement with the defendant, is not evidence. (*j*) There seems, however, to be more reason for considering that a rule exists which allows of declaration of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be contemporaneous, or nearly contemporaneous, with the transaction to which they relate. (*k*) In all these cases, the person who made the entry must be proved to be dead: if he be living, he ought to be produced as a witness, to explain the circumstances under which the entry was made. (*l*) Where it appeared that an entry was in the handwriting of a banker's clerk who was then in the East Indies, it was held inadmissible. (*m*)

Entries in a tradesman's books by deceased shopman.

Entries in the course of business.

Death of person, who made the entry must be proved.

Hearsay of persons having no interest to mis-state.

In some cases also, the declarations of a person deceased are admitted on the mere ground that he had a peculiar knowledge, and no interest to misrepresent. Thus, though the survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner; (*n*) yet where A., seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed to E., and after a long time there is a dispute between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. (*o*) So entries by a deceased rector or vicar as to the receipt of ecclesiastical dues are admissible for his successor, on the ground that he had no interest to mis-state the fact. (*p*)

Other cases of hearsay.

There are other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., which can occur so seldom in criminal proceedings, that it is not thought necessary to take further notice of them in this Treatise. (*q*)

(*h*) Barry *v.* Bebbington, 4 T. R. 514.

(*i*) 1 Phill. Ev. 319. Price *v.* Lord Torrington, 1 Salk, 285.

(*j*) Calvert *v.* Archbishop of Canterbury, 2 Esp. 646. Rosc. Ev. 34.

(*k*) 1 Phill. Ev. 318. See the cases there collected, and Doe *d.* Patteshall *v.* Turford, 3 B. & Ad. 890. Poole *v.* Dicas, 1 Bing. N. C. 649. Chambers *v.* Bernasconi, 1 Tyrw. 335. 4 Tyrw. 531.

(*l*) Cooper *v.* Marsden, 1 Esp. 2, by Lord Kenyon, C. J.

(*m*) Ibid.

(*n*) Anon. 1 Stra. 95.

(*o*) Bridgman *v.* Jennings, 1 Lord Ray. 734. Rosc. Ev. 33.

(*p*) Le Gros *v.* Lovemoor, 2 Gwill. 529. Armstrong *v.* Hewit, 4 Price, 218. Lord Arundel's case, 2 Gwill. 620. Pringal *v.* Nicholson, Wightw. 63. Walter *v.* Holman, 4 Price, 171. Parsons *v.* Bellamy, 4 Price, 190. 1 Phill. Ev. 307, *et seq.*

(*q*) See *post*, p. 784, as to evidence of character.

CHAPTER THE SECOND.

THE PROOF OF NEGATIVE AVERMENTS.—THE RULE THAT THE EVIDENCE MUST BE CONFINED TO THE POINT IN ISSUE.—WHAT ALLEGATIONS MUST BE PROVED, AND WHAT MAY BE REJECTED;—AND THEREWITH OF SURPLUSAGE AND OF VARIANCE.

SECTION I.

Of the Proof of Negative Averments.

General rule that he who asserts the affirmative must prove it.

It is a general rule of the law of evidence, in criminal as well as in civil proceedings, that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative, unless under peculiar circumstances where the rule does not apply. (*a*) Thus, on an indictment for bigamy, where the first marriage was by license, and the prisoner appeared to be under age at the time, it was held that it lay on the prosecutor to prove the consent of parents, required by the 26 Geo. 2, c. 33, in order to show the marriage valid, and not on the prisoner to prove the negative in his defence. (*b*)

The presumption of law in favour of innocence sometimes drives the prosecutor to prove the negative averments.

In criminal proceedings, however, where negative averments usually impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence; which presumption, making, as it were, a *primâ facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative. (*c*) Thus, on an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative that he did not deliver them; for a person shall be presumed duly to have executed his office till the contrary appear. (*d*) On an

(*a*) Gilb. Ev. 131. Bull. N. P. 298.

(*b*) Rex *v.* Butler, Russ. & Ry. 61. Rex *v.* Morton, ib. 19, in note to Rex *v.* James, *ante*, vol. 1, p. 209. But since the 4 Geo. 4, c. 76, a marriage by a minor without consent is valid. Rex *v.* Birmingham, *ante*, vol. 1, p. 210.

(*c*) The same rule applies in civil proceedings. The principal cases on the subject are Monke *v.* Butler, 1 Roll. Rep. 83. 3 East, 199. Rex *v.* Hawkins, 10 East, 211. Powell *v.* Milbank, 2 W. Bl. 851. S. C. 3 Wils. 355. Williams *v.* East India Company, 3 East, 193. Rex *v.* Twyning, 2 B. & A. 386. Doe *v.* Whitehead, 8 A. & E. 571.

(*d*) Bull. N. P. 298.

indictment for obtaining money, &c. under false pretences, the prosecutor must prove the averments negativing the pretences. In an action for the recovery of penalties under the hawkers and pedlars' act against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative, namely of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. (*e*) On the trial of an indictment on the 42 Geo. 3, c. 107, s. 1, (repealed by the 7 & 8 Geo. 4, c. 27,) which made it felony to course deer on an inclosed ground, "without the consent of the owner of the deer," it ought to have appeared from the evidence produced on the part of the prosecution, that the owner had not given his consent. (*f*)

But this presumption does not operate, when the affirmative is peculiarly within the knowledge of the party charged.

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned; but the general rule as above stated applies, *viz.*, that he who asserts the affirmative is to prove it, and not he who avers the negative.

Rex *v.* Turner.

Thus, upon a conviction under the 5 Ann. c. 14, s. 2, against a carrier for having game in his possession, it was held sufficient that the qualifications mentioned in the 22 & 23 Car. 2, c. 25, were negatived in the information and adjudication, without negativing them in the evidence. (*g*) "The question is," said Lord Ellenborough, in that case, "upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information." (*h*)

Rex *v.* Hanson.

In the more recent case of *Rex* v. *Hanson*, (*i*) the rule was again considered and laid down by the Court of King's Bench. In that case there had been a conviction by two justices for selling ale without an excise license. The information negatived the defendant's having a license; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the

(*e*) 1 Phill. Ev. 494.

(*f*) Rex *v.* Rogers, 2 Campb. 654. See also Rex *v.* Hazy and Collins, 2 Carr. & P. 458, and Rex *v.* Argent, Ry. & Moo. C. C. R. 154, *ante*, p. 738; the former of which cases was an indictment for lopping and topping an ash tree without the consent of the owner, and the latter an indictment for taking fish out of a pond without the consent of the owner. According to the report of the case of Rex *v.* Rogers, Mr. Justice Lawrence seems to have thought it necessary to call the owner of the deer for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. But this decision has been overruled; and it is now established that the non-consent may be inferred from the circumstances under which the act was done, or proved by the agents of the owner. *Ante*, p. 737.

(*g*) Rex *v.* Turner, 5 M. & S. 206. See also Spieres *v.* Parker, 1 T. R. 140, and Jelfs *v.* Ballard, 1 B. & P. 468, by Heath, J. In Rex *v.* Stone, 1 East, 639, the Court of King's Bench were equally divided on the point.

(*h*) 5 M. & S. 209.

(*i*) MS. Paley on Convictions by Dowling, p. 45, n. (1).

existence of a license. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a license; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; *Rex* v. *Turner* was cited as an express authority on the point. Abbott, C. J., said, "I am of opinion, that the conviction is right. It seems to me, that this case is not distinguishable from *Rex* v. *Turner*. It is a general rule, that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *Rex* v. *Turner*, all the learned Judges concur in that principle. I concur in all the observations upon which the judgment of the Court in that case was founded; and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, is here against the defendant. It is urged, that if we decide against the defendant, we shall open the door to a great deal of inconvenience; that by no means follows; this man might have produced his license without any possible inconvenience, which would at once have relieved him from all liability to penalties. Probably the whole inquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the license; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment, that the defendant had not a license. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his license. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion, that judgment must be given for the crown." (*j*)

Willis's case.

In *Willis's case* it is said to have been agreed that, although an indictment states that the prisoner, "then or at any time before not being a contractor with or authorized by the principal officers or commissioners of our said Lord the King, of the navy, ordnance, &c. for the use of our said Lord the King, to make any stores of war, &c.," yet, that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must show, if the truth be so, that he is within the exception in the statute. (*k*)

Apothecaries'

Upon the same principle a very late case, the *Apothecaries' Com-*

(*j*) So in Rex v. Smith, 3 Burr. 1475, which was a conviction for trading as a hawker and pedlar without a license, it was held that the onus of proving the license lay on the defendant.

(*k*) 1 Hawk. P. C. c. 89, s. 17, by the editor, *ante*, p. 268.

Company v. Bentley.

pany v. *Bentley*, (*a*) was decided. That was an action for a penalty on the 55 Geo. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, &c. *without having obtained such certificate as by the said act is directed.* No evidence was offered by the plaintiffs to show that the defendant had not obtained his certificate. The plaintiffs having closed their case, the counsel for the defendant submitted that there must be a nonsuit. But Abbott, C. J., said, "I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it; but that it rests with the defendant to establish his having a certificate."

SECTION II.

Evidence confined to the Point in Issue.

Evidence to be confined to point in issue.

No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offence, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge; and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. (*b*) Where upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed, it was proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused

Evidence must apply to the single transaction charged.

(*a*) Ry. & Mood. N. P. C. 159. S. C. 1 C. & P. 538.

(*b*) Rex v. Cole, Mich. T. 1810, by all the Judges, MS. 1 Phil. Ev. 477. In an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was forged, evidence that the party who negotiated the bill had been guilty of other forgeries, was held inadmissible. Viney v. Barss, 1 Esp. 292. See also Balcetti v. Serani, Peake, N. P. C. 142. Graft v. Bertie, Peake's Ev. 104.

to receive the evidence, on the ground, that it was a distinct transaction. (c) The prisoners were, therefore, acquitted on this charge; but were afterwards indicted again for the other offence, and convicted. In treason, no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; (d) but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (e) With this view the declarations of the prisoner and seditious language used by him, are clearly admissible in evidence, as explaining his conduct and showing the nature and object of the conspiracy. (f)

Acts of prisoner charged in indictment alone can be proved.

So, though it is not allowable in general, to inquire into any other stealing of goods, besides that specified in the indictment, yet, for the purpose of ascertaining the identity of the person, it is often important to show, that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (g) Thus also, on an indictment for the crime of arson, it may be shown, that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (h)

Where larceny of goods not laid in indictment may be proved.

Where several are proved to have been engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another, though not present; (i) and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. (j) Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention, would be evidence against the rest. (k) So where in a case of forgery, several persons had been shown to be connected together in respect of the charge contained in the indictment, it was held that what was said by one of them to a witness, when they were met together, on the subject of the present forgery, was evidence against the others, although the person who said it was not upon his trial. (l)

Acts of other persons engaged in the same design may be proved, whether they are indicted or not.

Where several different felonies are alleged in the same indictment, Prosecutor

(c) Rex v. Vandercomb and Abbott, 2 Leach, 708. *Ante*, vol. 1, p. 839.
(d) Fost. 245.
(e) Ibid.
(f) 1 Phill. Ev. 471, citing Rex v. Watson, 2 Stark. R. 134.
(g) 1 Phil. Ev. 169, 7 ed. See per Littledale, J., in Rex v. Rooney, 7 C. & P. 517, *post*, p. 776, note (x).
(h) Rickman's case, 2 East, P. C. c. 21, s. 11, p. 1035.
(i) Rex v. Stone, 6 T. R. 527. See also for examples of this rule, Rex v. Standley and others, Russ. & Ry. 305. Rex v. Gogerley and others, ibid., 343. Rex v. Bingley and others, ibid., 446.
(j) 2 Stark. Ev. 329. *Ante*, p. 700.
(k) Ibid.
(l) Rex v. Stansfield, 1 Lew. 118, Littledale, J.

confined to proof of one felony.

or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the Judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. (*m*) Thus, on an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election, (*n*) though on an indictment for stealing several articles, it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were stolen at different times, if they might have been stolen all at once. (*o*)

Proving one felony by showing prisoner guilty of another felony.

Where the felonies are connected.

Rex *v.* Ellis.

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. (*p*) On an indictment for stealing six shillings, the following facts were proved:—The prisoner was a shopman in the employ of the prosecutrix, and his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11*s.* 6*d.*; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11*s.* 6*d.* were found in it instead of 13*s.* 6*d.*, which ought to have been there. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Serjt., objected that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned Judge overruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of K. B. for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony; but the Court was of opinion that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. (*q*)

Birdseye's case.

So where on an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered a shop and ran away with the pork, and returned in about two minutes, replaced

(*m*) Young *v.* The King, 3 T. R. 106, by Buller, J. Rex *v.* Jones, 3 Campb. 132. Rex *v.* Kingston, 8 East, 41. But this rule does not extend to misdemeanors. Rex *v.* Finacane, 5 C. & P. 551.

(*n*) Rex *v.* Dunn, R. & M. C. C. R. 146.

(*o*) Ibid.

(*p*) Per Bayley, J. Rex *v.* Ellis, 6 B. & C. 145.

(*q*) Rex *v.* Ellis, *supra.* The indictment had been removed into that Court by *certiorari* from the city Court of Exeter.

the pork in a bowl, which contained the knives, and took away the whole together; in about half-an-hour after he came back to the shop, and took away the loaf of bread. Littledale, J., said, "This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction: but I think that half-an-hour is too long a period to admit of that construction. The taking of the loaf therefore is a distinct offence." (*r*)

Case cited in Rex *v.* Wylie. Several burglaries in the same night.

In the case of *Rex* v. *Wylie*, (*s*) Lord Ellenborough said, he remembered a case where a man committed three burglaries in one night: he took a shirt at one place, and left it at another; and they were all so connected, that the Court went through the history of the three different burglaries.

So where three burglaries were committed in the town of Uttoxeter, one at Keeling's and another at Bladon's, between twelve and three o'clock of the same night, and at Bladon's a crow-bar was found, which fitted some marks on a chest broken open at Keeling's, and which was proved to have been in the possession of the prisoners previously to the night in question; Wightman, J., on the authority of the preceding case, allowed evidence to be given of the finding of the crow-bar at Bladon's, and also of the finding goods stolen the same night from Bladon's in the possession of the prisoners, as such evidence tended to show that the prisoners had been at Bladon's, and that they might have left the crow-bar there. (*t*)

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them.

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them. Thus upon an indictment against two prisoners, charging each in different counts as principals in the first degree in committing a rape, and also as principals in the second degree in other counts, evidence has been held admissible that the prisoners, together with three other men, committed at the same place and time, the one after the other successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn. (*u*) So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks, which were in sight of each other, were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, was admitted, as the whole constituted part of the same transaction. (*v*) And where an indictment for arson contained five counts for setting fire to five different houses, which were all in one row, and the fire from the one first on fire had communicated to the others, it was held that, as it was all one transaction, the evidence as

(*r*) Rex *v.* Birdseye, 4 C. & P. 386.

(*s*) 1 New Rep. 94, S. C. 2 Leach, 983. *Ante*, p. 404.

(*t*) Reg. *v.* Stonyer and others, Stafford Sum. Ass. 1843. MSS. C. S. G.

(*u*) Rex *v.* Folkes, R. & M. C. C. R. 354. And the same was held in Rex *v.* Lea, 2 Moo. C. C. R. 9. 7 C. & P. 836. There several rapes committed in one boat were given in evidence; but other rapes committed in another boat, to which the prosecutrix was carried from the first boat, were not offered in evidence, as they were the subject of another indictment. C. S. G.

(*v*) Rex *v.* Long, 6 C. & P. 179, Gurney, B.

to all the houses was admissible. (*w*) So where upon an indictment against the prisoners for robbing Woodward, there being another indictment against them for robbing Urwick of a watch, it appeared that Woodward and Urwick were travelling in a gig, when they were stopped and robbed; Littledale, J., held, that evidence might be given that Urwick lost his watch at the same time and place that Woodward was robbed, but that evidence was not admissible of the violence that was offered to Urwick. One question in the case was, whether the prisoners were at the place in question when Woodward was robbed; and as proof that they were so, evidence was admissible that one of them had got something which was lost there at that time. (*x*) But where upon an indictment for robbing George and Henry Pritchard, it appeared that the prisoners attacked and robbed George and Henry Pritchard when they were walking together, Tindal, C. J., held that the prosecutor was not bound to elect as to which robbery he would proceed. It was all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and the robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case. (*y*) So where the prisoner was indicted under the 8 & 9 Wm. 3, c. 26, s. 1, for having in his possession an edger, contrived for marking money round the edges, and proof being offered that the prisoner had used this instrument for graining the edges of counterfeit half-crowns, it was objected that the act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less; but Burrough, J., held that the evidence was admissible, as whatever went to prove that the prisoner was guilty of the offence he was charged with, was evidence, however it might also go to show him guilty of another offence. (*z*)

Where other felonies are the subject matter of other indictments.

It is in the discretion of the Judge to admit evidence of other felonies in such cases.

It was formerly considered that if there were separate indictments for offences which constituted parts of the same transaction, evidence of an offence which was the subject matter of one indictment was not admissible upon the trial of another. (*a*) But it has been since held in several cases that there being another indictment pending makes no difference. (*b*) And it has been laid down by a very learned Judge that the correct rule in such cases is, that it is in the discretion of the Judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried. (*c*) Thus, where there were three indictments against a pri-

(*w*) Reg. *v.* Trueman, 8 C. & P. 727. Erskine, J., refused to put the prosecutor to elect as to which count he would proceed.

(*x*) Rex *v.* Rooney, 7 C. & P. 517. Littledale, J., added, "I think it makes no difference that Urwick's watch is the subject of another indictment." "Suppose Mr. Urwick had not been there at all, and that when Woodward was robbed, a watch had been under the seat of his gig, and that after the robbery he had discovered that the watch was missing, I have no doubt that evidence might be given of the loss of the watch at the place."

(*y*) Reg. *v.* Giddins, 1 C. & Mars. 634.

(*z*) Rex *v.* Moore, 2 C. & P. 235.

(*a*) Rex *v.* Smith, 2 C. & P. 633.

(*b*) See the cases, *ante*, p. 467, and per Littledale, J., Rex *v.* Rooney, *ante*, note (*x*).

(*c*) Per Patteson, J., Rex *v.* Salisbury, MS. C. S. G. S. C. 5 C. & P. 155.

soner for stealing notes from three letters, and it appeared that the prisoner stole notes out of one letter, and then opened another letter, and took out of it the notes it contained, and subsituted for them notes to an equal amount out of the first letter, it was held on the trial for stealing the notes out of the first letter, that the notes stolen out of the second letter might be traced to the prisoner, because such evidence was essential to the chain of facts necessary to make out the case. (*d*) But where on an indictment for night-poaching, in order to prove the identity of one of the prisoners, it was proposed to prove that a coat lost by one of the keepers on the occasion in question had been found in the house of that prisoner, there being a separate indictment for stealing the coat; Patteson, J., refused to receive the evidence, unless the prosecutor consented to an acquittal on the indictment for larceny. (*e*)

Evidence of other acts of prisoner as proof of his guilty knowledge.

Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. Thus, upon an indictment for uttering a forged bank-note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to show his knowledge of the forgery. (*f*) So on a prosecution for uttering counterfeit money, it is the practice, for the purpose of showing a guilty knowledge, to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. (*g*) So, though on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. (*h*)

Proof of other acts of the prisoner as evidence of his guilty intent.

If it be material to show the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus, upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. (*i*) So where upon an indictment for robbery it appeared that the prisoners went with a mob to the prosecutor's house, and one of the mob went up to him, and very civilly, and, as the prosecutor then believed, with a good intention advised him to give them something to get rid of them, and prevent mischief, upon which the prosecutor gave them the money laid in the indictment; it was held that for the purpose of showing that this

(*d*) Rex *v.* Salisbury, *supra.*

(*e*) Rex *v.* Westwood, 4 C. & P. 547. In Rex *v.* Salisbury, *supra*, Patteson, J., stated that he refused to admit the evidence in this case on the ground that he did not think it necessary in support of the offence charged.

(*f*) See *ante*, p. 404, *et seq.*, and the cases there cited, viz., Wylie's case, 1 New. Rep. 92. S. C. 2 Leach, 983. Rex *v.* Ball, Russ. & Ry. 132. 1 Campb. 324. So the possession of other forged instruments may be proved as evidence of a guilty knowledge. *Ante*, p. 404. Rex *v.* Hough, Russ. & Ry. 120; but there must be regular proof that they are forged, *ante*, p. 407. Rex *v.* Millard, Russ. & Ry. 245. It has been questioned whether it may be proved that the prisoner had uttered forged bills or notes *of a different kind.* Bayley on Bills, 4th ed. 450. But see *ante*, p. 405. Where the second uttering was made the subject of a distinct indictment, Vaughan, B., held, that it could not be given in evidence to show a guilty knowledge. Rex *v.* Smith, 2 C. & P. 633, but see the cases, *ante*, p. 406.

(*g*) *Ante*, vol. 1, p. 81.

(*h*) Rex *v.* Dunn, R. & M. C. C. R. 146.

(*i*) Rex *v.* Voke, Russ. & Ry. 531.

was not *bonâ fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of other demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present. (*j*) So upon an indictment for administering sulphuric acid to horses with intent to kill them, it has been held that the prosecutor is not confined to the proof of a single act of administering, but that other acts of administering may be given in evidence to show whether it was done with the intent charged in the indictment. (*k*) So where upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, Holroyd, J., received evidence of a second ineffectual attempt to obtain a 1*l.* note the following evening by similar threats, and upon a case reserved the judges were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction. (*l*) On a prosecution for a libel, the publication of other libels, by the defendant, not laid in the indictment, may be given in evidence, to show *quo animo* the defendant published that in question. (*m*) On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased. (*n*) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such acts constitute distinct felonies. (*o*) On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (*p*)

Evidence of one murder to show the motive for committing another.

Evidence of the murder of one person may be given upon the trial for the murder of another person, if such evidence tends to show that the prisoner might have had a motive arising out of the other murder for committing the murder with which he is charged. Upon an indictment for the murder of one Hemmings, it was opened that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot, and that the rector was shot by Hemmings, and that the persons, who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves

(*j*) Rex *v.* Winkworth, 4 C. & P. 444, Parke, J. Alderson, J., and Vaughan, B., and Lord Tenterden, C. J., afterwards concurred in opinion.

(*k*) Rex *v.* Mogg, 4 C. & P. 364, Park, J. A. J.

(*l*) Rex *v.* Egerton, Russ. & Ry. 375, S. C. mentioned by Holroyd, J., in Rex *v.* Ellis, *ante*, p. 774, note (*q*).

(*m*) *Ante*, vol. 1, p. 261. Stuart *v.* Lovell, 2 Stark. N. P. C. 95. So subsequent letters relating to the same subject, although libellous themselves, are admissible in an action for a libel, and although such libel needs no explanation. Pearson *v.* Lemaitre in C. P., May 11, 1843.

(*n*) 1 Phill. Ev. 476. So the declarations of the prisoner, and the seditious language used by him, are clearly admissible in evidence on an indictment for high treason, explaining his conduct, and showing the nature and object of the conspiracy. Rex *v.* Watson, 2 Stark. N. P. C. 134. 1 Phill. Ev. 471.

(*o*) Rex *v.* Tattersall, MS. Bayley, J. *Ante*, vol. 1, p. 27.

(*p*) Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 724.

murdered Hemmings; and that Hemmings' bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, showing that he entertained malice against the rector, it was proposed to show that Hemmings was the person, by whom the rector was murdered; it was objected that this was not admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., "I think that I must receive the evidence. On the part of the prosecution it is put thus,—that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings, to prevent a discovery of their own guilt; now to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker." (*q*)

Of other wounds.

So evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used. On an indictment for maliciously stabbing it appeared that the prisoner stabbed both the prosecutor and Redman at the same time and place, and it was held that evidence might be given of the shape of the wound inflicted upon Redman for the purpose of identifying the instrument with which the wound was inflicted on the prosecutor. (*r*)

To rebut an alibi.

If a prisoner call evidence to prove an alibi, evidence may be given in reply, for the purpose of rebutting the alibi, that the prisoner committed another robbery near the place where the offence charged was committed. On an indictment for robbery the defence was an alibi, and in order to show that the prisoner was near the place of the robbery at the time it was committed; Alderson, B., held that a witness might be examined to show not merely that he had been accosted by the prisoner on the road shortly before the prosecutor was robbed, but that he had also been in fact robbed by the party who accosted him. (*s*)

Proof of other acts and declarations of prisoner as evidence for him of his innocence.

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. Thus, on a charge of murder, expressions of good-will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. (*t*) So in the case of *Rex* v. *Lambert and Perry*, (*u*) where the supposed libel, which was the subject of prosecution, was contained in a paragraph of a newspaper, of which the defendants were the printer and proprietor, it was held by Lord Ellenborough, that the defendants had a right to have read in evidence any other paragraph in the same newspaper, connected with the subject of the passage charged as libellous, (although disjointed from it by extraneous matter, and printed in a different

(*q*) Rex *v.* Clewes, 4 C. & P. 221.

(*r*) Rex *v.* Fursey, 6 C. & P. 81, Parke, J., and Gaselee, J.

(*s*) Reg. *v.* Briggs, 2 M. & Rob. 199.

(*t*) 1 Phill. Ev. 470.

(*u*) 2 Campb. 400, and see Thornton *v.* Stephen, 2 M. & Rob. 45. The same was done in Newton *v.* Rowe, Gloucester Spr. Ass. 1843, *cor.* Erskine, J. MSS. C. S. G. So subsequent letters, relating to the same subject, are admissible in an action. Pearson *v.* Lemaitre, in C. P., May 11, 1843.

character,) for the purpose of showing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as, in trials for conspiracies, whatever the prisoner may have done or said, at any meeting alleged to be held in pursuance of the conspiracy, is admissible in evidence against him, on the part of the prosecution; so, on the other hand, any other part of his conduct at the same meetings, will be allowed to be proved, on his behalf; for the intention and design of the party, at a particular time, are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. (*v*) In the case of *Walker* and others, who were tried for a conspiracy to overthrow the government, and evidence was produced, on the part of the prosecution, to shew that the conspiracy existed, and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness, whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject? The question was opposed, but held by Mr. J. Heath to be admissible. The prisoner's counsel were also allowed in the same case, to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession. (*w*)

Walker's case.

Hardy's case.

On the trial of *Hardy* for high treason, where the overt act charged was, that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others, to call a convention of the people, in order that the convention might depose the King; the counsel for the prisoner were allowed to ask a witness, whether, before the time of the convention, which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business. (*x*) But the better opinion seems to be, that in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shown that they are in some way connected with the facts proved against him. (*y*) In the case of *Horne Tooke* and others, however, for high treason, several publications having been given in evidence on the part of the crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners, during the period assigned in the indictment for the existence of the conspiracy, the prisoner was allowed to read in his defence, various extracts from works which he had published at a former period of his life; and

But such acts and declarations of the prisoner must be connected with the facts proved against him.

(*v*) 1 Phil. Ev. 478.

(*w*) Ibid. and 23 St. Tr. 1131. See the observations of Alderson, B., in Reg *v.* Vincent, 9 C. & P 91.

(*x*) 24 How. St. Tr. 1097. On an indictment for a conspiracy against the defendant and Brown, (who was gone to America) with intent to defraud Sir C. C. of a sum of money advanced by him by way of annuity, some letters between the defendant and Brown were put in evidence on the part of the prosecution, and the defence was that the defendant had been made a dupe by Brown, and was not himself a participator in the fraud, and Lord Tenterden, C. J., held that, under the peculiar circumstances of the case, the whole of the correspondence between the defendant and Brown, on both sides, previously to the time of the execution of the annuity deeds, was admissible, but that all letters subsequent to that time were inadmissible. Rex *v.* Whitehead, 1 Carr. & P. 67. D. & R. N. P. R. 61. S. C.

(*y*) Rex *v.* Lambert and Perry, 2 Campb. 400. Lord George Gordon's case, 21 How. St. Tr. 542. Hanson's case, 31 How. St. Tr. 4281. 1 Phil. Ev. 480.

these the jury were permitted to carry along with them when they retired to consider of their verdict. (z) But the propriety of allowing such a defence has been questioned by very high authority. (a)

Evidence of several transactions when cumulative instances are necessary to prove the offence charged.

It may also happen, that from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus, on an indictment against several defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances; (aa) observing that the indictment was for a conspiracy to carry on the business of common cheats, and cumulative instances were necessary to prove the offence. The same sort of evidence, said his Lordship, is allowed on an indictment for barratry; (b) and in a prosecution for high treason itself, the gravest of all offences.

Cases as to the relevancy of evidence.

The rule is clear and general, that no question can be put which is not relevant to the issue (unless for the purpose of impeaching the credit of a witness;) but the applicability of the rule must obviously depend upon the particular circumstances of each individual case, and will not admit of a general demonstration. It may, however, be useful to state some criminal cases, where questions as to the relevancy of evidence have arisen and been decided.

Unlawful assembly. Hunt's case.

On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue. (c) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to shew, that early on the day of the meeting, in a spot at some distance from the place of meeting, (from which very spot a body of men came afterwards to the place of meeting,) a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (d) Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a

(z) 1 East, P. C. c. 11, s. 8, p. 61. 25 How. St. Tr. 545.

(a) By Lord Ellenborough in Rex v. Lambert and Perry, 2 Campb. 400.

(aa) Rex v. Roberts, 1 Campb. 400, *ante*, p. 701. But see Reg. v. Steel, 1 C. & Mars. 337, *ante*, p. 701.

(b) The prosecutor must, before the trial, give the defendant a note of the particular acts of barratry he intends to prove against him; and will not be at liberty to give evidence of any other. *Ante*, vol. 1, p. 184.

(c) Rex v. Hunt, 3 B. & A. 566. 577. 1 Phil. Ev. 476. See also Redford v. Burley, 3 Stark. N. P. C. 87, 88, 91.

(d) Ibid.

large assembly in another part of the country, very recently held for the same professed object and purpose, as were avowed by the meeting in question, that defendant having acted at both meetings as president or chairman; in a question of intention, as this is, it is most clearly relevant to show, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (*e*)

Articles found in prisoner's house after his apprehension:

In cases of treason and felony, it may be proved that articles were found secreted in the prisoner's house, after his apprehension. In *Watson's case*, evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. (*f*)

Writings found after prisoner's apprehension.

With respect to writings found after the prisoner's apprehension, it appears to have been laid down in *Hardy's case*, (*g*) that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to show their previous existence; for otherwise there was no evidence that the prisoner was a party to it. And on a prosecution against *Hevey*, *Beatty*, and *M'Carty*, for a conspiracy, it was held that some letters which were directed to the prisoners, and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them. (*h*) So on an indictment for uttering a forged bank-note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction, at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged. (*i*) But in *Watson's case*, (*j*) it was held that papers found in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner, might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence. (*k*)

Writings found

Writings found in the

(*e*) Rex *v.* Hunt, 3 B. & A. 566, 577. 1 Phil. Ev. 477. See also Redford *v.* Burley, 3 Stark. N. P. C. 87, 88, 91.

(*f*) 2 Stark. N P. C. 137. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton, had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted; he had been separated from the custody of the plate, since he had been confined in York Castle, for some time: but no doubt was entertained as to the admissibility of the evidence. Abbott, C. J., also observed, that an assize had scarcely ever occurred, where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension. See Reg. *v.* Courvoisier, 9 C. & P. 362.

(*g*) 24 How. St. Tr. 452.

(*h*) Hevey, Beatty, and M'Carty's case, 1 Leach, 235.

(*i*) Huot's case, 2 Leach, 820.

(*j*) 2 Stark. N. P. C. 140.

(*k*) A letter found upon the prisoner may be read, but it is no evidence of the facts it states. Thus, on an indictment against a person employed in the post-office for secreting a letter containing a bill of exchange, the contents of the letter, which was found upon him, were held inadmissible to prove that the bill was enclosed in it. Rex *v.* Plumer, Russ. & Ry. 264.

prisoner's possession, but not published, if plainly connected with the treasonable design charged, are evidence of such design upon an indictment for treason, though not published. (*l*) But it seems, that if it be doubtful whether they are so connected, they are not admissible. (*m*) In *Watson's case*, one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and *Sidney's case* was cited: but the Court distinguished that case from the present, and Abbott, J., said that he had always understood the ground of objection in *Sidney's case* was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to 1 *East's P. C.* 119, where it is said, "writings plainly applicable to some treasonable design in contemplation, are clear and satisfactory evidence of such design, although not published. If, say Mr. J. Foster, and Mr. J. Blackstone, "the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him." That was the objection which had constantly been made to the reception of the evidence in *Sidney's case*. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. (*n*)

in prisoner's possession though not published, may be read if relevant to the charge in the indictment.

If the papers found in the prisoner's custody be plainly relative to the design charged, they may be read in evidence without any proof of the handwriting being that of the prisoner. (*o*)

Without proof of being in prisoner's handwriting.

On an indictment against a county for not repairing a public bridge, the defendants may show under the general issue that the bridge had been repaired from time to time by private individuals: for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. (*p*) It is one medium of proof to show that the bridge has been repaired by individuals, though that alone would be of very little weight. (*q*)

On an indictment against a county for not repairing a bridge, evidence may be given that individuals have repaired it.

In a question put by the House of Lords to the Judges, in the course of the proceedings in the *Queen's case*, it was assumed, that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused, is a legitimate ground of defence. Lord Chief Justice Abbott, in delivering their opinion, observed, that the Judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point; (*r*) from which it may perhaps be inferred, that their Lordships had doubts whether such a defence is allowable.

Whether a prisoner may in his defence give evidence of a conspiracy to suborn witnesses against him.

In civil suits, as the evidence is to be confined to the points in issue, the character of either party cannot be inquired into, unless

Evidence of character.

(*l*) Rex v. Watson, 2 Stark. N. P. C. 141.
(*m*) Ibid.
(*n*) 2 Stark. N. P. C. 147.
(*o*) 1 East, P. C. c. 11, s. 56, p. 119.
(*p*) Rex v. (Inhab.) Northamptonshire, 2 M. & S. 262.
(*q*) 1 Phil. Ev. 170, 7th ed.
(*r*) The Queen's case, 2 Brod. & Bing. 310, 311.

Character of prosecutor.

it is put in issue by the nature of the suit itself. (*s*) In criminal proceedings, the prosecutor being usually also a witness, his character may be attacked in the prisoner's defence, in the same way as is applicable to the impeachment of the credit of witnesses generally. In the particular instance of an indictment for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, that from her general bad character the prosecutrix ought not to be believed on her oath, but her character as to general chastity may be impeached by general evidence. (*t*) And although evidence of particular facts to impeach her chastity was once held inadmissible. (*u*) Yet it has since been held that the prosecutrix may be cross-examined as to particular discreditable transactions; (*v*) and as to her having had connexion with the prisoner previously to the alleged rape; (*w*) and if she deny such connexion, the prisoner may show that she has been previously connected with him. (*x*) And in actions for seduction it has been held that the daughter of the plaintiff may be cross-examined as to her having had connexion with particular persons, at particular times and places, and if she deny it, witnesses may be called to contradict her as to such particular facts. (*y*)

Evidence of prisoner's good character;

In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character, (*z*) who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct, (according to the nature of the offence charged) has been during that time.

must be applicable to the charge;

The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. (*a*)

must not refer to particular acts.

The inquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, are not admissible. (*b*)

It is not the practice to cross-examine witnesses to character,

(*s*) 1 Phil. ev. 176, 7 edit. 467.

(*t*) *Ante*, vol. 1, p. 690.

(*u*) Rex *v.* Hodgson, Russ. & Ry. C. C. R. 211. *Ante*, vol. 1, 690.

(*v*) Rex *v.* Barker, 3 C. & P. 589, *ante*, vol. 1, p. 691.

(*w*) Rex *v.* Martin, 6 C. & P. 562, *ante*, vol. 1, p. 691.

(*x*) Rex *v.* Aspinall, 3 Stark. Ev. 952, *ante*, vol. 1, p. 691.

(*y*) Verry *v.* Watkins, 7 C. & P. 308, Grinnell *v.* Wells, Gloucester Spr. Ass. 1843, Erskine, J., MS. C. S. G. And see Andrews *v.* Askey, 8 C. & P. 7, *ante*, vol 1, p. 691.

(*z*) Formerly evidence of the prisoner's good character was admitted in capital cases only, in *favorem vitæ*. Rex *v.* Harris, 2 St. Tr. 1038. This evidence is now admitted in all prosecutions which subject a man to corporal punishment; but not in actions or informations for penalties, though founded on the fraudulent conduct of the parties. Peake's Ev. 7. The true line of distinction, C. B. Eyre observed, is this: in a direct prosecution for a crime such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, it is not. Attorney-General *v.* Bowman, cited 2 Bos. & Pul. 582.

(*a*) 1 Phil. Ev. 469.

(*b*) Ibid.

unless there be some definite charge against the prisoner, to which to cross-examine them. (*c*)

Soon after the passing of the 6 & 7 Wm. 4, c. 114, the act allowing persons indicted for felony to make their defence by counsel or attorney, the Judges promulgated, amongst others, the following rule of practice in cases of felony, that, "if the only evidence called on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do." (*d*) And it has been held since in a case of felony that the counsel for the prosecution has in strictness the right to reply, (*e*) on the whole case and not merely on the evidence to character, (*f*) although the counsel for the prisoner only calls witnesses to character; but this is not a right which in practice ought to be exercised, except under very special circumstances. (*g*)

The practice in cases of misdemeanor has uniformly been that when witnesses have been called, on the part of the accused, to character only, and for no other purpose, the counsel for the prosecution has not addressed the jury in reply, (*h*) but it seems that in strictness the right exists in cases of misdemeanor, though it ought rarely, if ever, to be exercised. (*i*)

6 & 7 Wm. 4, c. 111, previous conviction.

The 6 & 7 Wm. 4, c. 111, expressly provides that "if upon the trial of any person for any subsequent felony, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before the verdict of guilty of such subsequent felony shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony." If a prisoner cross-examines the witnesses for the prosecution as to his character, he "gives evidence" within the meaning of this section, and the previous conviction may be proved. (*ii*)

Method of leaving evidence of prisoner's character to the jury.

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character however excellent is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the

(*c*) Rex *v.* Hodgkiss, 7 C. & P. 298, Alderson, B. It sometimes, however, is proper to ascertain from the witnesses whether they have had sufficient opportunities of knowing the prisoner's character; as whether they have lived near him, or known him down to the time of the commission of the offence. C. S. G.

(*d*) Rules of Practice in cases of felony, promulgated by the Judges before the Spring Circuit of 1837. 7 C. & P. 676, *post*, p. 815.

(*e*) Rex *v.* Stannard, 7 C. & P. 673, Patteson, J., and Williams, J.

(*f*) Rex *v.* Whiting, 7 C. & P. 771, Bolland, B.

(*g*) Rex *v.* Stannard, *supra*.

(*h*) Per Patteson, J., in Rex *v.* Stannard, 7 C. & P. 673.

(*i*) Rex *v.* Stannard, *supra*, per Patteson, J., and Williams, J.

(*ii*) Reg. *v.* Gadbury, 8 C. & P. 676, *ante*, p. 130.

case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer. (*j*)

Prosecutor cannot show the prisoner's bad character.

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it: and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put into issue, but coming in collaterally. (*jj*)

SECTION III.

What Allegations must be proved, and what may be rejected.

In the present section it is proposed to consider, 1st, What allegations in an indictment must be proved to support it, and what may be disregarded in evidence; and, therewith, of the subjects of surplusage, and the divisibility of averments. 2dly, With what precision those allegations, which cannot be disregarded in evidence, must be proved; and, therewith, of the subject of variance.

1st. What allegations must be proved.

1st. What allegations must be proved, and what may be disregarded in evidence. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment; and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. (*k*) Thus, where the prisoner was charged with robbery *near the highway*, in a case that occurred soon after the 3 W. & M. c. 9, (which took away clergy from all robberies, whether near the highway or elsewhere,) and a robbery in a house was the offence proved, all the Judges were of opinion that the prisoner was ousted of the benefit of clergy. (*l*) So upon an indictment which charged the

Surplusage. Examples of surplusage.

(*j*) In Rex *v.* Stannard, 7 C. & P. 673, Patteson, J., said, "I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case." And per Williams, J., "It is evidence to be submitted to the jury, to induce them to say whether they think it likely that a person with such a character would have committed the offence."

(*jj*) Bull. N. P. 296, citing Martyn *v.* Hind Cowp. 437. The ordinary course, however, is to ask the witness whether he has not heard that the prisoner has been tried for a particular offence. C. S. G.

(*k*) Rex *v.* Holt, 2 Leach, 593. 1 Phil. Ev. 498.

(*l*) *Ante*, vol. 1, p. 904. Summers' case, 2 East, P. C. c. 16, s. 168, p. 785.

prisoners with robbing a person in a field, near the highway, where the jury found a verdict, "guilty of the robbery, but not near the highway," it was holden by all the Judges, that the prisoners were ousted. (*m*) So where Pye was convicted upon an indictment, which charged him with robbing Fernyhough *in the dwelling-house* of Aaron Wilday, and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it; on reference to the Judges, they all held the conviction proper. (*n*) In *Minton's case*, the indictment charged, that she feloniously, &c. *in the night time* set fire to the barn of P. G., and burned the same. The jury found the prisoner guilty of setting fire to and burning the barn, but not in the night time. And the Judges held that she was properly convicted. (*o*) Upon an indictment on the 8 & 9 Wm. 3, c. 26, s. 1, (now repealed) for having a die *made of iron and steel* in possession, without lawful authority, the Judges, on a case reserved for their opinion, held that, as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy this charge. (*p*) So where the indictment was upon the repealed statute 4 Geo. 2, c. 32, "for stealing so much lead belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hendon Church;" Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage. (*q*)

In *Rex* v. *Holt*, which was an ex-officio information for a libel; the information stated, that before the publishing of the libel, the King had issued a proclamation; that after the said proclamation had been issued, *divers addresses* on the occasion of such proclamation had been presented to his Majesty by divers of his subjects; it then proceeded to state, that the defendant well knowing the premises, &c., but intending to bring *the said proclamation* into contempt, &c., and to stir up sedition, &c., published the libel in question, entitled "A letter addressed to the addressers on the late proclamation," which was averred to mean his said Majesty's proclamation, after which followed the proclamation. After conviction, it was objected, on behalf of the defendant, that there was no legal evidence at the trial to prove that the addresses had been presented to the King. Buller, J., after stating his opinion that the fact had been sufficiently proved, observed, "However, on this information, I do not think the prosecutor need have given any evidence at all of these addresses; the averment respecting these addresses seems unnecessary; for the information, after stating the proclamation and

(*m*) *Ante*, vol. 1, p. 904. Wardle's case, Russ. & Ry. C. C. R. 9. S. C. 2 East, P. C. c. 16, s. 168, p. 785.

(*n*) Pye's case, 2 East, P. C. c. 16, s. 168, p. 785, 786. *Ante*, vol. 1, p. 904, S. P. by all the Judges in Johnstone's case, ibid.

(*o*) Minton's case, 2 East, P. C. c. 21, s. 5, p. 1021.

(*p*) Rex v. Oxford, Russ. & Ry. C. C. R. 382. Rex v. Phillips, ibid. 369.

(*q*) Rex v. Hickman, 1 Leach, 318. S. C. 2 East, P. C. c. 16, s. 31, p. 593. On the authority of this case, Holroyd, J., doubted whether, on an indictment on the repealed stat. 3 Wm. & M. c. 9, s. 5, for stealing in a lodging let to the prisoner, the allegation of the person *by whom* the lodging was let, might not be rejected as surplusage. Rex v. Healey, R. & M. C. C. R. 1.

the addresses, charges the defendant with a seditious intent to bring the said proclamation into contempt, without noticing the addresses again. The distinction between material and immaterial averments is perfectly well settled; if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be totally immaterial, and if the libel be not connected with the averment, it need not be proved." (*r*)

Descriptive averments.

No allegation can be rejected which is descriptive of the identity of any thing essential to the charge.

In considering the subject of surplusage, it must always be remembered, that it is a most general rule, that no allegation, whether necessary or unnecessary, which is *descriptive* of the *identity* of that which is legally essential to the charge in the indictment, can ever be rejected. (*s*) Thus, if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. (*t*) So where the prisoner was indicted on the Black Act for maliciously shooting at H. Sandon in the dwelling-house of *James* Brewer and *John* Sandy; and it appeared upon the evidence, that it was in the dwelling-house of John Brewer and James Sandy; the Court held the variance fatal, and said that the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed; and that although perhaps that averment was not necessary, (the statute saying, who shall maliciously shoot at any person in any dwelling-house *or other place*,) yet, having averred that it was the house of James Brewer and John Sandy, he was bound to prove it as laid. (*u*) So upon an indictment under the 57 Geo. 3, c. 90, (now repealed) for being found armed with intent to destroy game in a certain wood "called *the old walk* of, and belonging to, and then in the occupation of, John James, Earl of Waldegrave," it was proved that the wood in question was in the occupation of the Earl of Waldegrave; but it was also proved that the wood had always been called the *long* walk, and had never been called or known by the name of the *old* walk. And upon a case reserved for the opinion of the Judges, it was held, that though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of the close also, yet that the averment could not be rejected, and the variance was fatal. (*v*) So where the indictment was for breaking, &c., the house of J. Davis, "with intent to steal the goods of J. Wakelin, in the said house being," and there was no such person who had goods in the house, but J. W. was put by mistake for J. D.: the prisoner was held entitled to an acquittal; and it was ruled, that the words "of J. W." could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete. (*w*) This is not like the case of laying a rob-

(*r*) Rex *v.* Holt, 5 T. R. 446. S. C. 2 Leach, 593. See also Rex *v.* Phillips, 3 Campb. 74. *Ante*, vol. 1, p. 672.

(*s*) 1 Stark. Ev. 433.

(*t*) 1 Stark. Ev. 434. So upon an indictment for stealing four *live* tame turkeys, the Judges held that the word "live," being a description of the quality of the thing stolen, could not be rejected as surplusage. Rex *v.* Edwards and Walker, Russ. & Ry. C. C. R. 497.

(*u*) Duroure's case, 1 East, P. C. 415. S. C. 1 Leach, 351; but see Pye's case, and Johnstone's case, *ante*, p. 787.

(*v*) Rex *v.* Owen, R. & M. C. C. R. 118.

(*w*) Jenks' case, 2 East, P. C. c. 15, s. 25, p 514. So also on an indictment for burglary, where the name of the owner of the dwelling-house is mis-stated, the error is fatal. *Ante*, vol. 1, p. 826.

bery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery. (*x*) Where an indictment for stealing a bank-note, described it as *signed by A. Hooper*, for the Governor and Company of the Bank of England, it was held by the Judges, on a case reserved, that there could be no conviction without evidence of the signature being by *A. Hooper*. (*y*)

Name of the party.

So the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, cannot be rejected as surplusage, but must be proved, both as to Christian and surname, according to the indictment, for if the names there stated are not his real names, or the names by which he is usually known, the prisoner must be acquitted. (*z*) But if there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, any subsequent addition may, it seems, be rejected as surplusage. Thus, where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of "James Hamilton, Esq., *commonly called* Earl of Clanbrassil, in the kingdom of Ireland," and it appeared in evidence, that the prosecutor was an Irish peer, *viz.*, Earl of Clanbrassil, in Ireland, the Judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been "James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland," yet as "James Hamilton, Esq.," was a sufficient description of his person and degree, the subsequent words "commonly called Earl of Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage. (*a*)

Conviction *pro tanto*.

Although it be true, as above stated, that in order to convict a man of an offence, that offence must be completely averred in the indictment, and the evidence must correspond with, and support, the whole of the material averments, yet it by no means follows, that it is necessary to prove the offence charged in the indictment *to the whole extent laid*, for it is fully settled, that in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. (*b*)

(*x*) Ibid.

(*y*) Rex *v.* Craven, Russ. & Ry. C.C.R. 14.

(*z*) See *post*, p. 795, as to variances in respect of the name of the party injured.

(*a*) Rex *v.* Graham, 2 Leach, 547. From what is said in the latter part of the opinion of the Judges, as delivered by Perryn, B., it is not clear whether their lordships thought the words stated above should be rejected as surplusage, or only the words, "commonly called." In a case before Mr. J. Burrough, where the prisoner was indicted for stealing goods, laid to be the property of Andrew Wm. Gother, Esq., and it appeared on the cross-examination of the prosecutor, that he was not an esquire, whereupon it was objected that it was a fatal variance; the learned Judge overruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage, Rex *v.* Ogilvie, 2 C. & P. 230. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition, but is actually part of the name, Archb. Cr. P. 30.

(*b*) Rex *v.* Hollingberry, 4 B. & C. 329. This rule, however, must be understood, as it should seem, with this qualification; that if a prisoner be indicted for murder or felony, he cannot be convicted of a misdemeanor, except in the cases of felonies including assaults. See vol. 1, p. 778, *et seq.* Thus, where upon the facts stated upon a special verdict upon an indictment for felony, the Court of King's Bench was of opinion that the prisoner could not be convicted of felony, the Chief Justice (Sir Wm. Lee,) started a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give judgment as for a trespass:

It is sufficient to prove so much of the indictment as constitutes a crime punishable by law.

"The distinction," said Lord Ellenborough, in the case of *Rex* v. *Hunt*, (c) "runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." (d) On a charge of petit treason, if the killing with malice were proved, but no circumstances of aggravation were proved to make the offence treasonable, the prisoner might have been found guilty of the murder. (e) If A. be charged with the murder of B., *i. e.* with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprized of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. (f)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night, or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear, the prisoner may be found guilty of the simple larceny only. (g)

On an indictment for stealing in a dwelling-house, persons being therein and put in fear, the prisoner may be convicted of simple larceny. (h) And in all complicated larcenies, the prisoner may be acquitted of the circumstances of aggravation, as the fear or violence, and found guilty of the simple larceny. (i) So upon an indictment for horse-stealing, which is bad for not describing the animal by any term used in the statute, there may be a conviction for simple larceny. (j) So if a man had been indicted upon the statute

and the counsel for the crown, in support of the power of the court to do so, cited 2 Hawk. P. C. 440, and Cro. Jac. 497. Martin Leeser's case, 1 And. 351. Kel. 29. Dalt. 331. *E contra*, it was insisted that by this means a defendant would be deprived of many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The court ordered the prisoner to be discharged; and said, that in the cases cited *pro rege*, the Judges appear to have been transported with zeal too far. Rex *v.* Westbeer, 2 Stra. 1133. S. C. 1 Leach, 12.

(c) 2 Campb. 585.

(d) The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offence are ill averred. In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the court cannot apportion them: but in indictments the court assesses the fine, and they will set it only according to those facts which are well laid. Reg. *v.* Ingram, 1 Salk. 384.

(e) Case of Swan and Jefferys, Fost. 104. 1 Phil. Ev. 501.

(f) Mackalley's case, 9 Rep. 67 *b*. Co. Litt. 282 *a*. Gilb. Ev. 233.

(g) 2 Hale, P. C. 302. 1 Phil. Ev. 501. So where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the statute 12 Anne, c. 7, now repealed by the 7 & 8 Geo. 4, c. 27, and the Judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. *Ante*, vol. 1, p. 839. Rex *v.* Withal, 1 Leach, 88.

(h) Rex *v.* Etherington, 2 Leach, 671. S. C. 2 East, P. C. 635, *ante*, vol. 1, p. 851.

(i) 2 East, P. C. 784. But where, upon an indictment for robbery from the person, a special verdict was found, stating facts which in judgment of law did not amount to a taking from the person, but shewed a larceny of the party's goods; yet as the only doubt referred to the jury was, whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment, the Judges thought that judgment as of larceny could not be given upon that finding; but they remanded the prisoners to be tried upon another indictment for that offence. Ibid.

(j) Rex *v.* Beaney, Russ & Ry. 416.

of 1 Jac. of stabbing *contra formam statuti*, the jury might acquit him upon the statute, and find him guilty of manslaughter at common law. (*k*) And if a man had been indicted of stealing of goods of the value of ten shillings, the jury might find him guilty only of goods to the value of sixpence, and so guilty only of petit larceny. (*l*) If an indictment for treason charge several overt acts, it is sufficient to prove one. (*m*) If the indictment charges, that the defendant did, and caused to be done, a particular act, as "forged, and caused to be forged," it is enough to prove either one or the other. (*n*) If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (*o*) So where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with either of those intentions, they ought to find the prisoner guilty. (*p*) Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her; Holroyd, J., held that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse simply. (*q*) On an indictment on the 7 Geo. 3, c. 50, s. 1, (now repealed) stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either, was held sufficient. (*r*) And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. (*s*) Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part is sufficient. (*t*) So an indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment. (*u*) Where an information for publishing a malicious and seditious libel, contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been

Instances of divisible averments.

(*k*) 2 Hale, P. C. 302.

(*l*) Ibid. The distinction between grand and petit larceny was abolished by the 7 & 8 Geo. 4, c. 29.

(*m*) Fost. 194.

(*n*) By Lord Mansfield in Rex *v.* Middlehurst, 1 Burr. 400.

(*o*) Rex *v.* Hunt, 2 Campb. 583. Rex *v.* Williams, ibid. 646.

(*p*) Rex *v.* Evans, 3 Stark. N. P. C. 35.

(*q*) Rex *v.* Dawson, 3 Stark. N. P. C. 62.

(*r*) Rex *v.* Ellins, Russ. & Ry. C. C. R. 188. *Ante*, p. 216. And see Shaw's case, ibid.

(*s*) Ibid.

(*t*) Rex *v.* Hill, Russ. & Ry. C. C. R. 190. *Ante*, p. 310.

(*u*) Carson's case, Russ. & Ry. C. C. R. 303. So on an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, J. Rex *v.* Burdett, Lord Raym. 149. See also Rex *v.* Gillham, 6 T. R. 265. Serjeaunt *v.* Tilbury, 16 East, 416. Rex *v.* Hill and others, 1 Stark. N. P. C. 369.

committed in both places. (*v*) But if it be necessary to state a prescription in an indictment, such prescription must be proved to the whole extent laid, otherwise the consequence might be, that the record would be evidence of a right which had been expressly disproved at the trial. (*w*)

Joint offence charged against several, and one alone convicted.

Where the indictment charges several with a joint offence, any one of them alone may be found guilty. But they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately, a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus, where two persons, Hempstead and Hudson, were indicted upon the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found Hempstead guilty as to part of the articles of the value of 6*l.*, and Hudson guilty as to the residue; the Judges (upon a case reserved) held, that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson, it might be given against Hempstead. (*x*)

2dly. With what precision of proof the allegations which cannot be disregarded in evidence must be supported, and herein of variance.

2dly. It is to be considered with what precision of proof those allegations, which cannot be disregarded in evidence, must be supported; or, in other words, what is a fatal variance between a material averment in an indictment, and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material provided the substance of the matter be found. (*y*)

Rule that it will be sufficient to prove the substance of the issue.

Upon this principle, where an indictment for the murder of a serjeant at mace of the City of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (*z*) In an indictment for perjury in an answer to a bill in Chancery, the bill was stated to have been filed by A. against B. (the present defendant) and *another*, it appeared in evidence that it was filed against B., C., and D., but the perjury was assigned on a part of the answer which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. (*a*)

Proof of offence charged.

And with respect to the proof of the offence charged the rule is universal, that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party were killed by a different weapon from that de-

(*v*) Rex *v.* Sutton, 4 M. & S. 532.

(*w*) Rex *v.* Marquis of Buckingham, 4 Campb. 189.

(*x*) Rex *v* Hempstead, Russ. & Ry. C. C. R. 344. *Ante*, vol. 1, p. 858.

(*y*) 1 East, P. C. c. 5, s. 115, p. 345.

(*z*) Rex *v.* Mackally, 9 Co. 67 *a*. *Ante*, vol. 1, p. 569.

(*a*) Rex *v.* Benson, 2 Campb. 508. S. P. by Abbott, C. J. Rex *v.* Powell, R. & M. N. P. C. 101.

scribed, it will maintain the indictment, as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe, or a wound or bruise alleged to have been given with a wooden staff, be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. (*b*) But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. (*c*) So where upon an indictment for murder, which charged that the prisoner with a certain piece of brick, which he then and there held in his right hand, struck and beat the deceased, thereby giving to him, with the piece of brick aforesaid, one mortal wound and fracture, of which he died; it appeared probable upon the evidence, not that the prisoner struck with the piece of brick, but that he struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the brick was the cause of the death. The jury found that this was the case. As the indictment contained no charge of throwing the deceased down, the learned Judge who tried the prisoner inclined to think the evidence did not correspond with the charge, and reserved the point for the consideration of the Judges, who were unanimously of opinion that the means of death were not truly stated, and that the variance was fatal. (*d*) So where the indictment stated that the prisoner assaulted the deceased, and struck and beat him on the head, and then and there gave him divers mortal blows and bruises of which he died; and the evidence was that the prisoner knocked the deceased down by a blow on the head, and that in falling down upon the ground he received the injury which caused his death; the Judges, on a case reserved, held that, the cause of death not being truly stated, the prisoner could not be convicted. (*e*) If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. (*f*)

Matters of inducement.

"The cases which relate to the necessity of proving particular

(*b*) *Ante*, vol. 1, p. 557. So where an indictment on the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a *decoction* of a certain shrub called savin; and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated, that such a preparation is called an *infusion*, and not a decoction, (which is made by boiling the substance in the water); upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was mis-described. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. Rex *v.* Phillips, 3 Camph. 74.

(*c*) See the cases on this subject collected, *ante*, vol. 1, p. 557.

(*d*) Rex *v.* Kelly, R. & M. C. C. R. 113, *ante*, vol. 1, p. 557.

(*e*) Rex *v.* Thompson, R. & M. C. C. R. 139, *ante*, vol. 1, p. 557.

(*f*) *Ante*, vol. 1, p. 510. Rex *v.* Mackally, 9 Rep. 67 *b*. Fost. 351. 1 Phil. Ev. 502.

averments," said Mr. J. Chambre in the case of *Turner* v. *Eyles*, (g) "only distinguish between that which is material, and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of action." The same learned Judge in *Smith* v. *Taylor*, (h) observed that "the rules of evidence, as applicable to the allegations of a declaration, depend upon the way in which the facts alleged are introduced; if they be mere matters of inducement, they do not require such strict proof as those allegations which are precisely put in issue between the parties." And Mr. J. Buller, in *Gwinnet* v. *Phillips*, (i) laid down that averments which are merely inducement need not be precisely proved. The result of these authorities appears to be, that there is no difference between substantive averments and those which are only inducement, as to the necessity of proving them in some degree; but that the latter do not require such strict proof as the former. (j)

Instances of fatal variances.

But any difference in substance between the statements in the indictment and the evidence, as to the offence charged, will be fatal. Thus where an indictment for obtaining money under false pretences stated that the defendant pretended *he had paid a sum of money into the Bank of England*, and it appeared in evidence that he said generally, *the money had been paid into the Bank of England*, Lord Ellenborough, C. J., held it a fatal variance, and acquitted the defendant. (k) Where the prisoner was indicted (on the repealed statute 15 Geo. 2, c. 34) for stealing a cow, and it appeared in evidence that the animal stolen was a heifer, it was holden a fatal variance by the twelve Judges, who were of opinion that as the statute mentioned both heifer and cow, it must be considered as using one term in contradistinction to the other. (l) Upon the same principle, where two prisoners were tried on the above-mentioned statute, on a charge of stealing five sheep, and upon the evidence they appeared to be lambs, the Judges held that the prisoners could not be convicted, as the statute mentioned both sheep and lambs. (m) So where on an indictment under Lord Ellenborough's act the prisoner was charged with *cutting* I. S., and the evidence was that the wounds were inflicted by *stabbing* and not by cutting, the Judges held that as the statute used the alternative "*stab* or *cut*," the variance was fatal. (n) If, on an indictment for perjury, the oath is stated to have been taken at the assizes, before Justices assigned to take the said assizes, it will be a fatal vari-

(g) 3 B. & P. 463.

(h) 1 N. R. 210.

(i) 3 T. R. 646.

(j) See acc. 1 Phil. Ev. 498. But Mr. Starkie, vol. 1, Ev. 450, note (l), observes that the distinction between the gist, and that which is the inducement is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question: but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon it's mere order or connection in point of time, or otherwise, with other material averments. On the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement*, or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. Ibid.

(k) Rex v. Plestow, 1 Campb. 494.

(l) Cook's case, 1 Leach, 105. 2 East, P. C. c. 16, s. 48, p. 616, *ante*, p. 138.

(m) Rex v. Loom, R. & M. C. C. R. 160, *ante*, p. 138. But see Reg. v. M'Culley, *ante*, p. 139.

(n) Rex v. M'Dermot, Russ. & Ry. C. C. R. 356. See also Rex v. Douglas, *ante*, 301.

ance if the oath was administered when the Judge was sitting under the commission of Oyer and Terminer, and gaol delivery. (*o*) In an indictment on the 43 Geo. 3, c. 58, the intent laid was to murder, to disable, or do some grievous bodily harm; the intent found by the jury was to prevent being apprehended; it was held by the Judges on a case reserved, that a conviction could not be supported. (*p*) Where the prisoner was charged with being at large after an order for his transportation, and the indictment stated that his Majesty extended his mercy to him upon condition of his being transported for life beyond the seas; and it appeared in evidence that the condition upon which he received the royal mercy was not general, as the indictment stated, but specific, that he should be transported to New South Wales or some of the islands adjacent, the Judges held the conviction wrong. (*q*)

Misnomer of party whose existence is essential to the charge.

The name of any party whose existence is essential to the charge must be proved in conformity to that laid in the indictment, for a misnomer of him is usually fatal. (*r*) And if such person be described as a certain person to the jurors unknown, and it appear in evidence that his name clearly was known, the prisoner cannot be convicted. (*s*) Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true. Upon an indictment for an assault upon Elizabeth Edwards it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; but the conviction was held to be good. (*t*) So where an indictment laid the property of a horse in Joshua Jennings, it was held to be supported by proof of property in Joshua Jennings the younger. (*u*) So where an indictment for perjury alleged a suit to have been between Peacock and

(*o*) Rex *v.* Lincoln, Russ. & Ry. 421. But in an indictment for perjury alleged to have been committed on the trial of a cause before one of the Judges of the King's Bench, without a *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the Judge specified. Rex *v.* Coppard, M. & Malk. 118. Lord Tenterden, C. J. So where the indictment alleged that the cause came on to be tried before E. W., one of the Judges, &c., and it was stated in the nisi prius record in the usual form that the cause was tried before the two Judges of assize, one of whom was E. W., it was held no variance, Rex *v.* Alford, 14 East, R. 218.

(*p*) Rex *v.* Duffin and Marshall, Russ. & Ry 365.

(*q*) Fitzpatrick's case, Russ. & Ry. 512.

(*r*) 1 Stark. Ev 470. See *ante*, p. 788, as to the misnomer of the person stated to be the owner of the dwelling-house, in burglary, and on an indictment under the Black Act. On an indictment for stealing in a dwelling-house to the value of 5*l.*, the name of the owner of the house must be proved as laid. *Ante*, vol. 1, p. 857. So on an indictment for robbing a dwelling-house in the day time, some person being therein, the name of some person who was in the house at the time must be correctly stated. Rex *v.* Kelly, Carr. Suppl. 42. The 7 Geo. 4, c. 64, extends only to remedy the misnomer *of the defendants*, when pleaded in abatement.

(*s*) 1 East, P. C. 651. Rex *v.* Robinson, Holt, N. P. C. 595. Rex *v.* Walker, 3 Campb. 264. Rex *v.* Deakin and Smith, 2 Leach, 863. But if the charge against an accessory is that the principal felony was committed *by persons unknown*, it is no objection that the same grand jury have found a true bill imputing the principal felony to I. S. Rex *v.* Bush, Russ. & Ry. 372. See *ante*, p. 97.

(*t*) Rex *v.* Peace, 3 B. & A. 579. The court said, "The question here is, not whether the party has been rightly described, but who the party is who is described in the indictment as having been assaulted." But generally if the father and son be both named A. B., by A. B., simply the father shall be intended, Wilson *v.* Stubs, Hob. 330. Lepiot *v.* Browne, 1 Salk. 7. Sweeting *v.* Fowler, 1 Stark. N. P. C. 106. 1 Stark. Ev. 472.

(*u*) Hodgson's case, 1 Lewin, 236, Parke, J. S. P. Bland's case, ibid., Bolland, B.

R. Miles, and the proceedings stated the suit to have been between Peacock and R. Miles the elder, it was held no variance. (*v*) The prosecutor may be described by the name he has assumed, though it is not his right name; thus, where the goods stolen were laid to be the property of Mary Johnson, and the prosecutrix stated that her original name was Mary Davies, but that she had been called and known by the name of Mary Johnson, and not Mary Davies, for the last five years, and had not taken the name of Johnson for any purpose of concealment or of fraud; the Judges, on a case reserved, were of opinion that the time the prosecutrix had been known by the name of Johnson warranted her being called so in the indictment. (*w*) And so a person is well described by the name by which he is generally known. Thus where a count for offering a bribe to an officer of the customs stated his name as Thomas Dabbs, and he proved that his true name was Thomas Tyrrel Dabbs, but that he generally went by the name of Thomas Dabbs, and signed his name Thomas Dabbs without Tyrrel; it was held that this was no variance. (*x*) So where an indictment for robbery laid the property in John Hancox, and it appeared that his name was John Walter Hancox, but that he was generally known by the name John Hancox; Parke, J., held that this was sufficient. (*y*) So where in an indictment a boy was called Edward Dobson, and he stated that his right name was Dobson, but that most persons who knew him called him Peach, and that his mother had married two husbands, the first named Peach and the second Dobson, and that he was told by his mother that he was the son of the latter, and that she always used to call him Dobson; it was held that the evidence that the boy's mother had always called him Dobson must be taken to be conclusive as to his name, and that, therefore, he was rightly described in the indictment. (*z*) But where on the indictment of Frances Clark, for the murder of "George Lakeman Clark, a base-born infant male child," it appeared in evidence that the deceased child was a bastard son of the prisoner, and that she murdered it, as charged in the indictment, but that the child was christened George Lakeman, being the names of its reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the prisoner called it George Lakeman; the Judges held that as the child had not obtained his mother's name by reputation, he

Name assumed.

By which a person is generally known.

Of bastards.

(*v*) Rex *v.* Bailey, 7 C. & P. 264, Williams, J., who cited a MS. case where it was alleged that there was an indictment against A. B. and C. D., at a former time, and on the record being produced it appeared that it was an indictment against A. B. and C. D., the younger, and Lawrence, J., held it a fatal variance; on which it was observed that that must have been on the ground that if a person was named simply it meant the elder.

(*w*) Rex *v.* Norton, Russ. & Ry. 510.

(*x*) Attorney-General *v.* Hawkes, 1 Tyrw. 3, and per Alexander, C. B., "By the aid of an averment of the identity of Thomas Dabbs and Thomas Tyrrel Dabbs, the defendant might plead an acquittal on this information, by way of *autefois acquit* to another information for offering a bribe to Thomas Tyrrel Dabbs on this occasion."

(*y*) Rex *v.* Berriman, 5 C. & P. 601. See Rex *v.* Sheen, 2 C. & P. 634. And see Rex *v.* ——, 6 C. & P. 408, where an indictment for stealing a whip, the property of Richard Pratt, was held to be sustained by evidence that the prosecutor was generally known by that name, although his proper name was Richard Jeremiah Pratt. And see Williams *v.* Bryant, 5 M. & W. 447, where the defendant executed a bond in the name of William Bryant, being known at that time by that name, his real name being William Francis Bryant, and the Court held that the proof was sufficient upon the plea of *non est factum*.

(*z*) Rex *v.* Williams, 7 C. & P. 298, Williams, J., after consulting Alderson, B.

was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. (*a*) And so where an illegitimate child, three weeks old, had been baptized by the name of "Eliza," but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as "Eliza Waters," Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong. (*b*) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable from the last, because there was no evidence there that the child was ever called Waters at all. (*c*) And where, on an indictment for the murder of "a certain female child whose name to the jurors was unknown," it appeared that the child had not been baptized, but the prisoner had said she should like it to be called "Mary Ann," and had called it "her Mary Ann" at one time, and "Little Mary" at another; the father was a baptist, and the child was a bastard, and twelve days old; and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was right. (*d*) Where an indictment for larceny laid the goods stolen to be the property of *Victory Baroness Turkheim*, and the prosecutrix proved that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father, and that she had constantly and uniformly acted in and been known by that appellation, but that her name without her title was Selina Victoria; the Judges held the description sufficient. (*e*)

Waters' case.

Evans' case. Name by reputation.

Smith's case.

But if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus Segrave for Seagrave is no variance, (*g*) nor is Benedetto for Beniditto. (*i*) So on an indictment for committing an offence on one John Whyneard, it appeared that his name was spelt Winyard,

Idem sonans.

(*a*) Rex *v.* Clark, Russ. & Ry. C. C. R. 358.

(*b*) Rex *v.* Waters, R. & M. C. C. R. 457. S. C. 7 C. & P. 250.

(*c*) Reg. *v.* Evans, 8 C. & P. 765, Erskine, J., after consulting Patteson, J.

(*d*) Rex *v.* Smith, R. & M. C. C. R. 402. S. C. 6 C. & P. 151.

(*e*) Sulls' case, 2 Leach, 861. An indictment for a robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found, Rex *v.* Turner, 1 Leach, 536. Where an indictment charged the prisoner with the manslaughter of Mark Robinson, and a witness stated that the deceased stayed three days and nights at his inn, and that he asked the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased, and received by him; Patteson, J., held that the witness might be asked what name the deceased told him, as it was evidence to show the name by which he usually went. Rex *v.* Timmins, 7 C. & P. 499.

(*g*) Williams *v.* Ogle, 2 Stra. 889.

(*h*) Abitbol *v.* Beniditto, 2 Taunt. 401.

but it was pronounced Winnyard; and the Judges on a case reserved, held that the prisoner had been rightly convicted. (*i*) But an indictment charging the prisoner with having personated "Peter M'Cann" is not supported by evidence that he personated "Peter M'Carn." (*j*) So it has been decided that "Shakespeare" cannot be considered as *idem sonans* with "Shakepear." (*k*)

Variance between writings, &c., stated in indictment and produced in evidence.

Many fatal variances have arisen in cases where it is necessary to state a record, deed, or other writing in the indictment, between such statement, and the record, deed, or writing, when produced in evidence. (*l*) Where the matter of a written instrument is introduced in pleading by the words "according to the tenor following," or "of the tenor following," or "in the words and figures following," or "the words and matters following," or in fact any words which imply that a correct recital is intended, any the slightest variance between the instrument set out, and that produced in evidence is fatal. (*m*) But a most salutary statute, 9 Geo. 4, c. 15, has recently passed to provide against variances of this description, in cases of misdemeanors, which, after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," enacts that "it shall and may be lawful for every Court of record holding plea in civil actions, any Judge sitting at Nisi Prius, and any Court of Oyer and Terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or *in any indictment or information for any misdemeanor*, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party as such Judge or Court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly."

9 Geo. 4, c. 15, for amending variances between matters in writing or print, and the record in cases of misdemeanor.

Amendments under this statute ought to be sparingly made in criminal cases.

It has been held in two cases of perjury that amendments ought to be made very sparingly under this statute, and it seems they ought not to be made where the variance might have been avoided by ordinary care in comparing the indictment and the instrument. (*n*)

(*i*) Rex *v.* Foster, Russ. & Ry. 412.

(*j*) Rex *v.* Tannet, Russ. & Ry. 351.

(*k*) Rex *v.* Shakespeare, 10 East, 83. So Tarbart for Tabart is a fatal variance in a bail piece. Bingham *v.* Dickie, 5 Taunt. 14.

(*l*) See the cases collected in 1 Stark. Ev. 431, *et seq.*

(*m*) 2 East, P. C. 976. Arch. Cr. Pl. 46 and 99.

(*n*) In Jelf *v.* Oriel, 4 C. & P. 22, Lord Tenterden, C. J., refused to amend the declaration, on the ground that the mistake arose from want of common care in draw-

In the first case the indictment alleged that a judgment was entered up "in or as of Trinity Term, in the 5 Wm. 4," and in the margin of the copy of the record when produced was entered "June the 26th, 5 Wm. 4," pursuant to the Rule H. T., 4 Wm. 4, s. 3, and it was held that the judgment was not properly stated, and an amendment refused. (*o*) And in the second the indictment in stating a commission to examine witnesses on interrogatories alleged that the commissioners were commanded to examine the witnesses, and the commission commanded the commissioners *or any three or two of them*, to examine the witnesses, and the variance was held fatal, and an amendment refused. (*p*) But where an indictment for perjury alleged that the defendant produced an affidavit *entitled* in the Court of Chancery, and in the suit therein at the suit of E. J. Christian, and in the suit therein at the suit of the *Commissioners* of Charitable Donations and Bequests in Ireland, and the affidavit when produced was entitled "In Chancery between the *Commissioner* of Charitable Donations and Bequests in Ireland," &c., Lord Denman, C. J., ordered the record to be amended by striking out the word "entitled." (*q*)

ing it, but in many instances it has been the want of common care that caused the mistake, and to prevent the failure of justice, though such carelessness or ignorance was one of the objects of the legislature in passing the act. 1 Phill. Ev. 518.

(*o*) Rex *v.* Cooke, 7 C. & P. 559, Patteson, J., and Littledale, J., *ante*, p. 629.

(*p*) Reg. *v.* Hewins, 9 C. & P. 786, Coleridge, J., *ante*, p. 629.

(*q*) Reg. *v.* Christian, 1 C. & Mars. 388. Where in a civil suit the declaration stated as matter of inducement a judgment recovered in the Queen's Bench, and the examined copy of the judgment being produced turned out to be a judgment in the Common Pleas, Lord Tenterden, C. J., allowed the record to be amended, as the act allows the amendment where any variance appears between any matter in writing produced in evidence and the recital or setting forth thereof on the record, and the examined copy of the judgment was a matter in writing so produced, and the statute therefore authorized the amendment. Briant *v.* Eicke, M. & M. 359. So an amendment in the date of a bill of exchange has been allowed. Bentzing *v.* Scott, 4 C. & P. 24, Parke, J. And where a declaration stated that the plaintiff caused to be left with the defendant a copy of a writ of *subpœna*, and it appeared that the original writ was directed to the defendant and two others, while the copy was directed to him and John Doe, the latter name not appearing in the original subpœna at all; Lord Tenterden, C. J., allowed the allegation to be altered into "a copy of so much of the said writ of subpœna as related to the said defendant:" and the Court of Common Pleas held the amendment was properly made. Masterman *v.* Judson, 8 Bing. R. 224. And upon the authority of this case the Court of King's Bench held that a statement of a contract in the declaration might be amended so as to agree with the written contract produced at the trial, as to the time for the performance of it, though it did not appear in the declaration whether the contract was in writing or not. Lamey *v.* Bishop, 4 B. & Ad. 479, and per Taunton, J. "If the plaintiff had declared upon a contract in writing the act would apply; then it is absurd to say that it does not apply, because the plaintiff has omitted the words 'by agreement in writing,' which in pleading are unnecessary." This case seems to overrule Ryder *v.* Malbon, 3 C. & P. 594, where Park, J. A. J., held that a statement in an avowry of the terms of the holding could not be amended so as to make them conformable with the lease produced at the trial. In Smith *v.* Brandram, 2 M. & Gr. 244, a material variance in point of legal effect between a contract of guarantee produced in evidence, and the contract set out in the declaration was held amendable under this statute. In Brooks *v.* Blanshard, 3 Tyrw. 844, 1 C. & M. 779, which was an action for a libel contained in a letter, the letter having been burnt, the Court of Exchequer held that a variance between the libel as set out in the declaration, and the parol evidence of the contents of the letter, could not be amended, as this act only applies where the variance is between some matter in writing or in print produced in evidence, and its recital on the record. It may be added that in Prudhomme *v.* Fraser, 1 M. & Rob. 435, Lord Denman, C. J., refused to order superfluous averments and innuendos in a declaration for libel to be struck out at the trial under the 3 & 4 Wm. 4, c. 42, s. 23. Mr. Starkie, 1 Ev. 495, treats this as a decision under the 9 Geo. 4, c. 15, but that is an error, and that statute seems clearly not to apply to such a case. C. S. G.

Proof of place laid, where the offence is not local.

On the trial of indictments for offences which are not local in their nature, generally speaking, it will be sufficient to shew that the offence was committed in some place within the county or other division; and it seems to be agreed, says Mr. Serjeant Hawkins, (r) that a mistake of the place, in which an offence is laid, will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Although the offence must be proved to have been committed in the county, where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. (s) This has been determined to be the rule in cases of high treason, and must equally apply to cases of conspiracy and felony. (t) Upon the trial of an indictment for a transitory felony the prosecutor need not prove affirmatively that there is such a parish as that laid in the indictment. An indictment for highway robbery laid the offence in the parish of St. Thomas, Pensford, in the county of Somerset, and it was objected by the counsel for the prisoner, that there was no proof that there was any such parish in the county, all the witnesses swearing to the parish of Pensford, and not St. Thomas, Pensford; Littledale, J., said the objection was not valid, and that he once reserved a case from the Oxford circuit on that ground, and a great majority of the Judges held, that it was not necessary to prove affirmatively in the case for the prosecution, that such a parish as that laid in the indictment exists within the county, and that they expressed a doubt how they should hold, even where it was proved negatively for the prisoner that there was no such parish. (u)

Prosecutor need not prove affirmatively that there is such a place within the county.

Nor is it any defence on not guilty that there is no such parish.

And it is no objection in the case of a transitory felony on the plea of not guilty, that there is no such place in the county as that in which the offence is stated to have been committed. An indictment stated that the prisoner at the parish of Normanton in the Woulds, in the County of N., maliciously set fire to a stack of beans, on not guilty pleaded it appeared that there was no such parish, and two points were saved for the consideration of the Judges; one, whether the offence was local; the other, whether there being no such parish was an objection on not guilty; and the Judges were unanimous that the offence had nothing of locality in it, and that there being no such place in the county could only be taken advantage of on a plea in abatement. (v) So where an indictment for larceny laid the stealing "at the parish of Hales Owen in the county of Worcester," and it appeared that that parish was situate partly in Worcestershire and partly in Shropshire, it was held sufficient. (w)

Exceptions as to proof of place laid.

To the above rule, as to the parish and place being immaterial, there are some exceptions; as, if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. (x)

Where the

But if the offence be in its nature local, and there be no such

(r) 2 P. C. c. 25, s. 84.
(s) 1 Phil. Ev. 206, 6th ed.
(t) Ibid.
(u) Rex v. Dowling, R. & M. N. P. R. 433.
(v) Rex v. Woodward, MS. Bayley, J. 3 Burn. J. D. & Wms. 384. S. C. R. & M. C. C. R. 323, *ante*, p. 568.
(w) Rex v. Perkins, 4 C. & P. 363, Park, J. A. J.
(x) Archb. Cr. Pl. 95. See Rex v. Glossop, 4 B. & Ald. 616

place as that laid in the indictment, the prisoner must be acquitted of such local offence; if, however, the indictment contain a charge of a transitory offence, as larceny, the prisoner may be convicted of such transitory offence, although he is acquitted of the local offence. The indictment stated that the prisoners, "late of the parish of St. Peter the Great in the county of W.," on, &c., "at the parish aforesaid, in the county aforesaid, the warehouse of H. Webb there situate," feloniously did break and enter and stole certain goods therein, and it appeared that the parish of St. Peter the Great was partly in the county of W., and partly in the county of the city of W., but that the warehouse was in that part of the parish which was in the county of W.; and Patteson, J., held that this was a local description of the place where the warehouse was situate, and that the indictment was not supported as to the breaking and entering the warehouse, but that the prisoners might be convicted of the simple larceny. (*y*) So the offence of stealing in the dwelling-house to the value of five pounds is local, and, therefore, if the house be stated to be situate in a parish and county, it must be proved that the whole of such parish is in such county, and if it be not so proved the prisoner cannot be convicted of stealing in the dwelling-house to the value of five pounds, but he may be of the simple larceny. The indictment charged that the prisoner, "late of the parish of St. Catharine, in the county of Gloucester," stole divers articles to the value of five pounds in the dwelling-house of M. D. G. Muirhead, "there situate," and it was proved that the parish of St. Catharine was partly in the county of Gloucester and partly in the county of the city of Gloucester, but that the house was situate in that part which was in the county of Gloucester; and Cresswell, J., on the authority of the preceding case, held that the prisoner could not be convicted of stealing in the dwelling-house, but that he might be convicted of simple larceny. (*z*)

offence is local the parish must be proved as laid in the indictment.

So on an indictment against a parish for not repairing a highway, the part of the road out of repair must be proved to be within the parish. (*a*) So it has been held, that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury. (*b*)

Proof that the place is usually and commonly known by the description used is sufficient. (*c*) And where premises are described

(*y*) Reg. *v.* Brookes and others, Worcester Spr. Ass. 1842, MS. C. S. G. S. C. 1 C. & Mars. 543.

(*z*) Reg. *v.* Jackson, Gloucester Spr. Ass. 1842, MS. C. S. G.

(*a*) *Ante*, vol. 1, p. 364.

(*b*) 1 Stark. Ev. 466, citing Rex *v.* Cranage, 1 Salk. 385. In this case the indictment stated that the defendant with others riotously assembled, *et quoddam cubiculum cujusdam S. S., in domo mansionali cujusdam David James fregit et intravit*, and thirty yards of stuff took and carried away; upon evidence it appeared to be the house of David Jameson, and Parker, C. J., held that this did not maintain the indictment, for part is local and part not local; the *cubiculum* is local, the taking and carrying away is not local, but then all is put together as one entire fact under one description, and you cannot divide them. So if there be an indictment for acting a play and speaking obscene words in such a parish, in a play-house in Lincoln's-Inn-Fields: if there be no play-house in Lincoln's-Inn-Fields the defendant must be acquitted; for though the words are not local, yet they are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's-Inn-Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the play-house stood. Per Parker, C. J., ibid.

(*c*) 1 Stark. Ev. 468.

to be situate in a particular parish, it is sufficient to prove that the parish is usually known by the name of description. (*d*) And although there be two parishes of the general name, the general description will be sufficient. (*e*) And where an indictment stated that the prisoner committed a burglary "at the parish of Woolwich," and the prosecutor stated that the correct name of the parish was "St. Mary, Woolwich," but the parish is called "the parish of Woolwich" in the Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 2; it was held that this was sufficient, as the statute showed that this parish is known by the name of "the parish of Woolwich." (*f*)

Where it is doubtful whether the allegation be merely formal, or it be descriptive, the allegation will be referred to venue, rather than to description, even though the action be of a local nature, and the existence of such a parish will be immaterial. (*g*)

An allegation that A. B. was constable of the parish of St. Paul, Covent Garden, is not satisfied by evidence that he was presented as a fit person to serve as constable for that parish, but sworn in for Westminster generally. (*h*)

Proof of time.

In criminal prosecutions, from the highest offence to the lowest, it is unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material; and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury. (*i*) In high treason, evidence may be given of an overt act, either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. (*j*) And where an indictment for a misdemeanor contained several counts, stating several misdemeanors of the same kind, and alleging the same day in each count as the day on which they were committed, the prosecutor was allowed to give evidence of such misdemeanors on different days. (*k*)

Proof of value.

It is immaterial, in general, whether the value ascribed to property in the indictment be proved or not, especially since the 7 & 8 Geo. 4, c. 28, has abolished the distinction between grand and petit larceny. Where value is essential to constitute an offence, as where a bankrupt is indicted for concealing property to the amount of 20*l.*, (*l*) and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having ascribed that value to those articles collectively. (*m*)

(*d*) 1 Stark. Ev. 468, citing Kirtland *v.* Pounsett, 1 Taunt. 570. Goodtitle *v.* Walter, 4 Taunt. 671. Per Mansfield, C. J., in Vowles *v.* Miller, 3 Taunt. 140.

(*e*) 1 Stark. Ev. 469, citing Doe d. Jmes *v.* Harris, 5 M. & S. 326. Taylor *v.* Willans, 3 Bing. R. 449, as where lands are described as situate in Westbury, there being both Westbury-on-Trym and Westbury-on-Severn in the same county. So where an indictment stated that a highway alleged to be out of repair led to the parish of Langwm, in the county of Monmouth, and it appeared that there were two parishes in the county, Langwm Isha and Langwm Ucha, and that the highway led to the former; Bosanquet, J., held the description sufficient. Rex *v.* Lantrissent, Monmouth Sum. Ass. 1832. MSS. C. S. G.

(*f*) Reg. *v.* St. John, 9 C. & P. 40, Parke, B., and Bosanquet, J.

(*g*) 1 Stark. Ev. 465, citing Jefferies *v.* Duncombe, 11 East. R. 226.

(*h*) Goodes *v.* Wheatley, 1 Campb. R. 231, as stated in 1 Stark. Ev. 470.

(*i*) 1 Phil. Ev. 514. See also *ante*, p. 623.

(*j*) Ibid.

(*k*) Rex *v.* Levy and others, *cor.* Abbott, C. J., 2 Stark. R. 458.

(*l*) Altered to 10*l.* by 6 Geo. 4, c. 16, s. 112.

(*m*) Rex *v.* Forsyth, Russ. & Ry. C. C. R. 274.

Videlicet.

It has been considered a rule, that the want of a videlicet will in some cases make an averment material that would not otherwise be so; as, if a thing which is not material is positively averred without a videlicet, though it was not necessary to be so, yet it is thereby made material, and must be proved, and that, therefore, where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a videlicet, for if he do not, he will be bound to prove the exact sum or day laid, it being a settled distinction, that where any thing which is not material is laid under a videlicet, the party is not concluded by it, but he is, where there is no videlicet. (*n*) But it is by no means generally true, that the omission of a videlicet will make it necessary to prove the particular sum or day, &c., strictly, as laid, (*o*) for the want of a videlicet will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial. (*p*)

(*n*) 2 Saund. 291 c. in note (1) to Dakin's case.

(*o*) 1 Phil. Ev. 213 (*u*), 7th Ed.

(*p*) Ibid. 1 Stark. Ev. 454. Rex *v.* Gillham, 6 T. R. 265.

CHAPTER THE THIRD.

OF WRITTEN EVIDENCE.

SECTION I.

Of the Proof and Effect of.—1. Public Documents.—2. Private Documents.

Public documents.

1st. Of the proof and effect of public documents. Acts of Parliament are either public or private. The printed statute-book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. (*a*) A private act of Parliament is usually proved by a copy examined with the Parliament roll. (*b*) A private act may contain clauses of a public nature, and then the act, as far as those are concerned, is to be regarded as a public act. Thus, a clause relating to a public highway, occurring in a private inclosure act, has been holden proveable in the same way as a public act. (*c*) In some acts of Parliament not relating to the kingdom at large, a special clause is often inserted declaring them to be public acts, and that they shall be taken notice of as such, without being specially pleaded; in which case they are to be proved in the same manner as public acts; it is not necessary to prove them by an examined copy, or to show that the printed copy was printed by the Queen's printer. (*d*) The clause referred to was intended for the facility of proof; it will not give the act the effect of a public act for other purposes, as with regard to the recital of facts contained in it. (*e*) A clause was often formerly inserted in private acts, providing that they shall be printed by the King's printer, and that a copy so printed shall be admitted as evidence of the act. In such cases a copy, purporting to be printed by the King's printer, will be admissible in evidence: it is not necessary to prove that the act was purchased at the King's printer. (*f*) By the 41 Geo. 3, c. 90, s. 9,

Statutes.

(*a*) Gilb. Ev. 10. 2 Phill. Ev. 127, 128.

(*b*) Bull. N. P. 225.

(*c*) Rex *v.* Utterby, 2 Phill. Ev. 128, per Holroyd, J. And see Hob. 227.

(*d*) 2 Phil. Ev. 128, citing Beaumont *v.* Mountain, 10 Bingh. R. 404. 4 M. & Sc. 177. Woodward *v.* Cotton, 1 C., M. & R. 44. 4 Tyrw. 689.

(*e*) 2 Phill. Ev. 129, citing Brett *v.* Beales, M. & M. 421.

(*f*) 2 Phill. Ev. 129, Lincoln Sum.

copies of the statutes of Great Britain and Ireland prior to the union, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in the Courts of either kingdom. (*e*)

Preamble proof of facts recited.

The preamble of an act of Parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of K. B. to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (*f*)

Journals of the Houses of Parliament.

The journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as civil, and may be proved by examined copies; but the printed journals are not evidence. (*g*) An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal. (*h*)

Gazette.

The public acts of government, and acts by the King in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such acts announced to the public in the Gazette, the Gazette is admitted in Courts of justice to be good evidence. (*i*) A proclamation for reprisals, published in the Gazette, is evidence of an existing war. (*j*) Proclamations for a public peace, or for the performance of a quarantine, and any acts done by or to the King in his regal character, may be proved in this manner; and upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles. (*k*) A Gazette, in which it was stated, that certain addresses had been presented to the King, has been adjudged to be proper evidence, to prove an averment of that fact in an information for a libel; (*l*) for they are addresses, said Lord Kenyon, C. J., of different bodies of the King's subjects, received by the King in his public capacity, and they thus become acts of state. And in *Rex* v. *Forsyth*, (*m*) the twelve Judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from. In *Rex* v. *Sutton*, (*n*) the Court of King's Bench determined, that the King's proclamation, (which recited, that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders,) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrage of that particular description had been committed in those parts of the country.

Proclamation.

Articles of war.

Recital in proclamation proof of facts recited.

Ass. 1832, by Park, J. A. J. Where the copy of an act is incorrect, the Court will be governed by the Parliament roll. Rex *v.* Jeffries, 1 Str. 446. Spring *v.* Eve, 2 Mod. 240, and 2 Phill. Ev. 129, and the cases cited there in note (5).

(*e*) Rosc. Ev. 73.

(*f*) Rex *v.* Sutton, 4 M. & S. 532.

(*g*) Lord Melville's case, 24 How. St. Tr. 683. Rosc. Ev. 73.

(*h*) Jones *v.* Randall, Cowp. 17. But a resolution of either house is not evidence of the truth of the facts there affirmed; and therefore, in the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the popish plot, a resolution in the journals of the House of Commons, asserting the existence of the plot was not allowed to be evidence of that fact. 4 St. Tr. 39. 1 Phill. Ev. 406, 7th ed., but see 2 Phill. Ev. 106, last ed.

(*i*) 2 Phil. Ev. 107, 108.

(*j*) Ibid.

(*k*) Ibid., and 109.

(*l*) Rex *v.* Holt, 5 T. R. 436. S. C. 2 Leach, 593.

(*m*) Russ. & Ry. C. C. R. 274. *Ante*, p. 231.

(*n*) 4 M. & S. 532.

Proof of records.

On an issue of *nul tiel* record.

Records are proved either by producing the record itself, or by an exemplification, or by a copy. When *nul tiel* record is pleaded, the record, if a record of the same Court, is produced and inspected by the Court; if a record of an inferior Court, it is proved by the tenor of the record certified under a writ of *certiorari* issued by the superior Court; if a record of a concurrent superior Court, it is proved by the tenor certified under a writ of *certiorari*, issued out of Chancery, and transmitted thence by writ of *mittimus*. (*o*) The issue of *nul tiel* record seldom occurs in criminal cases, except in the instance of a plea of *autrefois acquit, &c.* (*p*)

Where it is necessary to prove indictments.

Wherever it is necessary to prove the finding or the trial of an indictment, the record must be regularly drawn up, and either produced, or an examined copy of it produced and proved. Where, therefore, an indictment for a conspiracy alleged that at a Court of Quarter Sessions an indictment was preferred against A. B., and found by the grand jury, the Court of King's Bench held that the indictment indorsed a true bill, but without any caption to it, and the minutes made by the clerk of the peace containing the style of the sessions, and the minutes of the business done at it, were not sufficient evidence of the finding of the bill, and that the record itself or an examined copy was the only legitimate evidence to prove it. (*q*) And so it has been held that a plea of *autrefois convict* cannot be supported by the indictment with the finding of the grand jury upon it. (*r*) Where on an indictment for the non-repair of certain highways, upon the trial of which the question was, whether a parish was bound to repair all the highways in it as a parish, or the several townships the highways situate in each of them, in order to prove the conviction of the parish upon a similar indictment in 1806, a witness proved that he went to the house of the clerk of assize for the Oxford Circuit, in London, and there saw him and his son, and asked for the record, and received a written paper, which he produced, which he and the son of the clerk of assize compared with a document then produced as the record, and which the witness stated he thought was on paper, but he was not sure whether it was on paper or parchment, but it was much torn, and the son of the clerk of assize stated that he could not recollect the particular transaction; but the practice was, when a record was required, to make it out from the minutes and the indictment on an original parchment roll, which was signed by the Clerk of Assize, and a copy was then made

(*o*) Tidd. 801, 804. Rosc. Ev. 73. Where a record of a Court of Quarter Sessions is pleaded in a Court of Oyer and Terminer, or the converse, it ought, in strictness, to be proved as above stated: but the practice, it is said, is to apply simply to the clerk of the peace, or clerk of assize, who will make it out for you without writ, or will attend with the record itself at the trial. Arch. Cr. Pl. 124.

(*p*) Upon this plea, the proof of the issue lies on the defendant, and he will have to prove the record of acquittal: and also it has been said, the averments of identity in his plea. 1 Arch. Cr. Pl. 89. But this seems doubtful, for if the replication is *nul tiel* record, it should seem to admit the identity. The principal decisions regarding the plea of *autrefois acquit*, belonging rather to the law of criminal pleading than of evidence, will be found, vol. 1, p. 829, *et seq.*, and *ante*, p. 388, 648.

(*q*) Rex *v.* Smith, 8 B. & C. 341.

(*r*) Rex *v.* Bowman, 6 C. & P. 101. See the cases collected in note (*i*), vol. 1, p. 837, and Porter *v.* Cooper, 6 C. & P. 354, and Rex *v.* Thring, 5 C. & P. 507, where Gurney, B., held that the minute book of the Court of Quarter Sessions was not admissible in evidence on an indictment for perjury to prove the trial on which the perjury was alleged to have been committed; and Rex *v.* Bellamy, R. & M. N. P. R. 171.

on paper and compared with the roll, and stamped with the Oxford Circuit stamp, which copy was given to the party applying for it, and that, as far as his own experience went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made, and that he never knew of a paper-copy having been kept. And that the paper produced was signed by his father and stamped with the Circuit stamp. Coleridge, J., held that the paper was admissible as an examined copy of the record. (*s*)

Trials of appeals.

But although it was once held, on the trial of an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, that the sessions book produced by the clerk of the peace was not sufficient to prove the trial of the appeal. (*t*) Yet where on an appeal against an order of removal the book containing the proceedings at the sessions was proved to be the original sessions book, regularly made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in Court, and the minutes of each sessions were headed by an entry containing the style and date of the sessions, and the names of the justices in the usual form of a caption, and no other record was kept of the proceedings of the sessions than the said sessions book, and it had always been received in evidence in the Court of Quarter Sessions, for the purpose of proving them; the Court of Queen's Bench held, that such book was properly received in order to prove the quashing of an order of removal on the trial of a former appeal between the same parishes. (*u*)

Minutes admissible during the same assizes.

The minutes of a Court of Oyer and Terminer may be received, where the matter to be proved by the minutes has occurred before the same Court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the Court were received as proof of the trial of Hardy. (*v*) So the indictment with the officer's note upon it of a verdict of not guilty is sufficient evidence during the same assizes, upon a plea of *autrefois acquit*, that the prisoner was acquitted upon such indictment. (*w*)

In other cases.

When *nul tiel* record is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are either under the great seal or under the seal of the Court in which the record is produced, and are admissible without proof of the genuineness of the seal. (*x*) A record may also be proved by an examined copy, except upon the issue of *nul tiel* record. The copy must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original. (*y*) It ought to appear, that

(*s*) Reg. *v.* The Inhabitants of Pembridge, 1 C. & Mars. 157.

(*t*) Rex *v.* Ward, 6 C. & P. 366, Park, J. A. J. The clerk of the peace stated that he should have drawn up a record on parchment, if he had been applied to so to do, and the case does not state what the form of the entry in the book was. See the observations of the Court on this case in Reg. *v.* Yeovely, 8 A. & E. 806, *infra*.

(*u*) Reg. *v.* Yeovely, 8 A. & E. 806, and see per Patteson, J., in Rex *v.* Nottingham Old Water Works Company, 6 A. & E. 355.

(*v*) 2 Phill. Ev. 135, citing 25 St. Tr. 446.

(*w*) Rex *v.* Parry, 7 C. & P. 836, Bolland, B.

(*x*) Rosc. Ev. 74. Tooker *v.* Duke of Beaufort, Sayer, 297.

(*y*) Reid *v.* Margison, 1 Campb. 469. It is not necessary for the persons examining to exchange papers, and read them alternately. Gyles *v.* Hill, ibid., *n.* Rosc. Ev. 75.

the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. (z) So an office copy in the same Court, in the same cause, is equivalent to a record; but in another Court, or in another cause in the same Court, the copy must be proved. (a) In order to prove a verdict, a copy of the whole record, including the judgment, is necessary, for otherwise it would not appear but that the judgment had been arrested, and a new trial granted. (b) Where an indictment for perjury alleged that Burraston was convicted upon an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record when produced that Burraston had been convicted, but the judgment against him reversed upon error after the finding of the present indictment, it was held that the record produced supported the allegation in the indictment. (c) Records properly produced in evidence are conclusive against those who are parties to them:—thus, a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of their liability to repair; (d) but it is not conclusive as against other parties, except as to the fact that the persons charged have been convicted, (e) therefore an accessory may not only controvert the guilt of his principal, notwithstanding the record of his conviction; (f) but the record of the conviction of the principal upon a plea of guilty is not admissible where such principal might be called as a witness, (g) and it seems extremely doubtful whether such record be admissible against the accessory in any case. (h)

Effect of records in evidence.

Several statutes afford facilities for proving a previous conviction by means of a certificate of the clerk of assize, or clerk of the peace; but these provisions are made for the more easy proof of such convictions, and do not prevent the proof of the previous conviction by an examined copy of the record. (i) In order to give evidence of a writ, if it is the gist of the proceeding, it must be proved by a copy of the record after its return; but where the writ is only inducement, the fact of taking out the writ may be proved without a copy, because possibly the writ has not been returned, and then it is no record. (j) An answer in Chancery is proved by the production of the bill and

Proof of writ.

Proceedings in

(z) Adamthwaite v. Synge, 1 Stark. 183. 4 Campb. 372. S. C. Rosc. Ev. 75.

(a) Rosc. Ev. 75. Burnand v. Nerot, 1 C. & P. 578.

(b) Bull. N. P. 234. But the *nisi prius* record, with the postea indorsed, is sufficient evidence that the cause came on to be tried. Pitton v. Walter, 1 Str. 162.

(c) Reg. v. Meek, 9 C. & P. 513, Williams, J., *ante*, p. 603.

(d) Rex v. St. Pancras, Peake, N. P. C. 219; but see 2 Saund. 160. *Ante*, vol. 1, p. 369.

(e) See Rex v. Shaw and others, Russ. & Ry. 526, where, upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what is stated.

(f) Rex v. Smith, 1 Leach, 288.

(g) Rex v. Turner, R. & M. C. C. R. 347, *ante*, vol. 1, p. 43. In Keable v. Paine, 8 A. & E. 555, Patteson, J., said, "On an indictment for receiving goods feloniously taken, the felony must be proved, and neither a judgment against the felon, nor his admission, would be evidence against the receiver."

(h) Ibid.

(i) Rex v. Henry Saunders, Gloucester Spr. Ass. 1829, MS. C. S. G. The prisoner was indicted under the 15 Geo. 2, c. 28, s. 2, for uttering base coin after a previous conviction, and Parke, J., held that an examined copy of the record of the previous conviction was sufficient evidence thereof; for the statute, by giving an easier means of proof under sec. 9, did not exclude the proof by means of an examined copy. C. S. G.

(j) 2 Phill. Ev. 150.

answer, or of examined copies of them; (*k*) but on proof by the proper officer that the bill has been searched for in the office, and not found, the answer may be read without the bill. (*l*) Depositions in a suit in Chancery are not in general admissible without proof of the bill and answer, unless so ancient that no bill or answer can be found; (*m*) but an examined copy is admissible for the purpose of contradicting the testimony of the deponent when produced afterwards as a witness. (*n*) The proceedings in the ecclesiastical Courts are proved in the same way as those in equity; and their sentences are received in the temporal Courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction; but in a suit of jactitation of marriage a sentence against the marriage is not conclusive, as it decides not directly, but only collaterally, on the validity of the marriage. (*o*) When it is necessary to show a title to personalty under a will, or that a particular person is executor, the will cannot be read in evidence without some indorsement for the purpose of authentication; but the probate must be produced. (*p*) The seal of the Ecclesiastical Court on the probate proves itself. (*q*) Generally speaking, a probate unrepealed is conclusive evidence of the validity of the will; but on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. (*r*) To prove a probate revoked, an entry of the revocation in the book of the Ecclesiastical Court called the 'assignation book,' in which all causes are officially entered, is good evidence. (*s*) Administration is proved by the production of the letters of administration, or a certificate or exemplification thereof, granted by the Ecclesiastical Court, (*t*) or by the original book of acts, directing the grant of letters, or an examined copy of it. (*u*)

Chancery.

Proceedings in the ecclesiastical courts.

Proof of will.

Probate.

Proof of administration.

Judgments in a court-baron, county-court, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be evidence. (*v*) The judgment of a foreign court must be proved by evidence of the handwriting of the Judge of the Court who subscribed it, and the authenticity of the seal affixed. In the case of *Henry* v. *Adey*, (*w*)

Judgments of inferior courts.

Foreign judgment.

(*k*) 2 Phill. Ev. 139. The recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at the place sworn. Rex *v.* Spencer, R. & M. N. P. C. 97.

(*l*) Gilb. Ev. 49. See as to the proof of the identity of the parties, *ante*, p. 661. An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or the party's handwriting. Lady Dartmouth *v.* Roberts, 16 East, 334. Rosc. Ev. 78. See also Ewer *v.* Ambrose, 4 B. & C. 25.

(*m*) Bull. N. P. 240. Gilb. Ev. 62. Rosc. Ev. 79. 2 Phill. Ev. 149.

(*n*) Highfield *v.* Peake, Mood. & Malk. N. P. C. 109.

(*o*) Duchess of Kingston's case, 11 St. Tr. 262. *Ante*, vol. 1, p. 188.

(*p*) Rex *v.* Barnes, 1 Stark. N. P. C. 243. 2 Phill. Ev. 170.

(*q*) Kempton *v.* Cross, Cas. Temp. Hardw. 108. Rosc. Ev. 82.

(*r*) Rex *v.* Buttery and Macnamara, Russ. & Ry. 342.

(*s*) Rex *v.* Ramsbottom, 1 Leach, 25, in note to Rhodes's case.

(*t*) Kempton *v.* Cross, Cas. Temp. Hardw. 108. Rosc. Ev. 82. 2 Phill. Ev. 173.

(*u*) Elden *v.* Keddel, 8 East, 187. Davis *v.* Williams, 13 East, 232.

(*v*) Rex *v.* Hains, per Holt, Comb. 337. 12 Vin. Ab. Ev. A. *b.* 26, p. 99. Rosc. Ev. 80.

(*w*) 3 East, 221. 2 Phil. Ev. 143. See also Buchanan *v.* Rucker, 1 Campb. 63. Flindt *v.* Atkins, 3 Campb. 215, in a note.

the plaintiff, who sued here on a judgment obtained in the island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island. And on a motion to set aside the nonsuit, the Court said, they could not take official notice, that the seal affixed was the seal of the island, which was necessary to be shown, in order to prove the judgment, which it purported to authenticate: and that proving the Judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. (*w*) If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression. (*x*) If it is clearly proved, that the Court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shown to possess some other requisite to entitle it to credit; as, by proving the signature of the Judge upon the judgment. (*y*) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the Court, is evidence of the judgment in the Courts of this county: (*z*) but a document, purporting to be a copy of a judgment, made by the officer of the Court, is not admissible. (*a*) The written law of a foreign state must be proved by a copy duly authenticated. (*b*) Thus, where to prove the law of France, as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French Courts; it was ruled by Abbott, C. J., to be sufficient proof of the law. (*c*) The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. (*d*) So a person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a gentleman at the Scotch bar has been allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law. (*e*) And where, on an indictment for bigamy, it was proved that the prisoner had been married to a soldier of the name of Dent, and afterwards to one Wall, and the defence was that Dent had been legally married in Scotland, previous to his marriage with the prisoner, and a witness proved that Dent being with his regiment in Scotland, the witness, Dent, a female, and several others went to a house, to which they were directed after inquiring for the house of the clergyman of the place, where a gentleman performed a ceremony

Proof of foreign laws.

(*w*) The 6 Geo. 4, c. 133, s. 7, enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, does not make such certificate evidence without proof that the seal affixed is the genuine seal of the society. Chadwick *v.* Bunning, R. & M., N. P. C. 306.

(*x*) Cavan *v.* Stewart, 1 Stark. N. P. C. 525.

(*y*) Alves *v.* Bunbury, 4 Campb. 28. 2 Phil. Ev. 143.

(*z*) Black *v.* Lord Braybrook, 2 Stark. N. P. C. 11, 12.

(*a*) Appleton *v.* Lord Braybrook, 2 Stark. N. P. C. 6, 7 6 M. & S. 34. 2 Phil. Ev. 143.

(*b*) Clegg *v.* Levy, 3 Campb. 166. Rosc. Ev. 82.

(*c*) Lacon *v.* Higgins, 3 Stark. 178.

(*d*) Per Gibbs, C. J., Miller *v.* Kenrick, 4 Campb. 155. Rosc. Ev. 82.

(*e*) Rex *v.* Wakefield and others, Murray od. p. 238.

somewhat similar to the marriage service of the Church of England, between Dent and the female, and that they afterwards lived together as man and wife; Wightman, J., held that a gentleman, who had lived in Scotland until he was twenty, and who had frequently been there since, and who was possessed of very considerable literary attainments, and stated that he was well acquainted with the law of marriage in Scotland, although he was not a lawyer, was competent to prove that the marriage in question was a valid marriage according to that law. (*f*) A judgment obtained in one of the superior Courts in Ireland, since the Union, is not a record in England. (*g*) Convictions before justices of the peace are either produced in Court, and the handwriting of the magistrates to them proved, (*gg*) or they may be proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose. (*h*) In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy-office has been admitted in evidence, to prove the death of a sailor; (*i*) the book from the master's office in the Court of King's Bench, to prove a person one of the attorneys of that Court; (*j*) and the log-book of a man of war, which convoyed a fleet, to prove the time of the convoy's sailing. (*k*) Bank-books are good evidence to prove the transfer of stock; (*l*) and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence, to support an allegation in the indictment, that he was duly elected treasurer. (*m*) The day-book of a public prison, containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of a prisoner's commitment or discharge: (*n*) but it would not be admissible to prove the cause of his commitment. (*o*) So on an indictment for forging a seaman's will, an entry in a book called the assignation book, in which all causes are officially entered, was admitted to prove the probate revoked. (*p*) So the poll-books taken at an election for members of Parliament, or at an election of a mayor, are evidence. (*q*) The registers of christenings, marriages, and burials, preserved in churches, are good evidence: (*r*) and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung

Irish judgment.

Convictions before justices of the peace.

Public books.

Registers.

(*f*) Reg. *v.* Dent, Monmouth Spring Ass. 1843, MSS. C. S. G. See *ante*, vol. 1, p. 212.

(*g*) Harris *v.* Saunders, 4 B. & C. 411.

(*gg*) Massey *v.* Johnson, 12 East, 67. Gray *v.* Cookson, 16 East, 13. Mason *v.* Barker, Gloucester Spr. Ass. 1843, Erskine, J. MSS. C. S. G.

(*h*) Archb. Cr. P. 126.

(*i*) Bull. N. P. 249. Rhodes's case, 1 Leach, 24.

(*j*) Rex *v.* Cropley, 2 Esp. N. P. C. 524.

(*k*) D'Israeli *v.* Jowett, 1 Esp. N. P. C. 427.

(*l*) Breton *v.* Cope, Peake, N. P. C. 30. Marsh *v.* Colnet, 2 Esp. N. P. C. 665.

(*m*) Rex *v.* Martin, 2 Campb. 100.

(*n*) Rex *v.* Aickles, 1 Leach, 391.

(*o*) Salte *v.* Thomas, 3 B. & P. 188. 2 Phil. Ev. 164.

(*p*) Ramsbottom's case, 1 Leach, 25, in note. It would have been no bar to the conviction had the probate been unrepealed. Rex *v.* Buttery and another, Russ. & Ry. 342.

(*q*) Mead *v.* Robinson, Willes, 224.

(*r*) Bull. N. P. 247.

the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved; or persons may be called who were present at the wedding dinner, &c. (*s*) Whenever an original is of a public nature, and admissible in evidence, an examined copy is also admissible. (*t*) Thus, examined copies of the entries in the council-book, or of a license preserved in the Secretary of State's Office, (*u*) of entries in the bank-books, (*v*) of entries in the books of the East India Company, (*w*) or in the books of the commissioners of the land-tax, (*x*) or of excise, (*y*) are allowed to be read in evidence. So an examined copy of a parish register is evidence: (*z*) but not an examined copy of the register of a marriage in the Swedish ambassador's chapel in Paris. (*a*) It seems, however, that the books of the King's Bench or Fleet prisons, which, as it has been just mentioned, are evidence of the time of a prisoner's discharge, are not such public documents, that a copy of them may be given in evidence. (*b*)

Proof of public books by examined copies.

Inspection of records.

The judicial records of the King's Court are safely kept for public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an act of Parliament in the 46th year of Edward III. (*c*) But in the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the Court. (*d*) This rule proceeds from an

Copy of indictment after acquittal, how obtained.

(*s*) Birt *v.* Barlow, Dougl. 171. Rosc. Ev. 84.

(*t*) Rosc. Ev. 83. Lynch *v.* Clerke, 3 Salk. 154.

(*u*) Eyre *v.* Palsgrave, 2 Campb. 606.

(*v*) Marsh *v.* Colnett, 2 Esp. 665.

(*w*) Dougl. 593, *n.*

(*x*) Rex *v.* King, 2 T. R. 234.

(*y*) Fuller *v.* Fotch, Carth. 346.

(*z*) Bull. N. P. 247.

(*a*) Leader *v.* Barry, 1 Esp. 353.

(*b*) Salte *v.* Thomas, 3 B. & P. 190. 2 Ph. Ev. 164.

(*c*) 2 Phil. Ev. 174.

(*d*) This practice originated with an order made in the 16 Car. 2, by Hyde, Chief Justice of the King's Bench; Bridgman, Chief Justice of the Common Pleas; Twisden, J., Tyril, J., and Kelyng, J., "to be observed by the justices of the peace and others at the sessions in the Old Bailey," as follows:—"That no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon great occasions." Kel. 3. The jurisdiction of these Judges to make this order appears extremely questionable, and has been frequently doubted. See Browne *v.* Cumming, 10 B. & C. 70, and the authorities there referred to. In Rex *v.* Brangan, 1 Leach, 27, the prisoner having been acquitted, applied for a copy of the indictment; but Willes, C. J., admitting that the prosecution bore the strongest marks of being malicious, refused the application, because it was not necessary that he should grant it, declaring that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it, &c.; and that after a demand of it had been made the proper officer might be punished for refusing to make it out. In Browne *v.* Cumming, the Court expressed no opinion as to the authority of the Judges to make the order, but refused to restrain the plaintiff from using a copy of an indictment alleged to have been improperly obtained, on the ground that taking all the facts together they did not think there had been a mistake or misrepresentation of such a nature as to call upon the Court to interfere. The order in question, if not expressly overruled, is much shaken by Rex *v.* The Justices of Middlesex, 5 B. & Ad. 1113. In that case Bowman had been tried and convicted of larceny at the Clerkenwell sessions, after that sessions had lapsed for want of an adjournment, and being indicted for the same offence afterwards, at the Old Bailey, he proposed to plead *autrefois convict*, and the Court adjourned the case to give time for an application for a copy of the record; Rex *v.* Bowman, 6 C. & P. 101; and application was afterwards made to the clerk of the peace for a copy of the record, which was refused. And the Court of Queen's Bench granted a mandamus to make up the record of the proceedings against Bowman, on the ground that "the prisoner had a right to have the record of the proceedings, which passed at ses-

anxiety to protect prosecutors from being harassed by unfounded actions for malicious prosecutions, which actions cannot be maintained without proving the fact of the prosecution by the record or an examined copy of it; and it is therefore not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution. (*e*) But the copy is admissible without proof of the order of the Court allowing a copy of the record; for though it be the duty of the officer, charged with the custody of the records of the Court not to produce a record, or give a copy of it but upon competent authority, yet if the officer, in neglect of his duty, shall have given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received. (*f*) The rule is confined to cases of felony: in prosecutions for misdemeanors, the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the Court. (*g*) Formerly a defendant on a criminal charge was not entitled to an inspection of the grounds upon which the prosecution was instituted; (*h*) and, therefore, neither in cases of treason nor of felony had he any right to a copy of the depositions of the witnesses who were to appear against him. (*i*)

In case of felonies.

In cases of misdemeanor.

Inspection of depositions.

But now the 6 & 7 Wm. 4, c. 114, "an act for enabling persons indicted of felony to make their defence by counsel or attorney," by sec. 3, enacts "that all persons who after the passing of this act shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same) copies of *examinations of the witnesses* respectively *upon whose depositions they have been so held to bail, or committed to prison,* on payment of a reasonable sum for the same, not exceeding three-halfpence for each folio of ninety words: provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the Judge or other person to preside at such trial, shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such Judge or other person so

6 & 7 Wm. 4, c. 114, s. 3. Copies of depositions to be allowed to prisoners.

sions correctly made up, and to make any use of it he could." The report in Rex *v.* The Justices of Middlesex, erroneously states the application for the mandamus to have been after the prisoner had pleaded his former conviction. See Rex *v.* Bowman, 6 C. & P. 101, and 337. This case seems to overrule Rex *v.* Vandercomb and Abbott, 2 Leach, 708, and Rex *v.* Parry, 7 C. & P. 836, where the Court refused to grant the prisoners copies of their indictments, in order to enable them to plead *autrefois acquit*, and seems to establish the position that the prisoner is entitled, *as of right*, to a copy of the indictment for such a purpose; and, if for such a purpose, it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor. C. S. G.

(*e*) Tidd. 647.

(*f*) Legatt *v.* Tollervey, 14 East, 302.

(*g*) Morrison *v.* Kelly, 1 Black. Rep. 385. Evans *v.* Phillips, MS. Selw. N. P. 952. 2 Phil. Ev. 176.

(*h*) 2 Phil. Ev. 178.

(*i*) 2 Phil. Ev. 178. In some species of treason the prisoner is entitled to a copy of the indictment, ibid. Rex *v.* Holland, 4 T. R. 691. In that case an information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of inquiry in India: and the Court of King's Bench were of opinion that he had no right to have an inspection of that report, and that the Court had no discretionary power to grant it.

to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged."

By sec. 4, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the Court before which such trial shall be had." (*j*)

(*j*) Sec. 1 of this act reciting that "it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts that after the 1st of October, 1836, "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attornies practise as counsel." Sec. 2, declares and enacts, "that in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney." As to the practice which has prevailed since this statute passed, it has been held that a prisoner's counsel cannot be permitted to tell the jury any facts which he has heard from the prisoner, but which he is not in a condition to prove. If the prisoner does not employ counsel, he is at liberty to make a statement for himself, and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conducting cases by counsel. Reg. *v.* Beard, 8 C. & P. 142, Coleridge, J. And the same learned Judge held that after the prisoner's counsel had addressed the jury for him, the prisoner himself was not at liberty also to address them. Reg. *v.* Boucher, 8 C. & P. 141. But where on an indictment for maliciously wounding the prosecutor when no other person was present, the prisoner had made a statement before the magistrate, which was not put in by the counsel for the prosecution; Alderson, B., permitted the prisoner to make a statement before his counsel addressed the jury, and then his counsel addressed the jury and commented on the prisoner's statement as according with the evidence, and only supplying what was otherwise deficient in it. The learned Baron said, "I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel, but if so the ends of justice will be furthered; besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel." Reg. *v.* Malings, 8 C. & P. 242. And at the same assizes Gurney, B., after conferring with Alderson, B., allowed a similar course to be adopted, but said that he thought it ought not to be drawn into a precedent; and the prisoner read a written statement. Reg. *v.* Walking, 8 C. & P. 243. The report does not state what the particular facts were in this case. But where on an indictment for child-murder the two previous cases were cited, and permission asked for the prisoner to make a statement, Patteson, J., said, "The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact any thing which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can." The prisoner did not make any statement. Reg. *v.* Rider, 8 C. & P. 539. And where on an indictment for a misdemeanor in uttering base coin, a prisoner wished to make a statement of facts to the jury before his counsel addressed them, and it was said that Lord Denman, C. J., had allowed it to be done; Bosanquet, J., refused to permit it, and observed that he was not informed of the circumstances of the cases decided on this act, which he thought could only be meant to put prisoners in the same situation in felonies as they were in before in misdemeanors, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself, and one by his counsel. Reg. *v.* Burrows, 2 M. & Rob. 124. Soon after the passing of this statute a very learned Judge desired it to be understood that wherever there was counsel for the prisoner the case should always be opened. Per Parke, B., in Rex *v.* Gascoine, 7 C. & P. 772. The practice, however, has been since the statute as before, only to open the case where the facts have some peculiarity in them, or the nature of the charge itself is such as to require an opening in order to direct the jury's attention to the particular points for their consideration; and as the case in which the learned Baron is said to have made the observation, was one of stealing and receiving stolen hay, he may, perhaps,

Rules as to the practice after the passing of this statute.

At a meeting of the Judges after the passing of this statute for the purpose of choosing the Spring Circuits of 1837, (Littledale, J., Bosanquet, J., and Coleridge, J., being absent from indisposition,) a discussion took place as to some points which were thought likely to occur at the assizes, in consequence of the recent act for allowing prisoners indicted for felony to make full defence by counsel; and the following seemed to be the course of practice which the Judges present thought it would be most advisable to adopt.

1. That where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. (*k*)

2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness, as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

4. If the only evidence called on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do. (*l*)

5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner. (*m*)

have thought that the latter charge required some explanation, under the circumstances of the case, before the evidence was adduced. C. S. G.

(*k*) See *post*, in the section, "How the credit of witnesses may be impeached."

(*l*) See *ante*, p. 785.

(*m*) 7 C. & P. 676. The statute and the rules as to the practice under it have been inserted all together here, in order that the whole may be seen at one view. C. S. G.

Cases decided upon this statute.

A prisoner is not entitled under the act to a copy of his own examination, taken before the committing magistrate, which has been returned with the depositions, but only to a copy of the depositions of the witnesses against him. (*n*) This decision, observes Mr. Phillipps, (*nn*) is founded on the express language of the act, which speaks of depositions of witnesses, and says nothing of the examinations of prisoners. Yet it may in some cases be as necessary for the full defence of the prisoner, that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions, especially where a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's statement. In such a case, if it were necessary for the ends of justice the Judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination. (*o*)

Where the prisoner was committed for receiving iron, knowing it to have been stolen, and a person, who had been committed as having stolen the iron, was admitted as a witness for the Crown, Patteson, J., allowed the prisoner's counsel to inspect the depositions which had been returned against the person charged as the thief. (*p*)

Where a true bill was found against a prisoner for the murder of a person, on the investigation of whose death the coroner's jury returned a verdict of "wilful murder against some person or persons unknown," and the depositions taken before the coroner were in the possession of the officer of the Court before whom the prisoner was to be tried; it was held that, although the coroner could not have been compelled to return the depositions under the 7 Geo. 4, c. 64, s. 4; yet the Judges had power by their general authority as a court of justice, if they thought it essential to the interests of justice, to order a copy of them to be given to the prisoner. (*q*)

Inspection of public books.

Never granted in criminal cases.

Where civil rights are depending, a party has a right to inspect, and take copies of such books, &c., as are of a *public* nature, wherein he has an interest; (*r*) but a rule for inspecting a public writing is never granted, where the party who has them in his custody would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a criminal prosecution; for it is a constant and invariable principle that in *criminal cases* the party shall never be compelled to furnish evidence against himself. (*s*)

2. Of the proof of private documents.

2ndly. Of the proof of private documents. The execution of all written instruments which are attested, whether under seal or not, must be proved by the subscribing witness, if he can be produced, and is capable of being examined. Thus, not only bonds and other deeds, but attested notices to quit, (*t*) attested warrants to dis-

(*n*) Reg. *v.* Aylett, 8 C. & P. 669, Littledale, J., and Parke, B.

(*nn*) 2 Phill. Ev. 181.

(*o*) See per Coleridge, J., in *Ex parte* Greenacre, note (*q*), *infra*.

(*p*) Reg. *v.* Walford, 8 C. & P. 767. The report does not state whether these depositions were taken in the presence or absence of the prisoner.

(*q*) *Ex parte* Greenacre, 8 C. & P. 32, Littledale, J., and Coleridge, J., and per Coleridge, J., "Supposing these depositions had been against some other person tried a year ago for an offence with which this particular prisoner had nothing to do; yet if we had them have we not authority as a court of justice, if we think it essential to the interests of justice to order a copy of them to be given to him? I think that we have."

(*r*) Tidd. 647.

(*s*) Tidd. 649.

(*t*) Doe *v.* Durnford, 2 M. & S. 62. And it makes no difference that the party, upon whom the notice was served, read it and made no objection. Ibid.

train, (*u*) attested bills of exchange, or promissory notes, must be proved by the attesting witness. (*v*) And so strictly is this rule observed, that the testimony of the attesting witness cannot be dispensed with, though an acknowledgment of the obligor himself be proved, admitting that he executed the bond, (*w*) or the defendant has admitted the execution in his answer to a bill in Chancery; (*x*) for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (*y*) And although it was once held that if an attesting witness had become blind, he need not be called, but it was sufficient to prove his handwriting; (*z*) and this course was adopted in another case. (*a*) Yet it has since been held that a bond cannot be proved without calling the attesting witness, although he is blind, as he may from his recollection of the transaction, give most important evidence respecting it. (*b*) But where the attesting witness is dead, (*c*) or insane, (*d*) or infamous, (*e*) or has become interested after the execution of the deed, (*f*) or absent in a foreign country, or not amenable to the process of the superior Courts, (*g*) as where he is in Ireland, (*h*) or where he cannot be found after diligent inquiry, (*i*) evidence of the witness's handwriting is admissible. (*ii*) In these cases the proof of the subscribing witness's handwriting is evidence of the execution of the instrument by the party therein named, whose signature the instrument purports to bear; and for the purpose of proving the execution, that is, that the instrument was executed by the party so named, it will not be necessary to prove the handwriting of the party. (*j*) But with a view to establish the identity of the party, and to show that the person who executed the instrument is the party to the suit, or the party charged, proof of the party's handwriting may be important and most satisfactory evidence. (*j*) And it seems to be settled that where a written instrument is attested by a subscribing witness, who is dead, or abroad, or out of the reach of the process of the Court at the time of the trial, or cannot be found, it is requisite to give some evidence that the party who signed the instrument is the defendant sought to be charged under it, as well as to prove the handwriting of the subscribing witness. Where, therefore, the attesting witness to a promissory note was in Canada, and his handwriting was proved by his nephew, who did not know where either the defendant or the plaintiff lived, or anything about the defendant, or about his making his mark to the note, the Court of Exchequer held that this was

(*u*) Higgs *v.* Dixon, 2 Stark. N. P. C. 180.
(*v*) 2 Phill. Ev. 202.
(*w*) Abbot *v.* Plumbe, 1 Dougl. 216.
(*x*) Call *v.* Dunning, 4 East, 53.
(*y*) By Le Blanc, J., 4 East, 53.
(*z*) Wood *v.* Drury, 1 Lord Raym. 734, Holt, C. J., at Warwick Assizes.
(*a*) Pedler *v.* Paige, 1 M. & Rob. 258, Park, J. A. J.
(*b*) Cronk *v.* Frith, 9 C. & P. 197, Lord Abinger, C. B.
(*c*) Anon. 12 Mod. 607.
(*d*) Currie *v.* Child, 3 Campb. 283.
(*e*) Jones *v.* Mason, 2 Stra. 833.
(*f*) Godfrey *v.* Norris, 1 Stra. 34.
(*g*) Prince *v.* Blackburn, 2 East, 250.
(*h*) Hodnett *v.* Forman, 1 Stark. N.P.C. 90.
(*i*) Cunliffe *v.* Sefton, 2 East, 183.
(*ii*) 2 Phill. Ev. 210, *et seq.* See also what will be considered a diligent inquiry so as to let in such evidence, ibid., 212, *et seq.*
(*j*) 2 Phill. Ev. 214.

insufficient; for although proof of the attestation would be evidence of everything on the face of the instrument, *viz.*, of everything he as attesting witness asserted, yet by his attestation he does not assert that *this defendant* signed the note; but that *some* F. M. did; that F. M. is left unidentified and unconnected with the person sued; but the issue to be proved is that this F. M. executed. (*k*) Evidence that the defendant was present when the instrument was prepared, (*l*) or that he had made acknowledgments respecting it, (*m*) would be sufficient to connect him with the instrument. And if an instrument describes a party on the face of it by name, place of abode, and trade (as F. M. of R. in the county of Y., carpenter,) the cases establish that proof of the handwriting of the subscribing witness would be sufficient to show that it was signed by a person truly described as being of that name and place; but still the plaintiff must show that the defendant corresponds with that description. (*n*) The handwriting of a party may be proved by a witness who has seen him write; and, if a witness states that he has only seen him write once, but thinks the signature is his handwriting, it is evidence to go to the jury, although he says that he can form no belief on the subject. (*o*) A written correspondence with the party, although the witness has never seen him write, will be sufficient to enable him to speak to the handwriting; for when letters are sent directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises, that the answer was sent by the person whose handwriting it purports to be. (*p*) So where a witness who had never seen the defendant, but had corresponded with a person of defendant's name living at Plymouth dock, where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was the handwriting of the person with whom he corresponded, the evidence was held sufficient. (*q*) So where, on an information for a libel, in order to show that certain letters were in the handwriting of the defendant, a witness proved that he had never seen the defendant write, but he had seen a number of letters, which purported to have come from him on the subject of a cause, in which he was engaged on one side, and the witness on the other side, and the witness had acted upon those letters in the course of the cause; Lord Tenterden, C. J., held that the witness was competent to prove the defendant's handwriting. (*r*)

Handwriting, how proved.

It is an established rule, that handwriting cannot be proved by comparing the paper with any other papers acknowledged to be genuine. (*s*) But upon a question respecting the identity of handwriting the jury may be allowed to take other papers, which have been proved to be the writing of the party whose handwriting is

(*k*) Whitelock *v.* Musgrave, 3 Tyrw. 541. 1 C. & M. 521.

(*l*) Nelson *v.* Whittall, 1 B. & A. 19.

(*m*) Whitelock *v.* Musgrave, *supra*.

(*n*) Whitelock *v.* Musgrave, *supra*, per Bayley, J.

(*o*) Garrels *v.* Alexander, 4 Esp. 37. The signature of a person may be proved by a witness who has seen him write his surname only. Lewis *v.* Sapio, M. & Malk. N. P. C. 39, by Abbott, C. J., overruling Powell *v.* Ford, 2 Stark. R. 164, 2 Phill. Ev. 249. A witness may prove the identity of a mark from having seen the person make it on several occasions. George *v.* Surrey, M. & M. 516.

(*p*) Per Lord Kenyon, Cary *v.* Pitt, Peake Ev. App. 85.

(*q*) Harrington *v.* Fry, 1 Ry. & Mood. 90.

(*r*) Rex *v.* Slaney, 5 C. & P. 213.

(*s*) *Ante*, p. 393. 2 Phill. Ev. 251.

disputed—provided they are part of the proofs in the cause,—and may compare them with the disputed writing, for the purpose of forming their opinion whether the disputed writing is genuine. (*t*) But it is an established qualification of this rule that documents, irrelevant to the issues on the record, are not to be received in evidence at the trial, in order to enable a jury to institute such a comparison. (*u*) Upon an indictment for sending a threatening letter, there being no proof that the prisoner sent it, except from its being supposed to be in his handwriting, and the evidence of handwriting being very slight; Bolland, B., held that the counsel for the prosecution could not put in a document undoubtedly written by the prisoner, but unconnected with the charge in the indictment, that the jury might inspect it, and compare it with the letter in question. (*v*) And it cannot be permitted to introduce writings, irrelevant to the matters in issue, in order to enable a witness to institute such a comparison. (*w*) Neither can a witness be cross-examined as to other documents which are not in evidence in the case. In an action on a bill of exchange against the acceptor, the defendant's witnesses swore that they believed that the acceptance was not in his handwriting, and it was held that a paper purporting to be signed by the defendant could not be laid before each of the defendant's witnesses in cross-examination, in order to ask them whether they believed the signature to be that of the defendant, for the purpose of testing their knowledge of his handwriting by the agreement or disagreement of their testimony on this point. (*x*)

Knowledge of writing acquired by inspection of documents.

Questions have several times arisen whether a witness may speak to handwriting, not from direct comparison, but from a standard in his own mind, where that standard has been obtained by the inspection of papers which have been shown to him purposely with a view to a particular cause. (*y*) Where a witness had seen the alleged writer of a disputed signature write several times for the purpose of showing the witness his manner of writing; Lord Kenyon, C. J., rejected the evidence, as the defendant might write differently from his common writing through design. (*z*) Where, however, a witness had observed a name signed to an affidavit, which had been used by the plaintiff's counsel in answer to an application to postpone the cause, and in the affidavit it was sworn that the party signing it was the plaintiff's wife; Park, J. A. J., held that the witness might speak to that person's name as the attesting witness to an agreement, purporting to be signed by the plaintiff. (*a*)

Doe v. Suckermore.

Where a defendant in an ejectment produced a will, and one day of the trial called an attesting witness, who swore that the attestation was his, and on his cross-examination two signatures to depositions

(*t*) 2 Phill. Ev. 256. Griffith *v.* Williams, 1 Cr. & J. 47. Doe *d.* Perry *v.* Newton, 5 A. & E. 514. 1 Nev. & P. 4. Solita *v.* Yarrow, 1 M. & Rob. 133. Eaton *v.* Jervis, 8 C. & P. 273.

(*u*) 2 Phill. Ev. 256. Bromage *v.* Rice, 7 C. & P. 548, Littledale, J., and Patteson, J. Griffith *v.* Williams, *supra.* Doe *d.* Perry *v.* Newton, *supra.*

(*v*) Rex *v.* Morgan, 1 M. & Rob. 134, note.

(*w*) 2 Phill. Ev. 256.

(*x*) Griffits *v.* Ivery, 11 A. & E. 322, 3 P. & D. 179. And Lord Denman was of opinion that the objection would not be removed by independent proof that the paper was in fact written by the defendant. In Hughes *v.* Rogers, 8 M. & W. 123, Parke, B., stated that he had acted in conformity with this decision in a case at Stafford.

(*y*) 2 Phill. Ev. 259.

(*z*) Stranger *v.* Searle, 1 Esp. 14.

(*a*) Smith *v.* Sainsbury, 5 C. & P. 196.

respecting the same will in an ecclesiastical Court, and several other signatures were shown to him (none of these being in evidence for any other purpose of the cause,) and he stated that he believed them to be his, and on the following day the plaintiff tendered a witness to prove the attestation not to be genuine; the witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court; and the Court of Queen's Bench were equally divided, Lord Denman, C. J., and Williams, J., holding that the evidence of the witness was receivable, and Patteson, J., and Coleridge, J., that it was not. (*b*) And where the plaintiff called the son of an attesting witness to a bond who stated that the signature was not his father's handwriting, and the counsel for the plaintiff then put into his hands another paper, not in evidence in the cause, and asked him if that was in his father's handwriting, to which he replied in the negative; it was held that witnesses could not be called on the part of the plaintiff to prove that this second paper had been actually signed by the father in their presence, on the ground that their evidence if received would have had the effect of raising a collateral issue. (*c*)

Hughes v. Rogers.

Stamps.

A written instrument, which requires a stamp, in criminal as well as civil cases, is inadmissible in evidence, unless it be duly stamped, and no parol evidence will be received of its contents. Thus, where the prisoner, being a clerk, receiving money on his master's account, gave to the debtor a receipt on plain paper; the receipt was held, by Bayley, J., not to be evidence against the prisoner on an indictment for embezzling the money so received. (*d*) But in certain cases unstamped written instruments have been received in evidence, when produced merely to prove something collateral, and not for the purpose of being enforced between the parties, and when it is not material to consider whether the instruments are good or available in law. (*e*) Thus, a paper, purporting to be a bill of exchange or promissory note, may be given in evidence to support an indictment for forgery, or for uttering with a knowledge of the forgery. (*f*) So on an indictment on the 7 Geo. 4, c. 50, s. 2, for stealing a letter, where it appeared that the check or draft which the prisoner had taken out of the letter was drawn on unstamped paper, it was objected, on behalf of the prisoner, that it could not be received in evidence, even as a medium to show that he had stolen the letter; but the Court overruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of

Unstamped instrument for collateral purposes.

(*b*) Doe *d.* Mudd *v.* Suckermore, 5 A. & E. 703. 2 Nev. & P. 16. See 2 Phill. Ev. 260, *et seq.*, where the learned author considers this case with much ability, and contends for the admissibility of the evidence.

(*c*) Hughes *v.* Rogers, 8 M. & W. 123. Alderson, B., said, "This case is very different from that where a party denies one document to be in his handwriting, and admits others put into his hands; there it has been made a question whether those documents may not be looked at by the jury in order to see whether they have really been written by the same person; on that point there has been some difference of opinion, but the real question there is, does it enable the jury to appreciate the testimony given by the witness?"

(*d*) Rex *v.* Hall, 3 Stark. N. P. C. 67.

(*e*) *Ante*, p. 347.

(*f*) Ibid.

recovering the money contained in it. (*g*) Upon an indictment for conspiracy, where it was alleged that a part of the intended fraud was the setting up of a fraudulent assignment of a mortgage, it was holden that, for the purpose of showing this, an unstamped written agreement in the handwriting of one of the defendants was admissible, for if a written instrument is charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not. (*h*) If a party were indicted for stealing certain goods, he might give in evidence an unstamped assignment to him of the goods; for there the allegation would be that the accused took the goods feloniously, and by showing that he had executed something which he supposed gave him a right to take them, the assignment is not made available in law or equity; but it is merely shown that the prisoner took the goods, thinking the deed gave him the right, when in truth it did not. (*i*) So in a case of embezzlement, if the party accused had paid away the money on unstamped promissory notes, they would be evidence to show the mistake under which he had paid it away. (*j*)

In all cases where the question is, whether an agreement is void at common law or by statute, and the party introduces it, not to set it up and establish it, but to destroy it altogether, there is no objection to its admissibility for want of a stamp. (*k*) A party, therefore, who sets up an usurious contract, may give in evidence an unstamped agreement for the purpose of proving usury. (*l*) So where a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement in consideration of a sum of money, and upon other terms, to proceed no further with the petition, it was held that the written agreement was admissible in evidence for the purpose of insisting on the illegality of the transaction, in answer to an action for the sum so agreed to be paid, without its being stamped. (*m*) So where in an action for goods sold and delivered the plaintiff's case was, that the defendant had received them from a person, who had fraudulently obtained them from the plaintiff by a cheque drawn on a party who would dishonour the cheque, it was held that the cheque was admissible in support of this case, though not duly stamped; for if it be necessary in a civil action to show that there has been a felony, or an obtaining by false pretences, the same evidence is admissible as if the case were that of an indictment for felony or fraud; and it was clear that if the party who drew the cheque had been indicted the cheque would have been admissible. (*n*)

The correct distinction in these cases.

In a recent case Lord Abinger, C. B., pointed out the distinction in these cases as follows:—"The stamp act for the sake of the re-

(*g*) Pooley's second case. 2 Leach, 900. S. C. 1 East, P. C. Addenda xvii. *Ante*, p. 221. The prisoner had been previously tried on the first section of the act, which makes it a capital felony for any servant of the post-office to secrete any letter containing a bank-note, or any warrant or draft for the payment of money; and it was held that a draft which required a stamp, but was unstamped, was not a draft for the payment of money within the act. Pooley's case, case, 2 Leach, 887. *Ante*, p. 214.

(*h*) Rex *v.* Fowle, 4 C. & P. 592, Lord Tenterden, C. J.

(*i*) See per Rolfe, B., Williams *v.* Gerry, *infra*.

(*j*) Per Rolfe, B., ibid.

(*k*) Per Lord Abinger, C. B., Coppock *v.* Bower, 4 M. & W. 361.

(*l*) Nash *v.* Duncomb, 1 M. & Rob. 104, Lord Tenterden, C. J.

(*m*) Coppock *v.* Bower, *supra*.

(*n*) Keable *v.* Payne, 8 A. & E. 555. See Rex. *v.* Parker, 2 Moo. C. C. R. 1. 7 C. & P. 825, where it was so held.

venue was intended to exclude the reception in evidence of the instruments therein mentioned, unless stamped, whenever they are introduced for the purpose of making them available; that is, of setting them up and giving effect to them. Therefore, in every case where a question arises between the parties in a cause as to the evidence which may be given; for instance, in the case of an agreement which is the subject of the action, or has some collateral relation to it, the moment it appears to be in writing, no other evidence than the written document being producible, if it proves to be unstamped, it must be rejected. So with regard to promissory notes and bills of exchange, and all matters which are the subjects of the stamp acts, unless they are stamped when they are produced, they must be rejected, wherever they are produced, to show that they have, or ever had, any validity. But the case is different when the purpose is not to give them effect, but to defeat them, and to show that they were entered into for the purpose of fraud and conspiracy. Thus, if there were a conspiracy, and the parties intended, *inter se*, to take certain measures to gain an advantage from an agreement, although it be not stamped, it is received in evidence to show a guilty mind. There it is used not with a view to set it up, but to show that it was absolutely void, and as evidence of a fraud, and of the guilty purpose in which the parties to it were engaged." (*o*) Where, therefore, upon the trial of an issue whether certain goods were the property of the plaintiff or Davies, the plaintiff claimed to be entitled to the goods by virtue of a bill of sale dated the 2nd of January, 1840, from Davies, as a security for the repayment of 300*l.*, therein stated to have been advanced at different times by the plaintiff to Davies; the defendant alleged that the transaction was a fraudulent one; and the plaintiff in order to show that it was not, proposed to give in evidence a former assignment of the same goods, dated the 18th of October, 1839, as a security for the sum of 180*l.*, being a portion of the 300*l.*, which had been then advanced, on which the word "cancelled," was written; but this assignment was not stamped; the Court of Exchequer held that it was not admissible in evidence without a stamp, as the object was not to show that the instrument was void in law, but to use it as evidence of a binding contract between the parties, which they then meant to act upon, available, though not availing, and which, upon payment of the duty, would have become good. (*p*)

And where in the case of an indictment for feloniously setting fire to a house with intent to defraud an insurance company, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods, in a house described in the policy, were

(*o*) Per Lord Abinger, C. B., in Williams *v.* Gerry, *infra*.

(*p*) Williams *v.* Gerry, 10 M. & W. 296. "On the other hand, supposing that the defendant had taken upon himself the *onus probandi*, in the first instance, that the whole transaction was a fraud, I do not say that he might not have given this assignment in evidence, and shown that it originated in a fraudulent conspiracy, and that it was merely colourable, being intended by and bye, to be used for the purpose it was used for before the jury, or that the parties were hatching up evidence from time to time, to be used only when the immediate necessity arose, and the time came for the fraud to be practised. It might, I think, be evidence of such a corrupt agreement, and to show such a conspiracy. It was, therefore, an instrument which might be evidence for the party who sought to attack it, but not for a party whose object was to support it." Per Lord Abinger, C. B., ibid.

insured against fire, and upon which a memorandum was indorsed stating, that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum. In this house, so mentioned in the memorandum, the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp; and upon this circumstance, an objection was taken on behalf of the prisoner, that it was essentially necessary to show, in support of the charge, that there subsisted a legal effective contract; and that, by the express provisions of the stamp acts, the memorandum in question, not being stamped, could not be given in evidence, or be good or available in any manner whatever. The point being reserved for the consideration of the twelve Judges, was argued before them; and the conviction was held to be wrong.(*q*)

As to other points repecting the proof and effect of public and private documents, since they are of rare occurrence in criminal proceedings, it is thought more advisible to refer the reader to the general Treatises on the Law of Evidence, than to encumber this work with any notice of them.

(*q*) Gillson's case, 2 Leach, 1007. Russ. & Ry. C. C. R. 138. *Ante*, p. 567. Lord Ellenborough, Mansfield, C. J., Wood, B., Grose, J., and Heath, J., were of opinion the conviction was right. The Lord Chief Baron, Thompson, B., Lawrence, J., Le Blanc, J., Chambre, J., and Graham, B., were of the contrary opinion.

CHAPTER THE FOURTH.

OF CONFESSIONS AND ADMISSIONS.—OF EXAMINATIONS BEFORE MAGISTRATES.—AND OF DEPOSITIONS.

SECTION I.

Of Confessions and Admissions.

Confessions sufficient for conviction without proof *aliunde.*

A FREE and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true. (*a*) And the highest authorities have

(*a*) Gilb. Ev. 123. Lambe's case, 2 Leach, 552, 4th edition. Mr. J. Blackstone, and Mr. J. Foster, entertained a different opinion. (See Fost. 243.) The former in the fourth volume of his Commentaries, p. 357, says, in speaking of confessions made to persons not in authority as magistrates: "Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision; and incapable in their nature of being disproved by other negative evidence." A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and it be clearly shown that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. "For," as has been well observed, (Greenleaf's Evid. 247) "besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear, to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received. The weighty observation of Mr. J. Foster is also to be kept in mind that "this evidence is not in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted." Fost. 243. Mr. B. Parke has on several

now established, that a confession, if duly made, and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence *aliunde.* (*b*)

occasions observed that "too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say." Earle *v.* Picken, 5 C. & P. 542, note. So where one of two witnesses called to prove the same statement of the prisoner to his wife, said that the words were, "keep yourself to yourself, and don't marry again;" and the other, "keep yourself to yourself, and keep your own counsel." Alderson, B., said, "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence." Rex *v.* Simons, 6 C. & P. 540.

(*b*) Wheeling's case, in note 1 Leach, 311. Rex *v.* Eldridge, Russ. & Ry. C.C.R. 440. Rex *v.* Falkner, ibid., 481. In Greenleaf's Evid. 251, it is observed, "in each of the English cases usually cited in favour of the sufficiency of this evidence, there was some corroborating circumstance. Wheeling's case seems to be an exception, but it is too briefly reported to be relied on. In the United States the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law," citing Guild's case, 5 Halst. 163, 185. Long's case, 1 Hayw. 524 (455). 2 Hawk. P. C. c. 46, s. 36. The whole statement in 1 Leach, 311, of Wheeling's case is that "it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence." This statement may mean that where the commission of a felony is proved by independent evidence, a prisoner may be convicted on his confession, though there be nothing to corroborate that confession as to his being the party who committed such felony; and the manner in which Wheeling's case is introduced rather leads to the inference that that is the meaning of the statement. In Rex *v.* Eldridge, on an indictment for stealing a mare, it appeared that the mare was seen on the 8th of October in the afternoon in the possession of one of the prosecutor's servants, who was taking it towards one of his fields, but neither that servant nor the prosecutor were called as witnesses: the mare was not found in the prosecutor's possession on the 11th of October. The prisoner had the mare in his possession on the 13th, and sold her under her value. A full confession before a magistrate was proved, and the prisoner convicted. The Judges held "that there was sufficient evidence to confirm the confession." It is to be observed, that independently of the confession the case was complete, with the exception of proving that the mare was put in the prosecutor's field by his servant. See Rex *v.* Yend, 6 C. & P. 176, *ante*, p. 122, and Rex *v.* Fellows, *ante*, p. 123. In Rex *v.* Falkner and Bond, on an indictment for robbing one Halliday, he was called on his recognizances but did not appear, and the prisoner, Falkner, had been desirous to send a message to Halliday to keep him from appearing. The only other evidence was that Bond had confessed the offence to the constable who apprehended him, and that both the prisoners, on hearing the depositions read over to them, which contained the charge, had admitted that they were guilty; the depositions charged the prisoners with robbing Halliday of certain quantities of copper. The prisoner was found guilty, and the Judges held the conviction right, but no reason is stated for the decision. If the depositions were read in evidence *at the trial*, as they might be if the prosecutor was kept away by means of the prisoners, the case does not seem in any degree to support the position in the text. In Rex *v.* White and Langdon, Russ. & Ry. 508, on an indictment for stealing oats, the prosecutor proved that he had sometimes more, sometimes less than 300 quarters of oats in his granary, the door of which had been fastened with a padlock, and was found by the prosecutor unhinged and drawn back, on the 24th of December. At half-past two o'clock that morning, two men were seen by a witness coming from the prosecutor's yard, each of them having a sack on his back, but the witness did not say that the men were the prisoners. White on the same day was in possession of some bags of oats, of the same kind as those in the granary of the prosecutor, who could not, however, swear that he had lost any of his oats; each prisoner made an explicit confession of the offence which were proved, and the prisoners found guilty; and the Judges held the conviction right. In Rex *v.* Tippet, Russ. & Ry. 509, which was an indictment for stealing oats from the same prosecutor, the same evidence was given as in the preceding case, with the addition that the prisoner was under ostler in the prosecutor's stables, and a confession by the prisoner of his having stolen the oats in company with the prisoners in the preceding case was put in, and the prisoner convicted; and seven of the learned Judges (all who met on the occasion) were of opinion that the conviction was right, "as there was not only the

Must be free and voluntary.

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by *any sort* of threats or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence. (*c*)

"The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence, which he really never committed." (*d*) In determining, therefore, whether a confession be admissible or not, "the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one." (*e*)

A confession can never be received in evidence, where the prisoner has been influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration, if *any* degree of influence has been exerted. (*f*) It is a question for the Court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. (*g*)

confession but the evidence of the prosecutor also, which made it probable that oats had been stolen, as it appeared from such evidence that the door of the granary had been broken open, and most of the learned Judges thought that, without the owner's evidence, the prisoner's confession was evidence upon which the jury might have convicted." In Rex *v.* Tuffs, 5 C. & P. 167, the prisoner was indicted for stealing two heifers, which were not missed by the prosecutor or any other person in his service, and the only evidence against the prisoner was his own statement, when questioned on the subject, that he had driven away two heifers from his uncle's premises, "The World's End Dolver," the prosecutor and another person proved that the prosecutor's farm was called by that name, but they could not undertake to say that there was not any other of that name; Lord Lyndhurst, upon this told the jury that under the circumstances there was not any evidence of a stealing as to the heifers of the prosecutor; though if it had been proved that his was the only "World's End Dolver," it would have been sufficient. It does not, therefore, appear that it has ever been expressly *decided* that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction. In Rex *v.* Edgar, Monmouth Spr. Ass. 1831, MSS. C. S. G., the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patteson, J., said, "could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could."

(*c*) It is a mistaken notion that evidence of confessions obtained by promises or threats, are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. Warickshall's case, *cor.* Eyre & Nares, Barons, 1 Leach, 263. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. Ibid., note (*a*).

(*d*) Per Littledale, J., in Rex *v.* Court, 7 C. & P. 486, *post*, p. 846.

(*e*) Per Coleridge, J., in Rex *v.* Thomas, 7 C. & P. 345, *post*, p. 845.

(*f*) 2 Stark. Ev. 36.

(*g*) Rex *v.* Nute, *post*, p. 832. It is submitted, however, that it is a question for the jury whether they believe the witness gives a true account of what the prisoner said, and also whether the prisoner made the statement voluntarily, or was prevailed upon to make it by any inducement used by the witness, although the witness may have denied that he used any inducement what-

The general principle on which the decisions on this subject seem to have proceeded, seems to be this: that if, under the circumstances, there be reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received. (*g*)

Promises and inducements.

As to what shall be considered as a promise, or inducement, saying to the prisoner that it would be better for him if he did confess, is sufficient to exclude the confession. (*h*) So a confession induced by saying, "I am in great distress about my irons; if you will tell me where they are, I will be favourable to you," cannot be given in evidence. (*i*) Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;" upon which the prisoner took 11*s.* 6½*d.* out of his pocket, and said it was all he had left of it; a majority of the Judges held, that the evidence was inadmissible. (*j*) So, where a prisoner being in custody, said to the officer who had the charge of him, "If you will give me a glass of gin, I will tell you all about it," and two glasses of gin were given to him, and he made a confession of his guilt, Best, J., considered it as very improperly obtained, and inadmissible in evidence. (*k*) But where a prisoner made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible: Coleridge, J., said, "I am of opinion, that a statement being made by a prisoner while he was drunk, is not, therefore, inadmissible against him; and that to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement, when it is considered by the jury." (*l*)

Jones' case.

Confession by prisoner when drunk.

ever. The editor has known these questions left to the jury on several occasions, and it is conceived that it is the proper course, as they alone are the judges of the credibility of the witnesses. C. S. G.

(*g*) 2 Stark. Ev. 36.

(*h*) 2 East, P. C. c. 16, s. 94, p. 659.

(*i*) Cass's case, 1 Leach, 293, note (*a*).

(*j*) Jones's case, Russ. & Ry. C. C. R. 152, but see Rex *v.* Griffin, ibid., 151, *post*, p. 863.

(*k*) Rex *v.* Sexton, MS. Chetw. Burn. tit. *Confession*, p. 1086, Doyl. & Wms. The authority of this case has been qustioned in several books. Desc. Cr. Law, 424, Rosc. Cr. Evid. 37, Joy, 17, and it seems very justly. In the first place the offer to confess was volunteered on the part of the prisoner; secondly, there was no promise or threat at all used by the constable, nor was the prisoner in any way led to believe that by confessing he would escape from the charge, or be let out of custody; thirdly, there was no inducement to state anything but the truth. In 1 Burn's J. Doyl. & Wms. 1081, note (*a*), it is said, "the authority of this decision seems doubtful; for it is not every hope of favour held out to a prisoner that will render a confession afterwards made inadmissible; the promise must have some reference to his escape from the charge."

(*l*) Rex *v.* Spilsbury, 7 C. & P. 187. In a note to this case, 1 Phill. Ev. 465, it is observed, "The facts of the case as reported do not warrant the marginal note, which is as follows:—'*Semble*, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the Judge in his summing up.' It is not to be inferred from the case that a confession—so immorally, not to say criminally, extorted—would be received." The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases where confessions have been excluded there has been an anticipation

Promises and inducements.

Where, on an indictment for robbery, a witness stated that he had said to one of the prisoners, "You had better split, and not suffer for all of them," the statement of the prisoner was rejected.(*m*) So where a person said to the prisoner in the police barracks, "If any other person had to do in the case, it is better you should tell;" the statement there made by the prisoner was rejected. (*n*) So where on an indictment for larceny, a witness proved that he said to the prisoner, "It would have been better if you had told at first;" the statement of the prisoner was rejected; Gurney, B., saying, "That is an inducement. It amounts to this, that if it would have been better then, it would be better now. I think it hardly safe to admit the evidence after that." (*o*)

Mills' case.

Where a constable, whilst he had a prisoner in custody, on a charge of larceny, asked him whether he had committed the felony, which he denied, and then said, "It is of no use for you to deny it, for there is the man and boy who will swear that they saw you do it;" Gurney, B., held, that this was an inducement to say something, and, therefore, what the prisoner said was not admissible. (*p*)

Kingston's case.

So where on an indictment for administering arsenic, it appeared that the surgeon who was called in saw the prisoner, and said to her, "You are under a suspicion of this, and you had better tell all you know," it was held that a statement made after this to the surgeon was inadmissible. (*q*)

Partridge's case.

So where it appeared, on an indictment for larceny, that the prisoner, being in the custody of a constable, the latter said to the prosecutor, "You must not use any threat or promise to the prisoner;" and immediately after this, the prosecutor said to the prisoner, "I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing; I shall be glad if you will." The confession was held inadmissible; Patteson, J., saying, "I think this is a distinct promise; what could the prosecutor mean by saying, that if the prisoner would not tell, they could do nothing, but that if the prisoner did tell, they would do something for him." (*r*)

of benefit or injury *after* the confessing or non-confessing. Where liquor is given the benefit (if it can be called any) is received already, and nothing further is in expectation. C. S. G.

(*m*) Rex *v.* Thomas, 6 C. & P. 353, Patteson, J. By such a statement as that made by the witness the prisoner *might* be induced to suppose that he would be more mercifully dealt with if he confessed, and that he might therefore be induced to confess himself guilty of an offence he never committed. See Reporters' note, ibid.

(*n*) Moody's case, 2 Crawf. & D. C. C. Joy, 12.

(*o*) Rex *v.* Walkley, 6 C. & P. 175.

(*p*) Rex *v.* Mills, 6 C. & P. 146, and MSS. C. S. G. "These words seem to have been construed by the learned Judge as the same in effect as if the constable had said, it will be better for you to confess it, for we can prove it whether you do or not." Joy. 7.

(*q*) Rex *v.* Kingston, 4 C. & P. 387. Parke, J., after consulting Littledale, J.

(*r*) Rex *v.* Partridge, 7 C. & P. 551. Dr. Greenleaf Evid. 256, after citing this case, and Guild's case, *post*, p. 838, observes, "It is extremely difficult to reconcile these and similar cases with the spirit of the rule as expounded by Eyre, C. B., in Warickshall's case, *ante*, p. 826, note (*c*), the difference is between confessions made voluntarily, and those "*forced* from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the Court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit." In Rex *v.* Green, 6 C. & P. 655, Taunton, J., said, "I take it no man ever makes a confession without proposing to himself in his own mind some advantage to be derived from it," *post*, p. 847.

If an inducement be held out to one prisoner to make a statement, which implicates another prisoner, such statement is inadmissible; for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by an inducement. Upon an indictment for murder, against a man and woman, it appeared that a woman who was placed by the constable with the female prisoner, whilst he went to the inquest, to prevent her laying violent hands upon herself, and to prevent her from going away, told her to the effect that "she had better tell the truth, or it would lie upon her, and the man would go free." Parke, J., (after consulting Taunton, J.,) said, "As this declaration of the female prisoner can only legitimately be received in evidence to affect her and no one else, we think that it is not receivable, as it was made after an inducement held out by a person who had her in custody. If it were to be used at all, it could only be used to criminate her; and then it would be evidence obtained to criminate her by means of an inducement." (*s*)

Inducement to implicate another prisoner.

Where a constable, who apprehended a prisoner for stealing a brass tap, asked him what he had done with the tap he had stolen from the prosecutor's premises, and said, "You had better not add a lie to the crime of theft," and desired him to go with another constable, and shew him where he had put the tap; Gaselee, J., after expressing some doubt, refused to receive a confession made to the constable, who had addressed these observations to the prisoner. (*t*)

Shepherd's case.

If a prisoner be told that what he says would be used for him or against him, at his trial, his statement is inadmissible. A prisoner, when before a magistrate, was told by the magistrate's clerk not to say anything to prejudice himself, "as what he said, would be taken down, and would be used for him or against him at his trial." Coleridge, J., "This is an inducement, and it was held out by a person in authority. I am of opinion, that the prisoner's statement cannot be given in evidence. I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial." (*u*)

Drew's case.

(*s*) Rex *v.* Enock, 5 C. & P. 539. It does not appear to have been noticed either by the counsel or the Court that this was an inducement to *tell the truth*. See *post*, p. 846.

(*t*) Rex *v.* Shepherd, 7 C. & P. 579. Mr. Joy, p. 8, observes, that "the manner in which these words were used may have been considered by the learned Judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner *untruly* to confess himself guilty: or the words may have been deemed in effect the same, as if the constable had said, 'you have committed a theft, it will be better for you not to deny it—that is to confess.' The words viewed in this light imply an inducement rather than a threat." "This case has been controverted," Joy, 8, note (*a*), but it is not stated upon what occasion. It is difficult to see how the observations of the constable could induce the prisoner to state what was false, especially as he desired the prisoner to go and show where he had put the tap; and, therefore, the case seems at variance with Rex *v.* Court, *post*, p. 846, which seems to have proceeded on the correct principle, namely, that a confession is admissible unless it has been obtained by the prisoner being induced to suppose that it will be better for him to admit himself guilty of an offence which he really never committed. C. S. G.

(*u*) Reg. *v.* Drew, 8 C. & P. 140. In the "Law Magazine," vol. 27, p. 340, it is remarked, that the ground of this decision probably was that "the mind of man, especially the mind of a prisoner, is more prone to hope than fear." If the prisoner had been told merely that what he said would be used for him at his trial, it would clearly have been an improper inducement to make a statement; and it should seem that it is no less an improper inducement to tell the prisoner that his statement *would* be used for or against him, because he would naturally make such a statement under the influence of those words as he conceived would be beneficial to him upon his trial. C. S. G.

Confessions with a view to being admitted as a witness, and receiving a pardon.

A confession made by the prisoner with a view and under the hope of being thereby permitted to turn king's evidence, has been held inadmissible. In a trial for burglary, a witness was called to prove that one prisoner had desired him to apply to the justice to admit him as a witness for the crown; for that he had not entered the house, but had only stood at the door, while the other prisoners went up stairs to commit the felony; it was objected, that as this confession was made with a view and under the hope of being thereby permitted to turn king's evidence, it was not admissible; and Adair, Serjt., being of opinion that this was not a voluntary confession, the evidence was rejected. (*v*) On an indictment for murder, it appeared that the prisoner was taken into custody on the charge, on the 2nd of December, and that on the 11th he made certain statements, which were sought to be given in evidence. To prove one of these statements, a policeman was called, who said that he held out no inducement to the prisoner to make any statement, nor did he know that any one else had, down to the 11th of December, when the statement was made; but on the 6th of December, he knew that a reward of 100*l.* had been offered by the government, accompanied by a statement, that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner; and Cresswell, J., allowed this statement to be given in evidence. In a later part of the same case a policeman stated, that soon after the prisoner had been taken into custody, and before the 6th of December, the prisoner requested that he would let him know if any reward should be offered, or any papers published concerning the murder, and that he would bring any such papers to him as soon as they were printed. On the 6th of December, it was generally known that the Secretary of State had offered a reward and a promise of free pardon to any of the offenders, except such as had struck the blow, and on the 13th, the witness gave the prisoner one of the printed handbills, which offered 100*l.* reward to any person, who should give such information as should lead to the discovery and conviction of the murderers, and "a pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result." Cresswell, J., after consulting Patteson, J., held that a statement made by the prisoner to the witness on the 11th of December was receivable. In a still later part of the same case, it appeared that on the evening of the 10th of December, the prisoner said that he saw no reason why he should suffer for the crime of another, and as government had offered a free pardon to any one of the parties concerned, who had not struck the blow, he would tell all he knew about the matter. Cresswell, J.—"It now appears, with sufficient clearness, that the prisoner in making the statements ascribed to him, was influenced by the hope of pardon held out by authorized parties. I shall, therefore, reject the evidence of all statements made by him after the evening of the 10th of December,

Boswell's case. Statements made after a reward and pardon offered by the Secretary of State rejected, it appearing that they were produced thereby.

(*v*) Hall's case, in note to Lambe's case, 2 Leach, 559. But where a person had been admitted King's evidence, and confessed, and upon the trial of his accomplices, refused to give evidence, he was convicted upon his own confession. Rex *v.* Barley, 2 Stark. Ev. 13.

and expunge from my notes such as have already been given in evidence." (*w*)

Confession by one prisoner after another had been admitted Queen's evidence, and after a caution from a magistrate.

The prisoner, who was indicted with several others for burglary, sent for a magistrate, to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted Queen's evidence; the prisoner was aware of this, and it was to that he alluded, when he said that he knew the witness knew all; and that it was from the statement made by the person who had been admitted Queen's evidence, that the prisoner was examined, and his confession taken down. It was insisted, that under these circumstances, the confession was not admissible, as the caution, given by the magistrate, did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession, he would be put in the same situation with the other person who had done so. Crampton, J., received the confession, observing, that the magistrate stated, that as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under *the distinct impression of a previous promise or threat*, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate, was sufficient to obviate them. It was in effect telling the prisoner, that he would get no benefit from his confession, and that he should consequently dismiss from his mind, all expectation of getting any, if any such be had. (*x*)

Threats and menaces.

As to what shall be considered as a threat, saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession. (*y*) So a confession induced by saying, "Unless you give me a more satisfactory account, I will take you before a magistrate," or (*z*) by saying, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face," (*a*) cannot be given in evidence. So where a prosecutrix said to her servant girl, who was in custody on a charge of administering

Griffiths' case.

(*w*) Reg. *v.* Boswell, 1 C. & Mars. 584.

(*x*) Berigan's case, Joy, 27. 1 Ir. Circ. Rep. 177. In this case there were similar confessions made by all the prisoners, under circumstances precisely similar, and they were all admitted. "It is not improbable," observes Mr. Joy, "that in this case the prisoner was induced to make the confession, by what his fellow prisoner had done, and by *his* having been admitted Queen's evidence, but no promise, threat or inducement was held out by any person in authority calculated to make his confession untrue." Joy, 28.

(*y*) 2 East, P. C. c. 16, s. 94, p. 659.

(*z*) Thompson's case, 1 Leach, 291.

(*a*) Rex *v.* Parratt, 4 C. & P. 570, Alderson, J.

poison to her, "Jane, now you see the effects of your wickedness; you will be to go from here to morrow morning to Stourbridge to the magistrates, and not return again." The girl answered, "Sooner than I will go from here or any where else, I will tell the truth;" and the prosecutrix said "that is what I want," and the prisoner then made a statement; it was held that the statement was inadmissible, because it was made to prevent her being taken before the magistrates. (*b*)

Where the words used are ambiguous.

If the words used to a prisoner be such that he might consider them as a threat, a confession is not admissible. The prisoner being in custody on a charge of arson, he was told that "he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed," on which he made a statement. Taunton, J., doubted whether the words used might not be construed as a threat, and having consulted Littledale, J., said, "We think as the words were so ambiguous, that they might be considered by the prisoner as a threat, the evidence ought not to be given." (*c*)

Under false imprisonment.

Where a prisoner had been taken into custody by a constable without a warrant, and detained by him in durance for four days, and during his confinement, a confession was obtained under certain promises, and on the part of the prosecution it was attempted to be shown, that the confession was voluntary, and not made under such promises: Holroyd, J., said, "Even if that were so, the fact of its having been made while in *unlawful custody*, rendered it unavailing," and there being no sufficient evidence without it, he directed an acquittal. (*d*)

Wright's case. Words not amounting to a menace.

Where the prisoner was indicted for sheep stealing, and prior to his examination before the magistrate, his wife volunteered a confession of the particulars of the robbery; and on the prisoner being brought up for examination, the magisirate told him that his wife had already confessed the whole, and that there was quite case enough against him to send a bill before a grand jury; and then asked him what he had to say. The prisoner immediately confessed his guilt, and stated several facts, which had been previously deposed to by his wife. It was objected that this confession could not be received, inasmuch as the magistrate's address to the prisoner when he was brought before him to be examined, was in the nature of a menace. But Parke, J., overruled the objection, saying, he considered it rather as a caution. (*e*)

Confessions made after a former one unduly obtained.

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession, cannot be admitted as evidence.

In the case of *Rex* v. *Nute*, (*f*) the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her among other things, if she would repent and confess, God would forgive her, but she concealed from her that she would

(*b*) Rex *v.* Griffiths, MSS. C. S. G. Worcester Sum. Ass. 1832, Bosanquet, J. S. C. as Rex *v.* Richards, 5 C. & P. 318. See this case more fully, *post*, p. 838.

(*c*) Rex *v.* Williams, Gloucester Spr. Ass. 1832, MSS. C. S. G. See this case, *post*, p. 870.

(*d*) Ackroyd's case, 1 Lew. 49. This decision has been questioned; and it has been observed, that "if the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself; if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself." 1 Phill. Ev. 407, and see Rex *v.* Thornton, *post*, p. 847.

(*e*) Wright's case, 1 Lew. 48.

(*f*) 1 Burn. J., Doyl. & Wms. 1086.

not forgive her herself: she confessed. The next day, another person in her mistress's sight, though out of her hearing, told her, her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J., allowed the confessions in evidence, and the prisoner was convicted. The jury on having the confessions put to them, said they thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the Judges held these points were not for the jury, but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and if not, the confessions were evidence. So in *Rex* v. *Sexton*, (*g*) a confession had been improperly obtained, by giving the prisoner two glasses of gin: the officer to whom it had been made, read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him, affected his life, and a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said, could not be given in evidence against him, and that it was for him to consider, whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him: but for want of this information, he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate.

Sexton's case.

Where hopes of favour had been given, and the prisoner refused before the magistrate to confess, except upon conditions, Mr. J. Buller observed, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account, and it ought most clearly to appear, that the prisoner thoroughly understood such warning before his subsequent confession could be given in evidence. (*h*) And where it appeared that, before a prisoner was asked what he had to say, he was particularly cautioned by the magistrate not to say anything that would injure himself, for whatever he said would be taken down, and given in evidence against him; but it also appeared that a constable, who had previously induced the prisoner to make a confession to him by telling him it would be better to confess, had been examined before the magistrate, and in his examination had stated that he had told the prisoner that it would be better to confess, and had also stated all the prisoner had said to him in consequence; all which had been taken down, and read over to the prisoner before he made his statement; Littledale, J., refused to allow the statement to be given in evidence, as the caution given by the magistrate was not sufficient to obviate the effect of the inducement used by the constable. (*i*)

After promises of favour there must be explicit warning and caution.

Smith's case.

(*g*) 1 Burn. J., Doyl. & Wms. 1086.
(*h*) 2 East, P. C. 658.
(*i*) Rex *v.* Smith, Worcester Spr. Ass. 1830, MS. C. S. G. It is to be observed, that not only was there no express caution given in this case not to rely on the promise made, but that by receiving the previous confession in evidence the magistrate treated it as if it had been properly obtained, and the prisoner might therefore

So where the prosecutor, before the prisoner was taken before a magistrate, promised him that if he would tell the truth he would do what he could for him; and when before the magistrate, who was not informed of this promise, he was cautioned not to say anything to criminate himself. Park, J. A. J., thought the confession made before the magistrate scarcely admissible, as there should have been an explicit and express warning against the promise which had been made by the prosecutor. (*j*) So where a confession had been obtained from a prisoner, after his apprehension, by his master and a magistrate, by menaces and promises, and when the prisoner was in gaol the witness, who was also a magistrate, went to him, and the prisoner in his presence signed a written confession; but it did not appear that he was cautioned, nor what length of time had elapsed after the former confession; and the witness stated that he believed that the written confession, taken by him from the prisoner, was given in consequence of the impressions previously made on his mind by his master; the confession was rejected. (*k*)

Sherrington's case. Where one confession has been obtained by an inducement there ought to be strong evidence to show that the impression under which it was made was removed before a subsequent confession can be received.

Upon an indictment for murder it appeared that the prisoner worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own; and added, "There is no doubt thou wilt be found guilty; it will be better for you if you will confess." A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." The overlooker, in about ten minutes, delivered the prisoner to the constable of the township. The constable stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing), that the prisoner had confessed. That he took the prisoner to his house, and there said, "I believe Sherrington has murdered a man in a brutal manner." That the wife and brother of the prisoner were there, and said to the prisoner, "What made thee go near the cabin?" That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything. But that he did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement. That the overlooker was not present when the statement was made. For the prisoner it was submitted that the second confession must be taken to have been made under the same influence as the first. Patteson, J., "There ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can

well conceive that a subsequent confession could do him no injury, and might possibly *be better* for him; and see the ruling of the same learned Judge in Rex *v.* Gilham, *post*, p. 851.

(*j*) Rex *v.* Compson, Worcester Spr. Ass. 1829, MSS. C. S. G. The learned Judge left it to the jury to say whether the prisoner had sufficient warning before the justice or not. This course seems to have been erroneous. See Rex *v.* Nute, *ante*, p. 832.

(*k*) Bell's case, Joy, 71, M'Nall. Ev. 43.

be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination:" and the statement was rejected. (*l*)

Meynell's case. Confession in the afternoon after inducement in the morning.

And so where the prisoner was indicted for stealing two hams, and the constable, having a search warrant, found the hams in the prisoner's house, and thereupon, in the presence of one of the prosecutors, said to the prisoner, "You had better tell all about it;" the prisoner then made a confession; which it was admitted could not be received in evidence. In the afternoon of the same day another of the prosecutors went to the house of the prisoner and entered into conversation with her about the hams, when she repeated the confession she had made to the constable in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said, "I am clearly of opinion, that the confession is not receivable; it being impossible to say that it was not induced by the promise which the constable made to her in the morning." (*m*)

Hewett's case. Inducement on the Monday evening, confession on the Wednesday without express caution.

So where the prisoner was indicted for stealing money, the property of Mrs. Cooper, her mistress: the money was stolen on a Monday evening, and the prisoner being suspected, Mrs. Cooper told her on that evening that she would forgive her if she told the truth; on the next day, Tuesday, the prisoner was taken before a magistrate, but Mrs. Cooper not appearing against her she was discharged and placed under her brother's care; after that she made a statement. Mrs. Cooper did not on the Tuesday tell the prisoner that she would not forgive her, nor that anything she said would be given in evidence against her; and Patteson, J., held that this statement could not be given in evidence. On the Wednesday morning Houlton, a superintendent of police, went with Mrs. Cooper to the Bridewell where the prisoner was, and Houlton told the prisoner, in the presence of Mrs. Cooper, that she was not bound to say anything unless she liked, and that if she had anything to say Mrs. Cooper would hear her. Houlton did not know at this time that Mrs. Cooper had promised to forgive her if she would tell the truth, and he did not tell the prisoner that if she said anything it might be given in evidence against her. Patteson, J., after observing that *Meynell's* case (*n*) was the nearest to the present, added, "I think that the statement of the prisoner is not receivable in evidence. If Mrs. Cooper had not been present when the statement was made, it might have been different; but I think that as Mrs. Cooper was present, and the interval of time was only from the Monday to the Wednesday, the impression produced by Mrs. Cooper's promise of forgiveness on the Monday evening must be considered as still operating on the prisoner's mind." (*o*)

Cooper's case. Inducement by person in superior authority.

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson, it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for

(*l*) Sherrington's case, 2 Lew. 123.
(*m*) Meynell's case, 2 Lew. 122.
(*n*) *Supra.*
(*o*) Reg. *v.* Hewett, 1 C. & Mars. 534.

him. The prisoner, after he was committed, made a statement to the turnkey of the gaol, who had held out no inducement to him to confess, and had not given him any caution not to confess. Parke, J., "I think I ought not to receive the evidence, after what Mr. Simeon (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner." (*n*)

Confessions made after the effect of inducements have been done away are admissible.

But although such improper inducements may have been held out to a prisoner, as would exclude a confession made under their influence, yet if the Court, taking into consideration all the circumstances of the case, should be of opinion that at the time a confession was made, such inducements had ceased to operate upon the mind of the prisoner, such confession will be admissible. In determining whether an inducement has ceased to operate, it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, the time which has intervened between the inducement and the confession, and whether there has been any caution given, and if so, whether that caution has been given generally, or expressly and specifically with reference to the inducement held out. Thus, where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate, was held to be clearly admissible. (*o*)

When such are admissible.

Rosier's case.

Where it appeared that a constable told the prisoner he might do himself some good by confessing; and the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner then declined confessing; but afterwards in his way to prison, he made a confession to another constable; and he confessed again in prison to another magistrate; the Judges were unanimous in holding, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (*p*) Nor is it any objection to a confession made before a magistrate, that the prosecutor, who was present, first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper. (*q*)

Clewes' case. Inducement by

Where upon an indictment for murder, it appeared that the prisoner had sent for the coroner, desiring to make some statement;

(*n*) Rex *v.* Cooper, 5 C. & P. 535. The reporters observe, "If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner under such circumstances would be receivable; as it seems to be but a fair conclusion that what was said to the prisoner by the magistrate would be much more likely to operate on his mind than anything subsequently said by a constable." It may be added, that as the inferior can have no control over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior, as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect. See the ruling of Littledale, J., in Rex *v.* Gilham, *post*, p. 851. C. S. G.

(*o*) Rex *v.* Lingate, 1 Phil. Ev. 410 Bayley, J.

(*p*) Rex *v.* Rosier, 1 Phil. Ev. 411.

(*q*) Rex *v.* Edwards, 1 Phil. Ev. 411.

the coroner told him that any confession that he made would be produced against him on the trial, and that no hope or promise of pardon could be held out to him, either by the government, or by any one else. Previous to this time a magistrate had had an interview with the prisoner, and had told him that if he was not the man that struck the fatal blow, he would use all his endeavours to prevent any ill consequences from falling on him, if he would disclose what he knew of the murders, and that there were so many persons concerned in the transaction that it would be made known by some or other of them. The magistrate wrote a letter to the Secretary of State for the Home Department, to which he received an answer, stating, that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner: all this occurred before the prisoner sent for the coroner. It was objected that, although the inducement that the magistrate would interest himself with the government had been removed, yet there were two other inducements; first, the hope that would arise from the personal endeavours of the magistrate; and, secondly, the fear that if the prisoner did not confess, some one else would tell before him. Littledale, J. "I think that this declaration is clearly admissible. I think that the conversation with the magistrate, after he received the Secretary of State's letter, and the caution given by the coroner, must be taken to have completely put an end to all the hopes that had been held out."(r) So where a prisoner, when before a magistrate, stated that he had confessed to two constables, who were then present, and did not deny what the prisoner said, in consequence of their having told him that two others had split, and that he might as well, and that, if he told all, he would be acquitted; and the magistrate told him that he need not say anything before him, unless he pleased, and that his confession would do him no good, but that he would be committed to prison to take his trial; it was held, that his confession, made before the magistrate, was admissible, as it could not be said to result from the same influence as his confession to the constables. (s) So where a prisoner, when in custody, said to a magistrate that he wished to see his priest, and the priest stated that, observing that the prisoner appeared greatly agitated, he said to him, "the evidence at the inquest was so clear against you, there can be no doubt you are the guilty man." The prisoner then stated something to the priest, who thereupon asked the prisoner whether he had any objection to state to the magistrate what he had stated to him? The prisoner said he had not, and the magistrate being called in, the prisoner repeated in his presence what he had stated to the priest. It was objected that this could not be admitted: whereupon the magistrate was recalled, and stated, that on the evening of the day, on which he had the said interview with the prisoner, he cautioned him not to say anything to him or to the police to criminate himself. The magistrate was then allowed to state what the prisoner said to him on *this* occasion, which appeared to be in every respect the same as what he had stated in the previous interview. The prisoner was con-

a magistrate held removed by a subsequent communication from the same magistrate.

Howes' case.

Bryan's case.

(r) Rex v. Clewes, 4 C. & P. 221.
(s) Rex v. Howes, 6 C. & P. 404, Lord Denman, C. J.

victed, and eleven of the judges of Ireland held the conviction right. (*t*)

Griffiths' case. Threat of taking before a magistrate done away by actually taking thither.

Where a prosecutrix said to her servant-girl, who was in custody of a private person in her house, at night, on a charge of administering poison, "Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge, to the magistrates, and not return again;" on which the girl said, "Sooner than I will go from here, or any where else, I will tell the truth;" to which the prosecutrix answered, "That is all I want." A statement then made was held inadmissible. On the following morning a constable came to the house, and while there, without giving her any caution, said to the girl, "My dear girl, where did you get the stuff from that you put in the tea and coffee?" It was held that what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to Stourbridge, and while on the way thither she made a statement, without any caution having been given, or any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away from the house, and this must have been at an end when she was taken away by the constable. (*u*)

Nicholl's case. Effect of inducement done away by lapse of time.

Where prisoners were taken into custody on the 1st of October, and on that day the prosecutor frequently told them it would be better for them to confess. They were taken before a magistrate on the 3d, when they were told that they were not bound to say anything, but that what they did say would be taken down, and used against them on their trials. They each made a statement. It was contended that, as the the prosecutor did not tell them it would be better to confess to him, but, generally, that it would be better to confess, that the confessions to the magistrate might be produced by that inducement; Littledale, J., "It appears to me that the examinations may be read. If I could see that the influence was continuing, I should not allow them to be read, but two days elapsed between the promise and the confession. If the prisoners had gone before the magistrate the same day, I should have thought that the influence was continuing. I think it would make no difference that the promise was made by one person, but the confession to another." (*v*)

Guild's case.

And where the prisoner had been induced by promises of favour to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence. (*w*)

General rule.

In this case, upon much consideration the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the Court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession

(*t*) Bryan's case, Joy, 73. Jebb's C. & P. C. 157.

(*u*) Rex *v.* Jane Griffiths, MSS. C. S. G. S. C. but not so fully reported Rex *v.* Richards, 5 C. & P. 318, Bosanquet, J.

(*v*) Rex *v.* Nicholls and Edwards, Monmouth Spr. Ass. 1830, MSS. C. S. G.

(*w*) Guild's case, 5 Halst. 163, 168, as stated Greenl. Ev. 257.

was obtained, were entirely dispelled. (*x*) In the absence of any such circumstances the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected. (*y*)

As to the persons whose inducements will exclude confessions.

With regard to the persons, whose inducements will prevent the admission of confessions, it should seem, that all who are engaged in the apprehension, prosecution, or examination of a prisoner, are considered as persons of such authority, that their inducements will exclude any confession thereby obtained. Thus an inducement held out by the prosecutor, (*z*) the prosecutor's wife, (*a*) or his attorney, (*b*) or by a constable or other officer, (*c*) or some person assisting a constable, (*d*) or the prosecutor (*e*) in the apprehension or detention of the prisoner, or by a magistrate acting in the business, (*f*) or other magistrate, (*g*) or magistrate's clerk, (*h*) or by a gaoler (*hh*) or chaplain of a gaol, (*hhh*) or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, (*i*) or by a master or mistress to a servant, (*j*) or by a person having authority in the matter, (*k*) or by a person in the presence of one in authority with his assent, whether direct or implied, (*l*) will be sufficient to exclude a confession made in consequence of such inducement.

Person accompanying the prosecutor in pursuit.

A person, who has accompanied the prosecutor in pursuit of a prisoner, is a person in authority, so that his inducement will exclude a confession. The prisoner when taken into custody, was told by a person, who had accompanied the prosecutor in pursuit of the prisoner, that it would be better for him to confess; but it was urged that, as he was a person, who had no authority to interfere, the confession was admissible. Littledale, J.—"That applies to mere strangers; here the person went with the prosecutor, and was acting with his authority and sanction." The confession was rejected. (*m*)

Person supposed to possess authoirty.

"It has been argued, that a confession made upon the promises or threats of a person erroneously believed by the prisoner to possess authority, the person assuming to act in the capacity of an officer or magistrate, ought, upon the same principle (on which confessions to persons having authority are rejected) to be excluded. The principle itself would seem to include such a case; but the point is not known to have received any judicial consideration." (*n*)

(*x*) Greenl. Ev. 257, citing Guild's case, 5 Halst. 180.

(*y*) Greenl. Ev. 257, citing Roberts' case, 1 Devereux R. 259, 264.

(*z*) Thompson's case, 1 Leach, 291, *ante*, p. 831. Cass's case, ibid., 293, note (*a*), *ante*, p, 827, and many other cases.

(*a*) Rex *v.* Upchurch, R. & M. C. C. R. 465, *post*, p. 841.

(*b*) 1 Phill. Ev. 407.

(*c*) Rex *v.* Sexton, 1 Burn. J., D. & Wms. 1086.

(*d*) 1 Phill. Ev. 407.

(*e*) Rex *v.* Stacey, MSS. C. S. G., *infra*, note (*m*).

(*f*) 1 Phill. Ev. 407.

(*g*) Rex *v.* Clewes, 4 C. & P. 221, *ante*, p. 837.

(*h*) Rex *v.* Drew, 8 C. & P. 140, *ante*, p. 829.

(*hh*) Rex *v.* Gilham, *post*, p. 848.

(*hhh*) Rex *v.* Gilham, *supra*.

(*i*) Rex *v.* Parratt, 4 C. & P. 570.

(*j*) Rex *v.* Upchurch, *supra*. Reg. *v.* Taylor, 8 C. & P. 733.

(*k*) 1 Phill. Ev 407.

(*l*) Reg. *v.* Taylor, *supra*. Rex *v.* Pountney, 7 C. & P. 302.

(*m*) Rex *v.* Stacey, Monmouth Spr. Ass. 1830, MSS. C. S. G.

(*n*) Greenl. Ev. 258. As the question turns upon the effect produced upon the mind of the prisoner, and as that effect must be the same, whether the party be an officer or not, provided the prisoner believed him to be so, it should seem that a confession under such circumstances ought not to be admitted. In considering these ques-

Inducements used in the presence and with the sanction of persons in authority.

If a confession be obtained by means of any improper inducement held out by a person who has no authority in the presence of a person having authority, and with his consent, it is not admissible. And it is not necessary that the person having such authority should express his consent in words; for if he be silent he will be presumed, as he did not express his dissent, to have sanctioned the inducement. Where the constable, who took the prisoner into custody, was present, and had the prisoner in custody at an inn, when a confession was procured by inducements held out by the inn-keeper, and the constable being present did not caution the prisoner in any way; Alderson, B., said, "I have a very strong opinion against its admissibility; but as there are opinions which I am bound to respect, opposed to my own, I think I had better receive the evidence; and if it should become necessary, I will reserve the point for the consideration of the Judges." (*o*) So where upon an indictment for setting fire to the house of R. Lyford, it appeared that on the morning of the fire, the prisoner, who was the servant of the prosecutor, was sent for into the parlour, in which Mrs. Lyford and Mr. Winders were; and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, "You had better tell how you did it;" and that thereupon she made an answer. Patteson, J., said, "It is the opinion of the Judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not

Taylor's case.

tions it should be remembered that every person has authority where a felony has been committed to arrest the party who committed it, *ante*, vol. p. 1, 593, *et seq.*; in this respect, therefore, a private individual and a constable stand upon the same footing, and this may be well deserving of consideration in cases where the inducement is held out in the absence of the prosecutor or an officer. If a private person after a felony had been committed, were to tell a person not in custody that he suspected him of the felony, and that if he would confess he would let him go, but that if he would not he would apprehend him, it might, it is conceived, be well contended that a confession obtained thereby would be inadmissible, on the ground that the party had authority to apprehend, and was in effect a constable *pro hâc vice*. After the recent cases, an inducement by a private person, it should seem, can only be considered as inoperative, when it is given in the presence of a person in authority, such person expressing his dissent to it, or cautioning the prisoner against trusting to it, or where it is given to a prisoner in custody, no one having authority being present, as if a private person were to advise a prisoner in gaol through the grating to confess, or send a letter to him to the same effect. "The difficulty experienced in this matter," observes Dr. Greenleaf, p. 259, "seems to have arisen from the endeavour to define and settle, *as a rule of law*, the facts and circumstances, which shall be deemed *in all cases* to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt. Public policy, also, requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet, even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners are so various, and the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law that the confession must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the Judge under the circumstances of the case." C. S. G.

(*o*) Rex *v.* Pountney, 7 C. & P. 302. The prisoners were acquitted.

rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think therefore, that the inducement must be taken, as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible." (*p*)

Upchurch's case. A confession obtained from a servant through hopes and threats held out by the wife of the master and prosecutor is inadmissible.

On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived with him, and took her share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her, "Mary, my girl, if you are guilty do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. The mistress then said. "Pray tell me if you did it." The prisoner then confessed. It was contended on the part of the prosecution, that the wife had no authority, real or apparent, over the prisoner, so as to hold out any hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. The confession was admitted, and the question as to its admissibility reserved for the consideration of the Judges, who thought the confession ought not to have been received. (*q*)

Simpson's case. The confession of a girl fifteen years old, occasioned by many applications by the prosecutor's relations and neighbours, amounting to threats and promises, is not admissible.

On a trial for setting fire to a house, it appeared that the prisoner, a girl about fifteen years old, was a servant in the prosecutor's house, and that soon after the fire was put out, Handsley, a neighbour of the prosecutor's, said to the prisoner, "I doubt you have set this house on fire by the candle between the laths." She said she did not. On the same day, Mrs. Bowis, who lived about three hundred yards from the house of the prosecutor, and who was the mother of Mrs. Blackburn, the wife of the prosecutor, spoke to the prisoner in the prosecutor's house in the presence of Mrs. Blackburn, who was very deaf, and the prisoner's mother, and told her she had better confess the truth, because she believed it was her that fired both the house and the stack, and that it would be a great deal the worse for her if she did not confess. The prisoner said she did not. On the same day the prisoner was taken before a magistrate at Spilsby. On the next morning, Mrs. Bowis saw the prisoner again on the road to her house. Mrs. Bowis said to the prisoner, she should not come to her house, and told her again it was her that fired both the house and stack; she said she did not do it. Soon after, Handsley came up and joined them, and said to the prisoner, "Do'nt be so bold, perhaps you will have to go to Spilsby to-morrow." Spilsby was the place where the magistrates met. He told her that perhaps somebody will come forward to-morrow that saw you do it. She took her apron up, and held it to her face and said no more. She always denied it; and when Handsley said she might have to go to Spilsby, she denied it again. He said, "If you be guilty, go along with Mrs. Bowis, and beg your master and mistress's pardon, and

(*p*) Reg. *v.* Taylor, 8 C. & P. 733. (*q*) Rex *v.* Upchurch, R. & M. C. C. R. 465.

get away and be better in future, and we shall not seek after you;" and he said, "Never mind your wages, I'll give you a few shillings out of my pocket." And Handsley also told her it would be better for her to confess. After he went away, Mrs. Bowis went with the prisoner to Blackburn's house, and talked to her about the fire all the way; and after they got there, they went out of the house, and Mrs. Bowis said to the prisoner, "Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house;" before she said that, she told the prisoner that if she went to Spilsby again she would be a great deal worse off, and she said to her several times, both going along the road to the prosecutor's house, and also in the house, and also when she spoke to her out of doors that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. The counsel for the prisoner objected to evidence being given of what the prisoner said, on Mrs. Bowis charging her as before stated, on the ground that after these promises and threats had been held out to her, her answer could not be received unless she had a caution. For the prosecution it was contended that her answer might be received, because Handsley was neither a constable, nor did he stand in any relation to the prosecutor; and though Mrs. Bowis was the mother of the prosecutor's wife, yet that promises and threats made by a person standing in that situation, were not sufficient to exclude a confession. Littledale, J., allowed the evidence to be given, but reserved the question for the opinion of the Judges, whether it ought to have been received. On Mrs. Bowis saying to the prisoner, "Now, Sarah, you lighted the bundle of matches, and put it into the thatch," the prisoner said, "Yes, I did." Mrs. Bowis then told Mrs. Blackburn what had passed, and Mrs. Blackburn then came out, and then Mrs. Bowis, in the presence of Mrs. Blackburn, asked the prisoner what she did it for; whether it was for anything against the family? She said "No." Mrs. Blackburn asked if any one persuaded her to it? She said "No;" she said she had no malice. The prisoner in her defence asserted her innocence, and said that Mrs. Bowis said that if she would confess to it she should have her liberty, and she added that she did it on purpose to get her liberty, and that they frightened her to do it. The jury said they found the prisoner guilty with her own confession; but Littledale, J., told them they must find her either guilty or not guilty, and then they gave a verdict of guilty; and all the Judges, upon a case reserved, were unanimously of opinion that the confession ought not to have been received, and that the conviction was bad. (r)

(r) Rex v. Simpson, R. & M. C C. R. 410. The grounds upon which this decision proceeded are not mentioned in the report, and the real import of the case does not appear to be correctly abstracted in the text books, as observes Mr. Joy, p. 9, and after abstracting the case he well observes, "that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told in the first instance that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out *in* the prosecutor's house, [this is an error, it was after "they went out of the house,"] and although it does not appear distinctly whether the prosecutor or his wife were then present, [it is clearly to be inferred that they were not present, for after the prisoner said "I did," Mrs. Bowis told Mrs. Blackburn, and she "*then* came out"] the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife, and in his house, may perhaps be considered to have continued." Joy, 10,

Row's case. Inducements by persons not in authority.

With regard to the persons whose inducements will not exclude a confession, the following cases may be mentioned:—While the constable who apprehended the prisoner had him in custody to take him before a magistrate, some of the neighbours who had nothing to do with the apprehension, prosecution, or examination of the prisoner, officiously interfered, and admonished the prisoner to tell the truth, and consider his family, which was a large one. No answer or observation thereon was made by the constable, nor did the prisoner answer them, but he desired the constable to call upon him in an hour at the prison, which he did, and there the prisoner made a full confession, which was received in evidence, and upon a case reserved, the Judges present agreed that the evidence was admissible, and the conviction right, because the advice to confess was not given or sanctioned by any person who had any concern in the business. (*s*) So where the counsel for the prisoner objected to a confession before a committing magistrate, and offered to prove, that the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, Mr. Baron Wood overruled the objection, and admitted the confession. (*t*)

Gibbons' case.

In the case of *Rex* v. *Eliz. Gibbons*, (*u*) who was indicted for the murder of her bastard child, a surgeon was called to prove certain confessions made by the prisoner to him. He stated that he had held out no threat or promise to induce her to confess; but a woman, who was present, said that she had told the prisoner she had better tell all; and then the prisoner made certain confessions to the surgeon. It was objected, that as the confession was made after an inducement held out, it could not be received in evidence; but Park, J. A. J., after consulting Hullock, B., held that as no inducement had been held out by the surgeon, to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was a free and voluntary one. If the promise had been held out by a person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here, some person having no authority of any sort, officiously says, you had better confess. No confession follows, but some time afterwards, to another

and 11, and he refers to Rex *v.* Upchurch, *ante*, p. 841, and Reg. *v.* Taylor, *ante*, p. 840, to show that the mistress is a person in authority. It may be observed, also, that Patteson, J., held in Reg. *v.* Taylor, that an inducement held out by a person in the presence of the prisoner's mistress must be taken as if it had been held out by the mistress herself, from which it may be inferred that that very learned Judge considered the person holding out the inducement as the agent for that purpose of the mistress. In that case, as the prosecutrix expressed no dissent, she was taken to have sanctioned the inducement; so in the present case the same must be inferred as to the inducement first held out in the presence of the mistress, and as by her conduct in the latter part of the transaction the prosecutrix sanctioned what Mrs. Bowis had done in her absence, the learned Judges may have thought that Mrs. Bowis was the agent of the prosecutrix for the purpose of discovering the guilt of the prisoner. If a person were expressly employed by the prosecutor to discover the person who had committed a felony, there seems good reason why he should be considered as a person having so much to do with the apprehension and prosecution as to render a confession obtained by his inducements inadmissible. See Rex Stacey, *ante*, p. 839. C. S. G.

(*s*) Rex *v.* Row, Russ. & Ry. 153. See Rex *v.* Pountney, *ante*, p. 840, and Reg. *v.* Taylor, *ante*, p. 840, and *qu.* whether as the constable not only expressed no dissent to the inducements used, but by going to the prison seems to have sanctioned them, there was not ground for contending that the confession was improperly obtained. C. S. G.

(*t*) Rex *v.* Hardwick, 1 Phil. Ev. 408.

(*u*) 1 C. & P. 97.

person, the prisoner, without any inducement held out, confesses. The learned Judge added, that he and Hullock, B., had not the least doubt that the evidence was admissible. So where the counsel for the prisoner, proposed to show that the prisoner, being locked up alone in a room at a public-house, was told by a man that another prisoner had told all, and that he had better do the same to save his neck: and that on this, he confessed. It was held, that as the promise, (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore admissible. (*x*)

Confession to a person not in authority after inducement by such person.

There has been a difference of opinion among the Judges whether a confession made to a person who has no authority, after an inducement held out by that person is receivable: some of the Judges thinking it receivable, and others thinking it is not so. (*y*) And several cases have occurred, in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected. (*z*) But it is said to be "the opinion of the Judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority." (*a*)

Result of the cases.

The result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner: for a promise made by a person who interferes without any authority of this kind, is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent.

(*x*) Rex *v.* Tyler and Finch, 1 Carr. & P. 129, Hullock, B.

(*y*) Per Parke, B., in Rex *v.* Spencer, 7 C. & P. 776. In this case, after the prisoner was in custody, he was told by a person, who was neither prosecutor nor constable, nor had any authority of any kind, that it would be better for him to confess. The confession was not proved, as the very learned Baron offered to receive it subject to the opinion of the Judges.

(*z*) In Rex *v.* Dunn, 4 C. & P. 543, a witness proved that the prisoner wished to sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J., "Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person." In Rex *v.* Slaughter, ibid. note (*a*), the same learned Judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In Rex *v.* Arundel, Gloucester Summer Assizes, 1830, the same learned Judge ruled the same way, saying, "If an unauthorized person makes a promise, it will not prevent a statement made to another person from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received." The same distinction is also adverted to in a note to Rex *v.* Gibbons, *ante*, p. 843. For this distinction, however, there seems no sufficient reason. The correct inquiry in every case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. If it was, then a statement made under its influence, whether to the party using the inducement, or to another person, would be inadmissible. At the same time, it must ever be a circumstance deserving of consideration, in conjunction with others, that the prisoner did not make the confession to the party using the inducement at the time; but made it afterwards to another party; as that tends to show that he was not under the influence of the inducement when he confessed; and this is the view which the Court seem to have adopted in Rex *v.* Gibbons. See also Mr. Joy's observations, p. 26, 27. C. S. G.

(*a*) Per Patteson, J., in Reg. *v.* Taylor, 8 C. & P. 733, *ante*, p. 840.

It is no objection that the confession was made under a mistaken supposition, that some of the prisoner's accomplices were in custody: not even though some artifice has been used to draw him into that supposition. (*b*)

Instances of admissible confessions.

An inducement held out to a prisoner with reference to one charge, will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess, and this constable was called, and stated, that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., "I think not. If he was taken up on a particular charge I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. (*c*)

An inducement as to one crime will not exclude a confession as to another crime.

But where several felonies form part of the same transaction, an inducement held out as to one will exclude a statement as to another. On an indictment for attempting to set fire to the house of one Vidler, it appeared that the bed and bedding of two rooms in the house were found on fire, and soon afterwards a silver tea-spoon and a broken salt-spoon were found in the sucker of the pump. Vidler said to the prisoner, that if she did not tell the truth about the things that were found in the pump, he would send for the constable to take her, but he did not say anything to her about the fire. Coltman, J., held that this was such an inducement to confess, as to exclude anything that the prisoner said respecting the fire; as it was really all one transaction. (*d*)

Unless they are parts of the same transaction.

If what is said to a prisoner have no tendency to induce him to make an untrue statement, his confession is admissible. On an indictment for cattle-stealing, a witness stated that he had had a conversation with the prisoner, in which the prisoner asked the witness if it would be better for him to confess; upon which the witness replied that it would be better for him not to confess, but that the prisoner might say what he had to say to him, for it should go no further; it was objected that the statement made to the witness was not receivable, as it had been obtained under a promise. Coleridge, J., "The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one. I think that what was said in the present case must have had a contrary tendency." (*e*) So if what is said to a prisoner contain neither a promise, threat, or inducement to confess, the statement of the prisoner is admissible. The prisoner having been charged on oath, by Betsy Burford, an accessory before the fact, with having set fire to three hay-stacks, belonging to Organ, Nichol, and Gillman, the constable went with a warrant, specifying all the three charges, and stating them to have been made on the oath of

The proper question is whether the inducement be calculated to produce a false statement.

Long's case.

(*b*) Rex *v.* Burley, 1 Phil. Ev. 406.

(*c*) Rex *v.* Warner and Morgan, Gloucester Spring Assizes, 1832. MSS. C. S. G.

(*d*) Reg. *v.* Hearn, 1 C. & Mars. 109.

(*e*) Rex *v.* Thomas, 7 C. & P. 345.

the accessory, and, when the prisoner was apprehended, she was told that there was a very serious oath laid against her by Betsy Burford, who had sworn that she had set fire to Organ's, Nichol's, and Gillman's ricks; on which the prisoner made a statement; which was allowed to be given in evidence. (*f*)

Advising a prisoner to be sure to tell the truth.

If a person advise a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible, on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of a crime, of which he is really innocent. On an indictment for forgery the committing magistrate proved that no inducement was held out to the prisoner to confess; but the prosecutor had said, in the presence of the prisoner, that he considered the prisoner as the tool of one Gardiner, and the magistrate then told the prisoner to be sure to tell the truth; on which he made a statement. It was objected that this statement was not receivable; for though this was not, in form, an inducement to confess, it was in effect so. A person in authority advising a prisoner to tell the truth, conveyed to the mind of the accused an intimation that it would be better for him if he confessed the charge. Littledale, J., "I think I ought to receive the evidence. It can hardly be said that telling a man to be sure to tell the truth, is advising him to confess what he is really not guilty of. The object of the rule relating to the exclusion of confessions, is to exclude all confessions, which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence, which he really never committed." (*g*)

Lloyd's case.

Where a prisoner and his wife were both in custody on a charge of receiving bank-notes, but in separate rooms, and a person said to him, "I hope you will tell, because the prosecutrix can ill afford to lose the money," and the constable said, "If you will tell where the property is, you shall see your wife;" Patteson, J., said, "I think that this is not such an inducement as will exclude the evidence of what the prisoner said: it amounts only to this, that if he would tell where the money was he should see his wife." And the statement made by the prisoner was received. (*h*)

Oath not to reveal a confession.

It is no objection to receiving a confession that the party to whom it was made takes an oath that he will not reveal what is told to him. After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, "I wish you would tell me how you murdered the boy;—pray split." The prisoner said, "Will you be upon your oath not to mention what I tell you." The other prisoner went upon his oath, that he hoped, if he told, that he might never

(*f*) Rex *v.* Long, 6 C. & P. 179, Gurney, B. The statement to the prisoner was nothing more in substance than the statement contained in the warrant.

(*g*) Rex *v.* Court, 7 C. & P. 486. This case seems at variance with several other cases where a confession has been rejected because the prisoner was told it would be better for him to tell the truth. See Rex *v.* Enock, 5 C. & P. 539, *ante*, p. 829. Rex *v.* Williams, MSS. C. S. G. *ante*, p. 832. Rex *v.* Compson, *ante*, p. 834. Rex *v.* Edwards, *ante*, p. 836. Rex *v.* Griffiths, *ante*, p. 838. Rex *v.* Row, *ante*, p. 843. and Reg. *v.* Hearn, *ante*, p. 845. In these cases, it is conceived, that although the inducement was in terms to tell the truth, yet the learned Judges understood it as conveying to the prisoner's mind an intimation that he would gain some benefit by confessing himself guilty, even if he were not so. C. S. G.

(*h*) Rex *v.* Lloyd, 6 C. & P. 393.

stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard. (*i*)

Nolan's case.

So where a constable told a prisoner that his father had been charged with the murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the murder but himself, and then made a confession. Doherty, C. J., having conferred with Torrens, J., admitted the confession, observing, that although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it. (*j*)

Cain's case.

So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she refused to tell he would examine her person more closely; the prisoner then said, "it is unnecessary to examine me, for I had a child." Torrens, J., admitted this confession, on the ground that the witness was endeavouring to ascertain a fact within his own province; and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions. (*k*)

Proposal to confess coming from the prisoner.

If the proposal to confess comes from the prisoner, it seems that his confession is admissible, although the prosecutor, in consideration of his doing so, says he will do all he can for him. Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts, whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all that they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. Bosanquet, J., "I do not think there is anything in the objection, but I will take a note of it." Taunton, J., "I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it." The statement was received. (*l*)

Thornton's case. A confession obtained without threat or promise from a

In a case where Miller, the chief officer of the police at Liverpool, stated, that on the 18th of November the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police-office about one o'clock. The magistrates were then sitting

(*i*) Rex *v.* Shaw, 6 C. & P. 372, Patteson, J.

(*j*) Nolan's case, Joy, 16. 1 Crawf. & Dix. C. C. 74.

(*k*) Cain's case, Joy, 16. 1 Crawf. & Dix. C. C. 37.

(*l*) Rex *v.* Green, 6 C. & P. 655. The statement did not amount to a confession, and Bosanquet, J., desired the jury to lay it out of their consideration. See Dr. Greenleaf's observations, note (*r*), *ante*, p. 828.

boy fourteen years old, by questions put by a police officer, in whose custody the boy was on a charge of felony, and when he had had no food for nearly a day, held rightly received.

at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock; and between five and six o'clock, he told the prisoner, that in consequence of the falsehoods the prisoner had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied, that he would not have told so many falsehoods as he had, if he had not been concerned in it, and he again asked him if any body had induced him to do it? The prisoner then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was *perhaps illegal*, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the Judges; a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. (*m*)

Letter from the prisoner in gaol.

In another case, (*n*) where the prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor; Garrow, B., held, that the letter so obtained, was admissible in evidence, and said, he remembered making an objection, when at the Bar, to evidence under the same circumstances, before Mr. J. Gould, who overruled it.

There must be the hope of temporal benefit.

If the expressions be not calculated to raise any hope of some benefit or advantage of a mere temporal nature, it seems that they will not exclude a confession. Upon the trial of a girl for arson, evidence was offered of declarations made by the prisoner to her mistress, after her mistress had told her that it would be better if she would confess if she were guilty, for she would never be easy in her mind till she had confessed. Holroyd, J., after consulting Bayley, J., was of opinion that the evidence was receivable; but it was afterwards excluded on other grounds. (*o*)

Gilham's case. A confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit is admissible.

Upon an indictment for murder, it appeared that the prisoner and the deceased had been in the service of Mrs. Coxe, at Bath. The deceased was murdered in the night of the 26th of January, and the prisoner was apprehended on the 30th of that month, and some articles belonging to Mrs. Coxe afterwards found in a room hired by him. When in gaol, the prisoner had the Bible and the Whole Duty of Man by him; the gaoler pointed out several passages for

(*m*) Rex *v.* Silvester Thornton, Ry. & Mood. C. C. R. 27. Best, C. J., Bayley, J., and Holroyd, J., *dissentientibus*.

(*n*) Rex *v.* Derrington, 2 C. & P. 418, Garrow, B.

(*o*) Rex *v.* Hodgson, 2 Stark. Evid. 37, note.

Gilham's case.

him to read in the Prayer Book, particularly the opening sentences of the service, and told him if he wished to have a spiritual adviser, he would endeavour to get him one; and after some conversation, the prisoner expressed a wish to have the chaplain of the gaol. The chaplain went to the gaol and asked the prisoner why he sent to him; the prisoner answered, to read and pray with him, as he could not do it himself, or make use of the books which were lying before him, which were the Bible, Prayer Book, and Whole Duty of Man. The prisoner said he knew he was a sinner and should soon die. The chaplain asked him how he knew it; he replied, he had been told at the Hall he should be hanged for taking the goods of his mistress; and he then admitted that he had purloined a few things from her. The chaplain saw he was in a very perturbed and distressed state of mind, and asked him if there was not something still more heavy on his conscience; he said he knew he was a sinner as other men, and he knew he was suspected of the unhappy murder. The chaplain told him, if he was innocent, to maintain his innocence; but if not, his own heart would tell him. The chaplain, as the minister of God, thought it was his duty to warn him not to add sin to sin, by attempting to dissemble with God. The chaplain then asked him, as he confessed himself a sinner, and as he thought he should soon die, whether he would not wish to repent of his sins: he answered in the affirmative. The chaplain then explained to him what he considered to be the nature of true repentance; and, amongst other things, that it was not a mere acknowledgment of sin, but a deep search into ourselves, and by the purity of the Gospel, whenever we found ourselves deep defaulters, to confess the same before God, with a deep contrition on our part for having violated the law of God. The chaplain told him, that before God it would be better for him to confess his sins. The chaplain also told him, that, next to confessing his sins before God, another most important part of the duty of repentance was to repair, by all possible means in his power, every injury of whatsoever nature he had done to his fellow creatures; he enlarged very considerably on his repairing the injuries he had done his fellow creatures, as forming a branch of true repentance; and he said he might say, and repairing any injury done to the laws of his country. The chaplain stated that the prisoner was then extremely agitated; he read to him part of the Commination Service, commenting upon it as he went along. He thought at one time that the prisoner was on the point of making some immediate communication to him, and he asked him if he should send for Mr. Bourne (the gaoler), meaning it with a view of the prisoner making a communication to Bourne, because he considered he had made a great impression on the prisoner. The chaplain stated the prisoner's agitation and perturbed state of mind during the interview was so great, that he could not help being aware that the prisoner had something pressing on his mind; and the chaplain said, while that was the case, he could tell the prisoner, and the prisoner would feel, that no services of his would afford him, what he wished they should do, real comfort; telling him also he must be aware that he, as a minister of God, had but one object in view, to bring him to a state of true repentance; and that he could not but himself feel sensible that he was more concerned in the dreadful deed than he had admitted; that

Gilham's case.

he did not wish him to confess to him, but to bear in mind the subject on which he had talked to him and read to him. The prisoner was evidently so worked upon by what had been said, that the chaplain could not but observe it to him, and asked him, whether his conscience did not bear witness to the truth of what he had advanced. The chaplain soon after left him, the prisoner having expressed a wish to see him again. He then went and reported to the magistrates what had passed between them; and having recovered himself a little from the agitation he was in from so painful an interview, went to the prisoner again a little before three on the same day, and resumed the tenor of his conversation upon repentance, and confessing his sins before God, and repairing, by every possible means, any injury he had done to his fellow creatures. As the prisoner had himself alluded to the murder, the chaplain entreated him, if he knew himself guilty, to avail himself by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, the chaplain saw so evident an impression made on his mind, that he could not but tell him his fear, which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind, he (the chaplain) could not afford him the consolation by prayer, which it was his earnest wish to do, and so that his prayers could be of any avail to him; and he soon after left the prisoner. The first interview lasted about two hours, and the second about an hour and a quarter, and during these interviews the chaplain enlarged upon the topics mentioned to the prisoner. The chaplain said he could almost take upon himself to say, that he always used the terms, "confessing his sins before God;" but he afterwards said that he could not say, that he mentioned "before God" every time he used the word "confessing." After the second interview, the gaoler saw the prisoner, and told him, the prisoner, what had passed between him, the gaoler, and the prisoner's wife; and he also told the prisoner, that he was perfectly satisfied that what he, the gaoler, said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said to him, "Don't tell me anything but what you would wish the mayor and magistrates to know; for whatever you tell me I must inform them of." The prisoner then related to the gaoler the particulars of the murder, and the way in which he had committed it. The gaoler then said to him, "Now I shall tell all this to the mayor and magistrates." The prisoner then said, "That is what I wish;" he said he had endeavoured to make up his mind to confess before, he had a great mind on Monday. He then requested the mayor should come and hear what he had to say; and particularly wished to see the clergyman again. The next morning (Saturday) the gaoler saw him again, and read to him two prayers and a psalm: he said he felt himself a good deal easier in his mind. The mayor of Bath and town-clerk came about ten o'clock. The prisoner, before he saw them, told the gaoler that some part of what he had stated the night before was not correct, as to what part of the house he met the deceased in when he first struck her, and he said it was in another part of the house. When the mayor saw the prisoner in the gaoler's room, he said, "I am come to see you, as I understand you wish

1st caution.

1st confession to the gaoler.

to make some communication to me." The mayor then said to him, "Before you say anything, I think it necessary to apprize you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to use your own discretion, and say little or nothing, as you may think best; and if you have changed your mind since you sent to me, and do not choose to say anything, I will retire, and shall not feel at all angry with you for having brought me down unnecessarily." The prisoner said something; what he said was taken down in writing, in his own words, it was read over to him by the town-clerk, and the clerk asked him if he had any objection to sign it: he said he had not any, but his hand shook so much he could not write his name, but it was all true. The mayor then signed the examination, but it was not signed by the prisoner. This examination of the prisoner was read; and it contained a confession of his having committed the murder, and the circumstances attending it. It appeared from the evidence of the mayor, that the prisoner had undergone five or six examinations, including the coroner's inquest. In the course of the same morning, after the mayor was gone, one of the mayor's officers saw the prisoner, and in answer to a question how he was, the prisoner told him he was better since he had eased his mind; and in the conversation they had, he told the officer that he had committed the murder, and related some of the particulars. The next morning (Sunday) the prisoner was taken from Bath to the county gaol by another of the mayor's officers, and in answer to an inquiry how he felt, he said he felt a good deal better since he had relieved his mind; and in the course of their journey he told this last mentioned officer that he had committed the murder, and stated some of the particulars. It was contended, on the part of the prosecution, that even supposing the confession made to Bourne, the gaoler, at Bath, immediately after the chaplain's interview with the prisoner, were not receivable in evidence, still, that the confession made to the mayor was receivable, inasmuch as the mayor cautioned him against saying anything, unless he thought it right, and that what he said would probably be given in evidence against him. But Littledale, J., thought that, after what the chaplain had said to him, nothing that the mayor said could do away the effect which the chaplain had produced in his mind, and that it differed from those cases where a confession having been made under circumstances which prevented its being received in evidence, if a magistrate has cautioned a prisoner not to say anything against himself, a subsequent confession made before a magistrate has been admitted in evidence. The learned Judge received the confessions in evidence, and the prisoner was found guilty. But the point was reserved for the consideration of the Judges; before whom it was contended, on behalf of the prisoner, that the confessions were all made under the influence of hopes and terrors created on the prisoner's mind both by the gaoler and the chaplain, and were therefore inadmissible; that the hopes and fears spoken of in the authorities were of two classes, merely worldly and religious or spiritual. In this case, hopes of temporal favour were created in the prisoner's mind. It was not necessary that hope of pardon should be created; for any expectation of bettering his condition rendered the prisoner's confession inadmissible. That the persons exerting their influence

Gilham's case. 2nd caution.

2nd confession to the mayor.

3rd confession to the mayor's officer.

4th confession to the mayor's officer.

Opinion of Littledale, J.

Argument before the Judges for the prisoner.

Gilham's case.

over the prisoner to confess were the gaoler, in whose custody he was, and whose favour might lessen his coercion, and the chaplain, a person also in authority, and whose good opinion and report frequently influenced the fate of prisoners. But if no hopes of temporal favour existed, and the inducements held out were merely religious, still they were of such a nature as to vitiate the confession. Although the chaplain for the most part used the term of "confessing before God," yet it was impossible but that the prisoner must have understood him to mean confession to man, from the whole tenor of his exhortations. That the confession was clearly made under the influence of religious hopes, terrors and menaces. In terms, therefore, it was within the principle of the authorities. That in the case of a prisoner's examination on oath, the only duress that could be exerted was religious duress, and the duress of the religious obligation to speak even the truth, rendered the confession so obtained inadmissible. (*p*) On the part of the Crown, it was contended, that the confessions were properly received, not having been obtained by any hope of temporal favour, nor any species of duress. The true principle of exclusion was, that confessions obtained by the hopes of pardon and the fear of punishment, are made under the influence of a class of motives that might lead to falsehood. But no one could suppose that a man, under the influence of a deep sense of religion, would confess an atrocious murder of which he was not guilty. The motives, therefore, were of a class altogether different from those which usually excluded confessions, and instead of being entitled to no credit, were, from the nature of religion, of the very sort most likely to produce truth; (*q*) and if any hope of temporal favour had existed, which was not stated, there had been ample caution given to remove such impression, both by the gaoler and the magistrate. The Judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out: and that such hopes if referrible merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. (*r*)

Argument on the part of the crown.

Wild's case. A boy of fourteen charged with murder was told by a

Upon an indictment for murder, it appeared that the prisoner, who was a boy of the age of fourteen, was taken into custody by Mr. Wragg, not a constable, and on the same night was in the parlour of the inn, to which he was taken; several persons,

(*p*) The following authorities were cited, Rex *v.* Radford, tried at Exeter Summer Assizes, 1823, where a clergyman had prevailed on the prisoner to confess a murder, by dwelling on the heinousness of the crime, and the denunciations of Scripture against it, without giving him any caution that it would be used in evidence against him, and Best, C. J., refused to allow the clergyman to state the confession; saying, that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced, to allow what he then said to be given in evidence against him. But it is said, that this case was not determined on this ground; but that Best, C. J., thought that it was improper in the clergyman to violate the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect, and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it. Per Follett *arguendo*, ibid. 200. Rex *v.* Sparkes, cited Peake, N. P. R. 78. Williams *v.* Williams, 1 Hagg. 304.

(*q*) Rex *v.* Nute, 1 Burn. J., Doyl. & Wms. 1086, *ante*, p. 832. Rex *v* Hodgson, *ante*, p. 848, and Rex *v.* Mercerون, 2 Stark. R. 366, *post*, p. 854, were cited.

(*r*) Rex *v.* Gilham, R. & M. C. C. R. 186.

man present when he was taken up, "now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," and a statement made in consequence held strictly admissible.

neighbours, but no constable, were in the room, and had been asking him questions about the children, whom he was charged with drowning. One Clark, who was present when Wragg took the prisoner up, and who was not a constable, stated, "I told him to kneel down and tell the truth." Wragg took him into Adams' parlour, and began to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not tell anything about it. Wragg asked him if he would tell any one else, if he would go out of the parlour; the prisoner said nothing; Wragg then went out. I said to the prisoner, "Now kneel you down by the side of me, and tell me the truth." I believe this was the first thing. He did kneel down. I said, I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, "Did these children fall into the pit?" He said he pushed one in with one foot, and the other with the other, but not purposely. Mr. Moulden asked him if he had any malice or revenge; he said no. Subsequently to this, the son of the inn-keeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in, it began, "W. Wild being cautioned, &c.," and the evidence being read over to him, said, "I can give no other account than I have already given," &c. (*s*) The prisoner having been found guilty; upon a case reserved as to the admissibility of the evidence, the Judges present were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. (*t*)

Confessions elicited by questions put by magistrates.

It has been said that a prisoner ought not to be questioned by a magistrate; and in *Rex* v. *Wilson*, (*u*) the prisoner's statement was on this account rejected as inadmissible; but Mr. Starkie (*v*) observes, that by the statute of Philip and Mary (*w*) formerly, and now by the 7 Geo. 4, c. 64, s. 2, the magistrate is to take the *examination* of the prisoner, and he cites a case where Holroyd, J., admitted the prisoner's examination to be read against him notwithstanding this evidence. And in a still later case, (*x*) Littledale, J., held that the examination of the prisoner, taken before the committing magistrate, was admissible, though it appeared that part

(*s*) The statement is given at length in the report, as well as the statement made to the innkeeper's son, but they are omitted as nothing turned upon their contents. C. S. G.

(*t*) Rex *v.* Wild, R. & M. C. C. R. 452. The conviction was affirmed, but the prisoner was transported for life. Lord Denman, C. J., Vaughan, J., Bolland, B., and Bosanquet, J., were not present at the meeting of the Judges. The grounds of this decision are not stated in the report; but it should seem that the case may well be supported on the ground that the words addressed to the prisoner had no tendency whatever to induce him to make a false statement, but, on the contrary, were a most solemn adjuration to speak the truth. The decision seems fully warranted by the principle on which Rex *v.* Gilham, *supra*, rests. The decision, however, could hardly be supported, on the ground that the inducement was held out by a person without authority, as it was held out by a person present at the apprehension, and who was acting in concurrence with the party who apprehended him, and they were keeping the prisoner in custody, no constable being present. C. S. G.

(*u*) Holt, N. P. C. 597, *cor.* Richards, C. B.

(*v*) 2 Stark. Ev. 38.

(*w*) Repealed, and substantially re-enacted by the 7 Geo. 4, c. 64, see *post*, p. 874.

(*x*) Rex *v.* Ellis, R. & M. N. P. R. 432.

Magistrates may put questions to prisoners under examination.

of it had been elicited by questions put by the magistrate. And it seems now to be settled, that a magistrate may, if he think fit, put questions to a prisoner charged before him with a crime, and consequently, that the statement of the prisoner in answer to questions so put, is admissible in evidence. A prisoner was examined several times before a magistrate, who took down what the prisoner said at each examination, no threat or promise being used, but much being in answer to questions put by the magistrate. The prisoner at each examination had the notes read over to him, and stated them to be correct. He did not sign them, and at the last examination he refused to do so, saying that they were an incorrect account of the transaction. It was held that a magistrate has a right to put questions to a prisoner examined before him on a charge of felony, and that the magistrate might give evidence of what the prisoner said at each examination, he refreshing his memory from his notes. (*y*) So a confession obtained without threat or promise from a boy fourteen years of age, by questions put by a police officer, in whose custody the boy was, on a charge of felony, was held rightly received. (*z*) So a confession obtained by questions put by the prosecutor's wife, (*a*) or by persons who are neither constables or officers, (*b*) or by a fellow prisoner, (*c*) is admissible. So in *Rex* v. *Merceron*, (*d*) it was proposed on the part of the prosecution to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant had been compelled to attend: and on the part of the defendant it was objected, that since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant; but Abbott, J., overruled the objection and admitted the evidence. (*e*)

Confessions obtained by questions put by persons not magistrates.

(*y*) Rex *v.* Jones, Carr. Supp. 13, and 7 C. & P. 239, note (*a*). Bayley, J., Gaselee, J., and Vaughan, B. And there have been many cases since, where similar examinations have been held admissible. In Rex *v.* Bartlett, 7 C. & P. 832, Bolland, B., admitted an examination which appeared as if some part of it were in answer to questions put by the magistrate, who, however, stated that he had no recollection of having put any questions; and if he had, certainly none except for the purpose of explaining what had been already said by the prisoner. So in Rex *v.* Rees, 7 C. & P. 568, Lord Denman, C. J., admitted the prisoner's statement made in answer to questions put to him by the magistrate, it having been afterwards read over to him, and he having said that it was in substance correct.

(*z*) Rex *v.* Silvester Thornton, R. & M. C. C. R. 27. *Ante*, p 847. Reg. *v.* Kerr, 8 C. & P. 176. Gibney's case, Joy, 36. Reg. *v.* Hughes, ibid. 39. Although there can be no doubt that confessions elicited by questions put by officers are admissible, still there can be equally little doubt that it is no part of the duty, or rather that it is a breach of the duty, of an officer to put questions to prisoners, and learned Judges have in many cases reprobated such conduct in the strongest terms; and in a recent case, where it appeared that a constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office. Hill's case, Rose. Cr. Ev. 45.

(*a*) Rex *v.* Upchurch, *ante*, p. 841.

(*b*) Rex *v.* Wild, *ante*, p. 852.

(*c*) Rex *v.* Shaw, *ante*, p. 846.

(*d*) 2 Stark. N. P. C. 366. "I think there must be some mistake in that case; the evidence must have been given without oath; and before a committee of inquiry where the witness would not be bound to answer." Per Lord Tenterden, C. J., in Rex *v.* Gilham, R. & M. C. C. R. 203, on Rex *v.* Merceron being cited.

(*e*) So if a witness answers questions to which he might have demurred as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on 5 Geo. 2, c. 30, s. 21, the defendant's examination before the commissioners was allowed to be given in evidence, to shew that by his own confession he had concealed the property of the Bankrupt. Smith *v.* Beadnell, 1 Campb. 30. See also Stockfleth *v.* De Tastet, 4 Campb. 10.

If the examination of a prisoner taken before a magistrate, purport to have been taken on oath, it is not admissible, and evidence will not be received to show that in fact it was not taken on oath. An examination of a prisoner taken before a magistrate was written under the following words, which except as to the name were printed, "The examination of — Hornage, taken on oath before me, &c.," and was signed by the magistrate; and Le Blanc, J., rejected the examination, because it purported to have been taken on oath, and would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying that he could not allow that which had been sent in under the hand of the magistrate to be disputed. (*f*) So where the examination of a prisoner began "The information and complaint of R. Bentley, taken upon oath," &c.; Gurney, B., rejected the examination, and would not permit the magistrate's clerk to prove that the examination was not taken upon oath, and that the statement was a mistake. (*g*) So an examination beginning "This deponent saith," has been rejected, as that implied that the statement was made upon oath. (*h*) So where it appeared from the depositions, that the magistrate had written down that the prisoner was sworn, and made a statement, which he returned as his examination, but a witness said that in fact the prisoner was not sworn; Parke, B., in the presence of Bosanquet, J., said, that as the magistrate had returned that the prisoner was sworn, the statement made could not be received in evidence. (*i*) So where a statement made by a prisoner before a coroner at an inquest, purported on the face of it to have been taken on oath, but the coroner would have proved, if parol evidence were admissible, that in fact no oath was administered to the prisoner; Alderson, B., said "as the statement purports to be a statement on oath, I cannot receive it as evidence against the prisoner; and I think, as it so purports, I cannot allow parol evidence to be given to show that the statement was not made upon oath." (*j*)

If a prisoner's examination purport to have been on oath, evidence is not admissible to show that in fact it was not so.

If the examination of a prisoner is rejected on the ground that it purports to have been taken on oath, parol evidence of the prisoner's statement is not admissible. A statement of a prisoner made before the committing magistrate had at the conclusion the words, "taken and sworn before me," and under those words the signature of the magistrate; the statement was rejected, and evidence that the prisoner was not sworn held inadmissible; and it was also held that parol evidence of what the prisoner said before the magistrate could not be received. (*k*)

And parol evidence of the prisoner's statement is not admissible.

(*f*) Rex *v.* Smith, 1 Stark. R. 242.

(*g*) Rex *v.* Bentley, 6 C. & P. 148, and MSS. C. S. G. The prisoner in this case was not sworn: the magistrate having separate books, with printed headings on each page; one being the information book, and another the examination of prisoners' book; the magistrate's clerk had, by mistake, entered the prisoner's examination in the information book instead of in the prisoners' examination book. C. S. G.

(*h*) Rex *v.* Shellswell, Oxford Spr. Ass. 1828, Park, J. A. J. MSS. C. S. G.

(*i*) Reg. *v.* Pikesley, 9 C. & P. 124.

(*j*) Reg. *v.* Wheeley, 8 C. & P. 250. It is not expressly stated in the report that this was the examination of the prisoner as a party charged before the coroner; but it is to be inferred that it was so. And see Reg. *v.* Owen, 9 C. & P. 83, *post*, p. 860.

(*k*) Rex *v.* Rivers, 7 C. & P. 177, Park, J. A. J. The learned Judge said, "I remember a case in which a heading of a deposition was used, and it stated that the prisoner was sworn. The written evidence was rejected, and parol evidence was offered, and that was rejected also. As I see that there is a writing, I cannot receive parol evidence." Mr. Phillipps, vol i. p. 403, says, "But there seems no good

in wh the prisoner in custody at the of making. Their stat and where goods quotes S. v. Wheel why an objection Wheeley was in custody at the time

Examination on oath not admissible.

The ground on which these decisions proceeded was, that the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. (*l*)

Prisoner examined on oath before any charge made against any one.

Upon an indictment for administering poison, it appeared that on the day on which the prisoner was committed, she and several others were summoned before a magistrate, and at a time when she was under no charge, and when there was no specific charge against any person, she and the other persons were examined upon oath touching this poisoning, and their statements taken down in writing; but on the conclusion of the examination, the prisoner was committed for trial on this charge. It was proposed to put in the examination of the prisoner, and *Rex* v. *Tubby* (*m*) was cited. Gurney, B., "This case is quite distinguishable from the case cited. Under the circumstances of that case I should have been disposed to agree with my brother Vaughan. I remember in the case of *Rex* v. *Walker*, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors' Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary." (*n*)

As a witness against another prisoner.

Upon an indictment against a father and daughter for receiving stolen goods it appeared that the daughter had been examined upon oath as a witness before the committing magistrate, and it was proposed to ask what she then said in the presence of her father. Gurney, B., "I think you cannot do that. We cannot hear anything she said before the magistrate when she was a witness; if after having been a witness you make her a prisoner, nothing of what was said then can be admitted in evidence." (*o*)

With reference to an examination of a person charged as a prisoner

ground for this decision," and in vol. 2, p. 80, he says, "this is a strong decision, for if there was no oath imposed, and if the prisoner had his choice to speak or not, as he might think right, his statement was voluntary, and why should the mistake or carelessness of the magistrate, or his clerk, in making a mis-statement as to the fact of swearing be an estoppel to the reception of evidence, which in all other respects is unobjectionable?"

(*l*) Rex *v.* Smith, 1 Stark. N. P. C. 242. As to examinations by magistrates generally, see *post*, p. 874.

(*m*) 5 C. & P. 530, *post*, p. 858.

(*n*) Rex *v.* Lewis, 6 C. & P. 161, and MSS. C. S. G. Mr. Phillipps, vol. i. p. 403, observes, "When she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge." This is inaccurate, and neither warranted by the report in C. & P. nor my note of the case, and I was counsel in it. The prisoner was summoned in the ordinary way as a person who could give some evidence touching the matter, and not because any suspicion attached to her. See the note to the next case. C. S. G.

(*o*) Rex *v.* Davis, 6 C. & P. 177, and MSS. C. S. G. Mr. Phillipps, vol. i. p. 404, observes, "It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to show that the statement was not perfectly voluntary." It should seem, from the fact of her being examined as a witness, that she was not taken before the magistrates as a prisoner; and as to the circumstances sufficient to raise a suspicion of guilt, none such are stated to have been proved before the magistrate, either before or at the time when her examination was taken; and assuming that such suspicion might exist in the minds of the magistrates or others, or even that the prisoner might be aware that there was such suspicion, that was not the ground of the decision, but that the prisoner had been examined on oath as a witness; and after the decision in Reg. *v.* Wheater, *post*, p. 858, it may perhaps be doubted whether this was a sufficient reason for rejecting the deposition. C. S. G.

taken upon oath, Mr. Phillipps observes, "As an examination it is irregular; the modern statute, which regulates the proceedings of magistrates on criminal charges brought before them, makes a distinction between the examination of a prisoner, and the informations of those who make the charge; the informations, but not the examinations of the prisoner, being especially required to be on oath. Since the statement upon oath cannot be received as a judicial proceeding or formal examination, is it admissible as a confession? There are objections to it also in that form; the oath imposed on the prisoner, especially whilst in custody, is likely to operate as a constraint, or as a kind of compulsion, the statement therefore cannot be considered as completely free and voluntary." (*p*)

Prisoner examined on oath by mistake, and error corrected.

If a prisoner is sworn and examined by a magistrate by mistake, and his deposition is destroyed, and an examination then taken in the regular way, it is admissible. On an indictment for arson against two prisoners, it appeared that when one of the prisoners was first brought before the magistrate, it was thought that he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition, which had been commenced, was torn, and the prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was offered in evidence. It was objected that the whole examination before the magistrate was but one transaction, and that the oath was binding during the whole inquiry. Garrow, B., "What was first taken down and afterwards destroyed does not prejudice the prisoner. We do not know what he said; it is as if it never existed:" and the statement was received. (*q*)

Statement by prisoner not

The principle of these decisions does not apply to a statement made by a prisoner, in an examination before a magistrate, when

(*p*) 1 Phil. Ev. 402. Assuming that an oath may be *likely* to operate as a constraint, there seems no reason whatever why where a prisoner's examination has been taken upon oath, that fact should operate further than to raise a *primâ facie* presumption that the statement was not voluntary; and to throw the onus of showing that it was spontaneous upon the prosecutor. Suppose, after the statement of a prisoner had been regularly taken without an oath, he were himself to volunteer to swear to the truth of it, and the magistrate were incautiously to permit him so to do, it would be difficult to assign any good reason why such a statement should not be admissible. In Reg. *v.* Wheater, *post*, p. 858, Lord Abinger, C. B., said, in the presence of all the Judges, "I understand, if a prisoner's examination be on oath, it shall not be received in evidence without reference to a duress or threat; *I see no reason for it;* in principle, the answer may be quite voluntary." It should be remembered, that a magistrate has no authority to administer such an oath, and therefore, the prisoner has a right to refuse to take it. In Reg. *v.* Wheater, on Rex *v.* Tubby, *post*, p. 858, being cited, Alderson, B., observed, "It does not appear there that the oath was a lawful one:" from which, perhaps, it may be inferred that the very learned Baron considered that a distinction might be drawn between a lawful and an unlawful oath; and it is apprehended that such a distinction might well be drawn, as in the one case the justice has the power to enforce by commitment an answer to any legal questions; in the other, he has no such power. And see Rex *v.* Shaw, *ante*, p. 846. The first mention of the mode of taking prisoners' examinations, is in Kelying, p. 2, where the Judges' orders direct, "that all justices of the peace do take examinations of the felons without oath." The same is stated in B. N. P. 242. The first case where an examination was rejected on the ground that purported to be on oath, is Rex *v.* Smith, 1 Stark. R. 242, *ante*, p. 855. There is no doubt that an examination of a prisoner taken on oath is irregular, and therefore, inadmissible *as an examination under the statute*, and, perhaps, the rejecting the examination of prisoners on oath altogether, may have originated in not distinguishing between an examination admissible under the statute, and admissible as evidence at common law. The point seems to have been taken for granted in all the cases, and never solemnly discussed. C. S. G.

(*q*) Rex *v.* Webb, 4 C. & P. 564.

under charge or suspicion on oath as witness against another.

he was not in custody, but examined against another person on a distinct charge; provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to be clearly admissible. (q) And it may be laid down generally that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favour, is admissible in evidence against him on a criminal charge. (r) Thus, where upon an indictment for forgery it appeared that before the prisoner was either charged with or suspected of having committed any offence, one Shearer had been examined on a charge of forgery, and that the prisoner was called as a witness against Shearer on that occasion, and sworn to a deposition, which was proposed to be read against the prisoner; and it was objected that the deposition, being a statement made upon oath, could not be received as evidence against the prisoner; Parke, J., said, "I think I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence: and he might on that, as well as on any other occasion, when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge, and not having done so his deposition is evidence against him." (s) So where on an indictment for burglary it was proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion, and it was objected that it was a violation of the rule of law that a prisoner should not be sworn; Vaughan, B., said, "I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it a statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it." (t)

Deposition by a prisoner against another person on a charge of forgery.

Tubby's case.

Wheater's case. The examination on oath of a person as a witness before commissioners of bankrupt is admissible, he having been cautioned and allowed to answer what questions he liked.

The examination of a person taken on oath as a witness before commissioners of bankruptcy is admissible in evidence against him on a charge of forgery, he having been cautioned, and allowed to elect what questions he would answer. The prisoner, who was indicted for forging a bill of exchange, had been agent in London for his father, a cloth manufacturer near Leeds, who became embarrassed, and ultimately a bankrupt. The bill in question, which, with other forged bills, was found in the prisoner's possession, and had been paid after dishonour, had been remitted by him to his father, as alleged, by way of return for cloths. The prisoner had been examined by the commissioners under the fiat touching all these bills, after the solicitor of the assignees had failed in making out such a case, on a direct charge of forging them, before the Lord Mayor as would warrant the committing him for trial. His examination on oath before the commissioners was tendered in evidence on the part of the prosecution, and objected to. It appeared that

(q) 1 Phill. Ev. 404.

(r) Ibid.

(s) Rex v. Haworth, 4 C. & P. 254. Greenw. Stat. 138 n.

(t) Rex v. Tubby, 5 C. & P. 530. The deposition was not read, but withdrawn by the counsel for the crown, as it did not contain anything material. In Reg. v. Wheater, *infra*, Vaughan, J., said, "in Rex v. Tubby, what reason is there for saying that there was any restraint on the person making the statement?"

he had been attended before them by his solicitor, and been informed by them that he was at liberty to decline answering any question which he thought might criminate himself; that to some questions he had demurred on this ground, and those had been passed over; to others he had made objections on other grounds, which had not been allowed, and he had been compelled to answer. The examination was received in evidence, and the prisoner convicted; but it was contended, upon a case reserved, that the examination was inadmissible, as it was a compulsory statement upon oath. The prisoner was liable to an indictment for perjury if he swore falsely, under the 6 Geo. 4, c. 16, s. 99, as well as to all the consequences and penalties incurred by a refusal to answer by sec. 34. The prisoner was compelled to answer some questions, and it must, therefore, be taken that some part of the examination was compulsory. He was, therefore, under duress. The answers also were on oath which rendered the deposition inadmissible, the reason for which is that it would be a species of duress. It was contended, on the part of the crown, that the statement was voluntary, and not procured or influenced by threats or duress; the prisoner had the liberty to object to answer, and exercised his right to do so, and if he elected to answer, his answer, although he might have demurred, was receivable in evidence. The cases where statements have been rejected on the ground of the examination having been on oath were inapplicable, as in them the examination was improperly taken, and the party examined was charged as a criminal. In this case the examination was regular. The Judges present were all of opinion that the evidence was properly received, and the conviction good, except Lord Abinger, C. B., and Littledale, J., who were of the contrary opinion. (*u*)

Answers and depositions in Chancery.

Upon an indictment for forging a deed the answer and deposition in Chancery of the prisoner were tendered in evidence against the prisoner, and were objected to on the ground that they were upon oath, but Vaughan, B., was clearly of opinion that they were admissible, being made before any charge was made against the prisoner. The amended bill in the same suit in Chancery was put in and read; it contained a charge of forging the deed against the prisoner, on which it was again objected that the answer and deposition of the prisoner were not admissible upon the ground that the bill contained such charge of forgery. Vaughan, B., "The argument would go the length of not admitting depositions in the case of perjury. If the party chooses voluntarily to answer, he is bound by it, and the answers are admissible." (*v*)

Difference of opinion as to the admissibility of a deposition

A difference of opinion has existed whether the examination of a person upon oath as a witness, before a coroner, be admissible in evidence against such person on his trial, and the point does not appear as yet to be finally determined. In a case tried at Worcester, where it

(*u*) Reg. *v.* Wheater, 2 Moo. C. C. R. 45. 2 Lew. 157. Park, J. A. J., and Gurney, B., were absent. In Rex *v* Britton, 1 M. & Rob. 297, the balance-sheet of a bankrupt given on oath, under his commission, was held inadmissible; but the ground of this decision was, that the balance-sheet could not be given in evidence unless there were a valid commission; and therefore, the balance-sheet being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt as a part of the commission: per Patteson, J., in Reg. *v.* Wheater.

(*v*) Rex *v.* Highfield, Stafford Sum. Ass. 1828, MSS. C. S. G. The prisoner was executed. See Rex *v.* Lewis, *ante*, p. 856, as to an affidavit in a suit in the Ecclesiastical Court.

made before a coroner.

appeared that a coroner's inquest had been held on the body of A., and it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. as a witness; Park, J. A. would not allow the deposition of B., so taken on oath, on the coroner's inquest, to be read in evidence, on the trial of an indictment against B. for the same murder. (*w*)

Owen's first case. Depositions before a coroner by prisoners admitted on a trial for a rape on the deceased.

Upon an indictment for rape against Owen, Ellis, and Thomas it appeared that an inquest had been held upon the body of the woman alleged to have been ravished, and the coroner stated, that at the inquest Owen made four statements; he had been sworn before each statement; each of the statements was taken down in writing, and signed by Owen. Ellis made and signed a statement, and so did Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement; neither threat nor promise; they were all three brought before the coroner in custody. It was objected that these statements were not receivable in evidence, as they were on oath. These persons were in custody; and in *Reg.* v. *Wheeley*, (*x*) Alderson, B. rejected the statement of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody. Williams, J., "I know that my brother Alderson did so, but I also know that since that there has been a re-action of opinion (if I may be allowed the expression); I shall therefore receive the evidence, and reserve the point if it should become necessary." (*y*)

Owen's second case. The same depositions rejected on a trial for murder of the same woman.

But where upon an indictment against the same prisoners for the murder of the same female, whom they had been charged in the preceding case with ravishing, the same depositions of the prisoners, taken on oath, on the coroner's inquest held on the body of the deceased, (*z*) were tendered in evidence; Gurney, B., said, "I am not aware of any instance in which an examination on oath, before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner." After mentioning *Reg.* v. *Wheater*, (*a*) the learned Baron added, "I confess that I do not, on principle, see the distinction between that and some of the other cases. Still I am of opinion that in the present case, I ought to reject the evidence." (*b*)

Sandys' case.

Upon an indictment for the murder of Elizabeth S., it appeared

(*w*) Anonymous, 4 C. & P. 255, note (*b*). In Rex *v.* Clewes, reported as to other points in 4 C. & P. 221, the grand jury asked Littledale, J., "Can the evidence of a prisoner, who was examined on oath before the coroner as a witness, be admitted as evidence against the same person, when subsequently indicted for the murder of the person, on whose body the inquest was held?" Littledale, J., "Whatever any prisoner says at any time against himself is evidence, and therefore, such a statement is admissible." The preceding case was then mentioned, on which the learned Judge seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. MSS. C. S. G.

(*x*) *Ante*, p. 855.

(*y*) Reg. *v.* Owen, 9 C. & P. 83. The report then proceeds, Mr. Tooke, (the coroner) recalled "I asked Owen if he was desirous of giving his evidence, and he said, yes; he was sworn, and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did." Alderson, B., was the other Judge at Stafford when this case was tried.

(*z*) This is the whole statement in the report.

(*a*) *Ante*, p. 858.

(*b*) Reg. *v.* Owen, 9 C. & P. 238.

that no suspicion arose that her death had been caused by poison until after the death of Mary Ann S.; but the parents having insinuated that Mary Ann had been poisoned by Riley, she was taken into custody upon the charge, and on the examination before the coroner as to the cause of Mary Ann's death, the mother was examined on oath, as a witness, and her deposition was taken in writing, and read over to her, and she put her mark to it. In the course of that examination questions were put to her relative to the death of Elizabeth, and in consequence of her answers, and other circumstances, the body of Elizabeth was disinterred, examined, and found to contain arsenic in the stomach. The parents were thereupon taken into custody, and brought before the coroner, in custody, separately. The mother was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness, was then read over to her, and she said that she had a further statement to make, which she made, and what she said was written down, and afterwards read over to her; she was asked to sign it, and refused. The coroner signed it, and it was produced and offered in evidence against the mother, together with her original deposition. It was objected that as the greater part of the statement had been made by the prisoner, when under examination before the coroner, upon oath, it could not be read in evidence against her. Erskine, J., received the evidence, but reserved the point for the consideration of the Judges. (*b*) But as the mother was acquitted, the Judges thought it unnecessary to determine the question.

Deposition before a coroner on an inquest on the body of one person read over on the inquest on another body, and additional statement then made to it.

It has been determined by the opinions of all the Judges that although confessions, improperly obtained are not admissible, yet that any facts, which have been brought to light in consequence of such confessions may be received in evidence. (*c*) Thus, where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had, under promises of favour, made a confession: and in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed: it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession. (*d*) So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to make a confession, from which it appeared that he had disposed of part of them to a certain person; it was held allowable on the part of the prosecution to call that person to prove that he had received the property from the prisoner. (*e*) As far as these cases go, there can be no difficulty as to the propriety of their decisions, because the bare facts of the property being

Discoveries in consequence of confessions unduly obtained.

(*b*) Reg. *v.* Sandys, 1 C. & Mars. 345.

(*c*) 1 Phill. Ev. 411.

(*d*) Rex *v.* Warickshall, 1 Leach, 263, O. B. 1783. S. P. Mosey's case, 1 Leach, 265 *n.* O. B. 1784. So in Rex *v.* Harris, R. & M. C. C. R. 338, *post*, p. 877, after the prisoners had been before the magistrate, one of the prisoners went with one of the prosecutors to a field, and said he could find the skin buried, and showed the place, which was dug up and the skin found. So in Thurtell's case, cited in Alison's Cr. L. of Scotland, 584, and Joy, 84, although a confession obtained by means of promises or hopes of impunity held out, was not used in evidence against him, yet the fact that the goods were recovered, or the corpse found, in consequence of the confession, at the place mentioned in the confession, was held receivable in evidence.

(*e*) Lockhart's case, 1 Leach, 386.

found in the possession of the prisoner in the one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further than this, for it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given *that he did so describe the place*, and that the goods were afterwards found there. (*f*) In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can properly be used for such a purpose. Thus in *Harvey's case*, Lord Eldon, C. J., said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed the jury in that case. (*g*) But the more established rule, according to later practice and later authorities is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true. (*h*) Thus it is proper, and it is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. (*i*) So where on an indictment for burglary, it appeared that the prisoner had made a statement to a policeman, under some particular circumstances, which induced the counsel for the prosecution with the approbation of the Court to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether in consequence of something which the prisoner had said, he made a search for the lantern; Tindal, C. J. and Parke, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman, accordingly, stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence. (*j*)

What is the correct rule where property is found in consequence of a confession improperly obtained.

(*f*) Grant's case, and Hodge's case, 2 East, P. C. 658.

(*g*) At Bodmin Summer Assizes, 1800, 2 East, P. C. 658. See also Mosey's case, 1 Leach, 265, in note to Warickshall's case.

(*h*) Rex *v.* Butcher, 1 Leach, 265, note (*a*) to Warickshall's case, 2 East, P. C. c. 16, s. 94. p. 658.

(*i*) 2 East, P. C. c. 16, s. 94, p. 658.

(*j*) Reg. *v.* Gould, 9 C. & P. 364. Mr. Phillipps, vol. i. p. 412, after stating this case, adds, "But the Judge in such a case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that *he concealed*, but merely as evidence that he knew of or was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself."

So it has been determined, after a consideration by all the Judges, that although a confession improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. (*j*)

Acts done in consequence of a confession.

And from a decision in a late case, (*k*) it should seem that what the prisoner says at the time such acts are done, may also be received in evidence. In that case, the prisoner was charged with stealing a guinea and two promissory notes. It appeared in evidence that one of the notes was a Bank of England note for five pounds, and the other a Reading bank note for the like sum. The prosecutor had told the prisoner that he had better confess. Chambre, J., held, that although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen* from him. The note thus produced the prosecutor could not identify, otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a conviction and a case reserved, the majority of the Judges (*l*) agreed with Chambre, J., in thinking the conviction right and the evidence admissible. (*m*)

Declarations accompanying such acts.

But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements, unless confirmed by the finding of the property; for the same influence which might produce a groundless confession, might produce groundless conduct. A prisoner was indicted for larceny, and had been induced by a promise from the prosecutor to confess his guilt; and after that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person however denied knowing any thing about it, and the property was never found; it was held that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession was excluded, because being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession, might also produce groundless conduct. (*n*)

Not admissible except when confirmed.

(*j*) Warickshall's case, 1 Leach, 265.

(*k*) Rex *v.* Griffin, Russ. & Ry. C.R.C. 151.

(*l*) Lord Ellenborough, C. J., Mansfield, C. J., Macdonald, C. B., Heath, J., Grose, J., Chambre, J., and Wood, B.

(*m*) Lawrence and Le Blanc, Js., were of a contrary opinion, that the production of the money was alone admissible, and not his saying at the time he produced one of the notes "that it was one of the notes stolen from the prosecutor." And see Rex *v.* Jones, Russ. & Ry. C. C. R. 152. *Ante*, p. 827.

(*n*) Rex *v.* Jenkins, Russ. & Ry. C.C.R. 492. Mr. Phillipps, Ev. 1 vol. 413, says, "it was held that the evidence of what passed between the prisoner and the officer ought not to have been received, that is, *it was not receivable as evidence against the third person.*" This is clearly an error; there was only one prisoner indicted, and he for the larceny, and the only question was, whether the evidence was admissible against him. If the person pointed out had been indicted as the receiver, the fact of the prisoner pointing him out as the person, in his presence, and his denial would undoubtedly have been admissible in evidence against such person. C. S. G.

Confession evidence against the party confessing only,

The statement or confession of one prisoner, made in the absence of another prisoner when not before a magistrate, is only evidence against himself, and not against another prisoner, (*n*) and in general, the confession of one prisoner on his examination before a magistrate, is only evidence against the party who made the confession, and cannot be made use of against any others, whom on his examination he confessed to be engaged with him in committing the offence: (*o*) and even if such confession were made before a magistrate in the hearing of another prisoner, it would not be evidence against such prisoner; on the ground that there is a regularity of proceeding adopted before a magistrate, which prevents the prisoner from interposing when and how he pleases, as he would in a common conversation, and the prisoner is brought to answer the charge and evidence given against him, and not the statement made by another prisoner. Thus, where the confession was made before a magistrate in the presence and hearing of the accomplice, who did not deny it, Holroyd, J., held, (*p*) that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the Judges in a similar case, which had been tried at Chester. (*q*) So where a confession of the principal, made before a magistrate in the presence of the receiver, in which she stated various facts implicating the receiver, and others as well as herself, was tendered in evidence; Patteson, J., refused to receive in evidence any thing that was said by her respecting the receiver. (*r*) So where upon an indictment against Swinnerton for stealing, and Bowyer for receiving hay, it appeared that when the prisoners were before the magistrate, Swinnerton made a statement in the hearing of Bowyer, which was taken down: Bowyer then made the following statement: "I must beg pardon that I had it, I reckon that it was not right that I took it. If I had not picked it up some one else would." This statement was given in evidence, and it was proposed also to put in the statement of Swinnerton, who had pleaded guilty. Patteson, J.,—"When before a magistrate a prisoner is called upon to answer the depositions taken on oath, but he is not called upon to make any answer to the statement of another prisoner; I think, therefore, that the examination of Swinnerton is not admissible." (*s*)

although made before a magistrate in the hearing of an accomplice, who did not deny it.

Deposition of a witness on a summary conviction.

Upon similar grounds also, the deposition of a witness, who has been examined against a person before a magistrate in a case of summary conviction, is inadmissible. In an action for maliciously laying an information against the plaintiff, it was proposed to prove what a witness, called for the defendant, had said in the plaintiff's presence before the magistrate on the hearing of the information, on the ground that he had had the opportunity of cross-examining the

(*n*) Hevey, Beatty, and M'Carty's case, 1 Leach, 232.

(*o*) Tong's case, Kel. 18.

(*p*) Rex *v.* Appleby, 3 Stark. N. P. C. 33. In an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant: but Best, C. J., refused to admit it; and he observed, that what was said by the defendant to the plaintiff was evidence, but not what was said by a third person; or if it drew any answer from the plaintiff, that made it evidence. And his Lordship said, he remembered Gibbs, C. J., making the same distinction. Child *v.* Grace, 2 C. & P. 193.

(*q*) As to when the declarations of one conspirator are evidence against all his comrades, see *ante*, p. 697.

(*r*) Rex *v.* Turner, R. & M. C. C. R. 347.

(*s*) Reg. *v.* Swinnerton, 1 C. & Mars. 593.

witness, and commenting on his testimony; Parke, J., said, "I think it is the safer course to refuse it, and to hold that the deposition of a witness taken in a judicial proceeding, is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under consideration, had not the right of interfering: and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing, when and how he pleases, as he would in a common conversation. The same inferences, therefore, cannot be drawn from his silence, or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can be admitted, I think it better to refuse the evidence now offered." (*t*)

Seems, if referred to by the prisoner.

But if a prisoner in his examination before a magistrate makes an express reference to the examination of another prisoner, taken in his presence before the magistrate, the examination of such prisoner may be given in evidence against the prisoner so referring to it. (*u*) If a prisoner when before a magistrate on a charge of an assault, makes a statement in answer to what the person charging him with the assault stated, the statement made by such party and the answer of the prisoner to it are admissible. Upon an indictment for murder, it appeared that the deceased made a complaint to a magistrate of the prisoner having struck him a blow, (which ultimately occasioned his death,) and the prisoner was in consequence brought before two magistrates for the assault, and convicted and fined. On the examination of the charge of assault the deceased made a statement, and the prisoner made a statement in answer to it. (*v*) Tindal, C. J., held that evidence of what was said by the deceased on the examination, and also what the prisoner said in answer, was admissible; but added, "I shall not hold that what the deceased said is evidence as proving the facts he stated, as it would be if it were a deposition taken under the 7 Geo. 4, c. 64, but only evidence as producing an

(*t*) Melen *v.* Andrews, M. & M. 336. See Finden *v.* Westlake, ibid., 461, per Tindal, C. J., and see Child *v.* Grace, 2 C. & P. 193, *ante*, p. 864, note (*p*).

(*u*) Several instances have occurred where this has been done, and the case is similar to Rex *v.* John, 7 C. & P. 324, and Dennis's case, 2 Lew. 261, where the prisoners' examinations referred to the depositions of particular witnesses, and such depositions were held to be admissible in explanation of the prisoner's statement. In such a case it should seem that it would depend on the manner in which the reference was made to the other prisoner's examination, whether the facts stated in such examination were admitted or not. It might be that the prisoner's examination stated that the other prisoner's statement was correct, and if so that would be an admission of the facts stated in it; or the reference might be such as merely to require the reading of the other examination as explanatory of the prisoner's statement, without admitting any fact stated in it. In 2 Stark. Ev. 40, it is said, "in some instances the confession of one taken in the presence and hearing of another prisoner may be very material to explain the expressions and conduct of the latter upon that occasion; for any declarations of his, by which he assented to what was confessed by another, to his own prejudice, would be admissible against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations." C. S. G.

(*v*) This statement was not in writing, and objected to on that ground, but Tindal, C. J., held that "this being a summary conviction is not a case in which magistrates are required to take down the evidence in writing." And see Robinson *v.* Vaughton, 8 C. & P. 252. S. P.

answer from the prisoner, like any other conversation; and I do not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation." (*w*)

Confession in the hearing of a prisoner not before a magistrate.

And so if one prisoner were to make a confession in the presence of another prisoner, when not before a magistrate, such confession would be admissible against the prisoner in whose presence it was made, although he made no observation with reference to it; for a confession may be collected or inferred from the conduct and demeanour of a prisoner on hearing a statement affecting himself. (*x*) But as such statements frequently contain much hearsay and other objectionable evidence, and as the demeanour of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. (*y*)

Statement made in the presence of a prisoner by his wife.

Not only what is said by a prisoner, but what is said to him, or in his presence, except when before a magistrate, is admissible in evidence, and it makes no difference that what was said was said by a person who cannot be called as a witness. On an indictment for murder, some observations made to the prisoner by his wife, to which he made an evasive reply, were about to be stated, when it was objected that the statement ought not to be made, as the wife, if she could by law be examined, would give a direct contradiction to them; but Gaselee, J. and Parke, J., were both of opinion that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject matter of the charge, to which he made no direct answer, was receivable as an implied admission on his part. (*z*) So where the wife of the prisoner, who was indicted for the murder of his wife's mother, came into the room where he was in custody, and said to him, "Oh, Bartlett, how could you do it?" He looked steadfastly at her, and said, "Ah, what you accuse me of the murder too?" She said, "I do, Bartlett, you are the man that shot my mother." The prisoner did not make any reply. She then turned to the witness and said, "This was done for money." It was objected, that as the wife could not be examined on oath, what she had then said could not be used as evidence against him; but the evidence was held clearly admissible. (*a*)

Examinations not in the words of the prisoners are inadmissible.

The written confession of a prisoner is not admissible in evidence, unless it be in the language used by the prisoner. A prisoner made a confession to an officer, who left the prisoner and afterwards wrote down from recollection what the prisoner said to him. What the

(*w*) Rex *v.* Edmunds, 6 C. & P. 164. This decision has been doubted, 1 Phill. Ev. 400, and Joy, 79, 80, but as it should seem without any sufficient reason. The decision is precisely in conformity with the distinction taken by Best, C. J., in Child *v.* Grace, 2 C. & P. 193, *ante*, note (*p*), p. 864, and it is conceived that the evidence was admissible on the ground that *at common law* evidence of a deceased witness given upon oath in a judicial proceeding between the same parties is admissible in a subsequent proceeding, the party against whom the evidence is offered having had an opportunity to cross-examine in the former proceeding. See Rex *v.* Carpenter, 2 Show. 47, and the cases cited, *ante*, p. 752. C. S. G.

(*x*) 1 Phill. Ev. 400.

(*y*) Ibid.

(*z*) Rex *v.* Smithies, 5 C. & P. 332.

(*a*) Rex *v.* Bartlett, 7 C. & P. 832. See Rex *v.* Simons, 6 C. & P. 540, where Alderson, B., held that what a person is overheard saying to his wife, or even saying to himself, is evidence against him.

officer wrote was read over to the prisoner before the committing magistrate, and he said that what had been read over to him was the truth, and signed the paper. Best, J., "We have not the confession of the prisoner; we have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words, nothing that he says that has any relation to the subject being omitted, nor anything added, except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower orders of men have but few words to convey their meaning, and they know as little of expressions that they are not in the habit of using, as if they belonged to another language. I will not receive this paper in evidence." (*b*) In the same case it is said that Dallas, C. J., had refused to receive, at a former assizes, a confession, because it was not in the prisoner's own words. So where it was proved that the examination of the prisoner before the magistrate was read over to her, and that she signed it, but there was no evidence that it was taken down from what she said or in the words she used, and in fact it was in language clearly not such as she was likely to have used; Littledale, J., refused to permit it to be read. (*c*) And where a witness having, in her examination before the coroner, stated that she had slept with the prisoner, that he had given her two black eyes, that they had seen a placard, &c., the statement of the prisoner before the coroner was tendered in evidence, and was as follows:—"Prisoner admits sleeping with the witness, blackening her eyes, seeing the placard," &c., and it was objected that the examination was taken in the third person, which was not complying with the statute, and did not purport to be the language of the prisoner at all, but merely the coroner's expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made. Lord Denman, C. J., thought the objection of considerable importance. As to the mode of taking the examination of the prisoner, that was a very improper way in which to do it. His Lordship did not, however, see how he could exclude the evidence, but he should reserve the point in case it were necessary. (*d*)

Roche's case.

All names in the confession must be mentioned.

Where the confession of a prisoner mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol, or in writing, must be given in evidence. The Judge will, however, in such cases,

(*b*) Rex *v.* Sexton, 1 Burn's J., Doyl. & Wms. p. 1086.

(*c*) Rex *v.* Mallet, Gloucester Spr. Ass. 1830, MS. C. S. G. Verdict, not guilty.

(*d*) Reg. *v.* Roche, 1 C. & Mars. 341.

direct the jury that the confession is only to be taken as evidence against the prisoner who made it. On the Oxford Circuit it was the constant practice a few years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner. (*e*) But it has been held in many cases on that circuit (*f*) and elsewhere, (*g*) that the proper course is to state or read all the names mentioned by the prisoner in his confession. A very learned Judge has, however, expressed on several occasions a strong opinion that such a course is unfair. (*gg*) If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, be brought forward, the defendant has a right to lay before the Court the whole of what was said in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter, not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation, as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. (*h*) It seems at one time to have been considered that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part, and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced must be taken as true. (*i*) But the correctness of this position has been doubted, (*j*)

The whole of a confession or admission must be stated.

The jury are to give such credit to any statement in it in favour of the prisoner as they think fit.

(*e*) See Rex *v.* Fletcher, 4 C. & P. 250. Rex *v.* Limer, Stafford Sum. Ass. 1839, Bosanquet, J. MS. C. S. G.

(*f*) Rex *v.* Hearne, 4 C. & P. 215, Littledale, J. Rex *v.* Clewes, ibid., 221. Rex *v.* Daniel and Garland, Monmouth Spr. Ass. 1831, MSS. C. S. G. Bosanquent, J., saying, "The ground I go upon is, that I do not think I am authorized to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written." In Rex *v.* Giles and Betts, Worcester Spr. Ass. 1830, MS. C. S. G., where there was a parol confession, Littledale, J., said, "he was satisfied the proper way was to state the names uttered by the prisoner, as to state 'another person' instead of the name used was not to state the truth, which a witness was sworn to do." In Rex *v.* Harding, Bailey, and Shumer, Gloucester Spr. Ass. 1830, MS. C. S. G., where there was a written confession, Littledale, J., said "Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting himself to be accessory to the principal, how is it to be known that he is accessory to such principal, if the name of the principal is not to be read? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point." Rex *v.* Walkley, 6 C. & P. 175, Gurney, B.

(*g*) Rex *v.* Fletcher, 4 C. & P. 250, Littledale, J., at York. S. C. 1 Lew. 107. Hall's case, 1 Lew. 110, Alderson, B., at Appleby. Foster's case, 1 Lew. 110, Lord Denman, C. J., at Carlisle. Rex *v.* Fletcher, *supra*, was the case of a letter written by one prisoner, and implicating another.

(*gg*) Parke, B., in Mandsley's case, 1 Lew. 110, and Barstow's case, ibid. It would be extremely beneficial to prisoners in such cases to be tried separately, and such a course is nothing more than expedient in cases of difficulty, as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners. C. S. G.

(*h*) By Abbott, C. J., in the Queen's case, 2 Brod. & Bing. 297.

(*i*) By Bosanquet, Serj., in Rex *v.* Jones, 2 C. & P. 630. So where the prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement, made before the magistrate, in which the prisoner asserted that he had bought the goods; Garrow, B., directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. Ibid.

(*j*) By Park, J. A. J., in Rex *v.* Lloyd, Worcester Sum. Ass. 1830, MSS. C. S. G., and 1 Phill. Ev. 399.

and it seems now to be settled that the whole of the prisoner's statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by the prosecutor, but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not. (*k*) The jury may, therefore, believe one part of the prisoner's statement and disbelieve another. (*l*) They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. (*m*) In determining whether the statement be true or not the jury should consider whether it be probable or improbable in itself, and whether it be consistent or inconsistent with the other circumstances of the case. (*n*) If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (*o*) But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another. (*p*)

As to the mode of introducing confessions in evidence.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. (*q*) In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison to a coroner, for whom the prisoner had sent. It however appeared, that previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner; and it was suggested, on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that, therefore, the counsel for the prosecution were bound to call him. Littledale, J., "As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." (*r*) So where a prisoner being in the custody of two constables, on a charge of arson, one Bullock went into the room,

(*k*) Rex *v.* Clewes, 4 C. & P. 221, Littledale, J. Rex *v.* Steptoe, 4 C. & P. 397. Rex *v.* Higgins, 3 C. & P. 603, Parke, J. Rex *v.* Jones, Monmouth Sum. Ass. 1830, MSS. C. S. G., Park, J. A. J. Rex *v.* Locker, Stafford Spr. Ass. 1831, Patteson. J. MSS. C. S. G.

(*l*) 1 Phill. Ev. 399.

(*m*) Greenl. Ev. 253, citing Rex *v.* Steptoe, *supra.* Rex *v.* Clewes, *supra.* Rex *v.* Higgins, *supra*, and Respublica *v.* M'Carty, 2 Dall. 86, 88.

(*n*) Rex *v.* Steptoe, *supra.* Rex *v.* Jones, *supra.*

(*o*) Greenl. Ev. 253.

(*p*) Rex *v.* Jones, 2 C. & P. 630. So in a civil case, if a person says, "that he did owe a debt, but that he had paid it," such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. Per Hale, C. J. Anonymous case, cited 12 Vin. Abr. tit. Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable, that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phil. Ev. 399. See also Smith *v.* Blandy, R. & M., N. P. C. 257. Rose *v.* Savory, 2 B. N. C. 145.

(*q*) 1 Phill. Ev. 409.

(*r*) Rex *v.* Clewes, 4 C. & P. 221. The counsel for the prosecution declined to call Mr. Clifton, and he was called and examined by the prisoner's counsel. See this case, *ante*, p. 836.

and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. It was evident that the prisoner acted under some influence, as he first proposed going into another room; and *Rex* v. *Swatkins*, (*s*) was relied upon. Taunton, J., "A confession is presumed to be voluntary, unless the contrary is shown; and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J., his Lordship added, "We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been." (*t*)

If there be any probable ground to suspect that an officer has improperly obtained a confession, such officer ought to be called.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed, in the first instance, by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room, the prisoner said he wished to speak to him, and motioned the constable to leave the room, which he did and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended, that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., "I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables." (*u*)

It must appear either that some inducement has been used, or some express reference must be made to an officer, in order to make it in-

In order to induce the Court to call another officer in whose custody the prisoner had been, it must appear either that some inducement had been used, or some express reference made to such officer. A prisoner when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession, which he had previously made to Williams, a constable; it was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J.—"Although I do not

(*s*) *Infra.*

(*t*) Rex *v.* Williams, Gloucester Spr. Ass. 1832, MSS. C. S. G. The statement was rejected on another ground. See *ante*, p. 832.

(*u*) Rex *v.* Swatkins, 4 C. & P. 548, and MSS. C. S. G. It afterwards appeared that the prisoner had gone voluntarily before the magistrates at the inn, and then run away, was brought back by the constable, and detained by him in the room for the purpose of being a witness, and that he was not charged with the offence till after the statement was made. Patteson, J., "If he was not under any charge, that varies the case. As he was at that time attending as a witness, and was not in custody on any charge, I shall receive the statement in evidence, without putting the prosecutor to call the other constable."

think it necessary that a constable, in whose custody a prisoner has been, should be called in every case, yet as in this case there is a reference to the constable, I think he ought to be called." Williams was then called, and proved that he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J.—"I do not think it is necessary that a constable should be called, unless it appear that some promise was given, or some express reference was made to the constable. There was a distinct reference made to Williams, and therefore I thought he must be called; but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made; that might be either a confession, a denial, or an exculpation." (*v*)

cumbent on the prosecutor to call such officer.

A confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as matter of fact, is to be received with more than usual caution. (*w*) Thus on an indictment for setting fire to a ship with intent to defraud Greenfell & Eddy, being part-owners of the ship, a declaration of the prisoner that Greenfell & Eddy were part-owners was received in evidence, but it was objected that the bill of sale, under which Greenfell & Eddy claimed, was invalid in point of law; and it was held that if by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established, the declaration of the prisoner could not be relied upon for that purpose. (*x*) So where, on an indictment for bigamy, the prisoner had confessed the first marriage, but it appeared that the marriage was void for want of the consent of the guardian of the woman, the prisoner was acquitted. (*y*)

Of the effect of confessions.

As analogous to the former part of this section, concerning admissions and confessions by the defendant himself, it may be proper in this place to mention the subject of acts and declarations of co-conspirators and of agents. How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work (*z*) With respect to the statements and acts of agents, it was decided, on the impeachment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas, (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same,) was admissible in evidence against

Acts and declarations of co-conspirators and of agents.

Agent of defendant.

(*v*) Rex *v.* Warner and Morgan, Gloucester Spr. Ass. 1832, MSS. C. S. G. The prisoner's counsel then proposed to call Marsh, which was objected to as not being at the proper time, but Littledale, J., said, "It is much the more convenient time to do so. If it should afterwards turn out that the confessions were in consequence of what Marsh had said they must all be struck out, but it would be very difficult to do away with the impression they might have made on the mind of the jury." Marsh was then called for the prisoner, and proved that when the prisoner was in his custody it was not for the offence for which he was then being tried. See this case, *ante*, p. 845. This case was tried at the same assizes as Rex *v.* Williams, but after that case had been tried. C. S. G.

(*w*) 1 Phil. Ev. 401,

(*x*) Rex *v.* Philp, R. & M. C. C. R. 263.

(*y*) Anonymous, 3 Stark. Ev. 894, note (*m*), *cor.* Le Blanc. J.

(*z*) *Ante*, p. 697. See also 2 Stark. Ev. tit. *Conspiracy*.

Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. (*a*) In the *Queen's case*, (*b*) it was said by Abbott, C. J., in delivering the opinion of the Judges, that it would not be allowable on the part of the prosecution, to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the Judges, but the converse of it, considered by the Chief Justice, for the purpose of showing the grounds of the determination of the Judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been done by the agent of the *prosecutor*. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His Lordship concluded by observing, that notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a Judge to allow proof of this nature, to be submitted for the consideration of a jury; and that the inclination of every Judge was to admit, rather than exclude, the proffered proof.

Agent of prosecutor.

SECTION II.

Examinations before Magistrates.

Examination of prisoner before magistrate.

The cases in the foregoing section are applicable to confessions by prisoners generally; the subject of confessions, contained in the statutory examinations of prisoners before the committing magistrate, remains to be considered in the present section.

1 & 2 P. & M., c. 13, repealed by the 7 Geo. 4, c. 64.

By the 1 & 2 P. & M., c. 13, intitled, "*An act touching bailment of prisoners*," sec. 4, "Justices of the peace, when any prisoner is brought before them for any manslaughter or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and information of them that bring him of the fact and circumstances thereof, and the same, or as much thereof as shall be material, shall put in writing before they make the same bailment: which said examination, together with the said bailment, the said Justices shall certify at the next gaol delivery to be holden within the limits of their commission." This statute extended only to cases where the

(*a*) 29 How. St. Tr. 746. 1 Phil. Ev. 386.

(*b*) 2 Brod. & Bing. 302.

party accused was admitted to bail; but it was further enacted by the 2 & 3 P. & M., c. 10, intituled "*An act to take examinations of prisoners suspected of manslaughter or felony,*" after reciting the 1 & 2 P. & M., c. 13, and that the said act doth not extend to such prisoners as shall be committed and not bailed, that the Justice "before he shall commit a prisoner brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those that bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, *within two days after the said examination*, and the same shall certify in such form and at such time as he ought to do, if such prisoner so committed had been bailed." Between these statutes, this difference was observable: by the former, which was confined exclusively to cases where a prisoner arrested for manslaughter or felony *was admitted to bail*, the Justices of the peace must have taken the examination of the prisoner, and the witnesses against him, and put the same in writing *before they made the bailment:* by the latter, which applied only to cases where a prisoner arrested for manslaughter or felony was *committed to gaol*, Justices were required to take the like examinations, but were not obliged to put them in writing immediately, having *two* days given them by the act for that purpose. (*c*) It must also be remarked that these statutes did not extend to misdemeanors or high treason. (*d*) But the above-mentioned difference has ceased, and the defect has, as far as the not comprehending misdemeanors, been remedied, by the 7 Geo. 4, c. 64, which by sec. 2, (*e*) after reciting that it is ex-

2 & 3 P. & M., c. 10, repealed by the 7 Geo. 4, c. 64.

7 Geo. 4, c. 64, s. 2.

(*c*) Burn. Just by Chetw. tit. *Examination.*

(*d*) Rex *v.* Paine, 1 Salk. 281. S. C. 1 Lord Raym. 729, cited by Lord Kenyon in Rex *v.* Eriswell, 3 T. R. 723. 1 Hale, 306. They extended however, as the new statute must be considered to do, to petty treason, so far as to make examinations and informations under them admissible in evidence, by reason of the offence being substantially the same as murder, but such an information could not support a conviction for petty treason if the witness were living, though unable to travel, or kept out of the way by the contrivance of the prisoner; the 5 & 6 Edw. 6, c. 11, s. 12, requiring the witnesses, *if living*, to be examined in petty no less than in high treason. Fost. 337. However, as a prisoner might be convicted of murder on an indictment for petty treason, depositions or informations, even in such a case, would be evidence to support a conviction for murder, though not for petty treason. Radbourne's case, 1 Leach, 457. The 9 Geo. 4, c. 30, enacts that petty treason shall be treated in all respects as murder.

(*e*) Sec. 1, enacts that "where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall in the opinion of the justice or justices raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner hereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices, in the manner hereinafter mentioned: provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

Examination of prisoners in felonies.

pedient to amend and extend the provisons of the 1 & 2 P. & M., c. 3, and 2 & 3 P. & M. c. 10, enacts, "that the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know and declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great session or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively *shall subscribe all such examinations, informations*, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court *in which the trial is to be.*" (*f*)

7 Geo. 4, c. 64, s. 3. Misdemeanors.

Sec. 3 enacts, "that every justice of the peace before whom any person shall be taken on a charge of misdemeanor, or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged, and in every case of bailment shall certify the bailment in writing, and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and *shall subscribe all examinations, informations*, bailments, and recognizances, deliver or cause the same to be delivered to the proper officer of the Court in which the trial is to be, before or at the opening of the Court, in like manner as in cases of felony."

Sec. 4. Duty of coroners.

Sec. 4 prescribes the duty of coroners upon inquisitions in putting the evidence in writing and binding over the witnesses, but contains no provision as to taking the examination of any person charged with or suspected of causing the death of any person, on whose body the inquisition is held. (*g*)

When the prisoner's examination should be taken.

The proper time for taking the examination of a prisoner is after the witnesses have been examined and he has heard what they have deposed against him. (*h*)

As to the manner in which prisoners

The frequent warnings given to prisoners not to say anything that may criminate themselves, have, on several occasions, rendered it necessary for learned Judges to state what is the proper course of

(*f*) This part of the statute removes a difficulty which arose upon the statutes of Philip and Mary, by reason of their directing the magistrate to certify the examination at the next general gaol delivery *within the limits of their commission*; but as it often happened that a felon was taken and examined by a magistrate in a county where the offence was not committed, justices, of necessity, contrary to the words of the statute, certified in the county where the felon was indicted.

(*g*) See the section, *post*, p. 892, note (*b*). It seems in several cases to have been taken for granted that the coroner had the same authority to take the examination of a prisoner as a magistrate. See Rex *v.* Reed, M. & M. 403, *post*, p. 883. Reg. *v.* Roche, 1 C. & Mars. 341, *ante*, p. 867. Brogan's case, Rosc. Cr. Ev. 60, *post*, p. 887. C. S. G.

(*h*) Rex *v.* Fagg, 4 C. & P. 566, Garrow, B. Rex *v.* Bell, 5 C. & P. 162, *post*, p. 884. Rex *v.* Spilsbury, 7 C. & P. 187, *post*, p. 880.

proceeding in taking the examinations of prisoners. Thus, it has been laid down that "A prisoner ought to be told that his confessing will not operate at all in his favour, and that if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition it ought to be left entirely to himself whether he will make any statement or not; he ought not to be dissuaded from making a perfectly voluntary confession, because that is to shut up one of the sources of justice." (*i*) A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement it is the duty of the magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have been made on the prisoner's mind that the statement may be used for his benefit, and the prisoner ought to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. (*j*)

should be cautioned.

The examination of a prisoner ought to be taken down in the precise words used by him; and the language ought not to be changed; for if it appear to be in such language as the prisoner did not use, or could not have used, it will not be admitted in evidence against him. (*k*)

In what manner the examinations should be taken.

The examination of a prisoner must not be taken upon oath. But although it was in one case considered otherwise, (*l*) it seems now to be settled that questions may be asked of the prisoner by the magistrate, if he think fit so to do, and that the examination will not be rejected on the ground that the magistrate did put questions to the prisoner, especially if such questions were put merely for the purpose of explaining what the prisoner himself said. (*m*)

Not upon oath. Questions may be asked.

As by the statute the magistrate is expressly enjoined to put the examination into writing, it will be intended that he did as the law requires; and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shown that in fact such a statement never was reduced into writing. (*n*) And in order to render parol evidence of a prisoner's statement admissible, it is

Parol evidence of examination before magistrate, is admissible after clear proof that the examina-

(*i*) Per Gurney, B. Rex *v.* Green, 5 C. & P. 312.

(*j*) Reg. *v.* Arnold, 8 C. & P. 621, Lord Denman, C. J.

(*k*) Rex *v.* Sexton, 1 Burn. Just., Doyl. & Wms. 1086, *ante*, p. 867, and other cases there cited. The proper course is to take the examination in the first person; *e. g.* "I did so and so," &c., and to insert the very words the prisoner uses, whatever they may be. C. S. G.

(*l*) Rex *v.* Wilson, Holt, R. 597, per Richards, C. B.

(*m*) Rex *v.* Ellis, R. & M. N. P. R. 432. Rex *v.* Bartlett, 7 C. & P. 832. Rex *v.* Rees, 7 C. & P. 568, and see the cases, *ante*, p. 853.

(*n*) Jacobs' case, 1 Leach, 309. Fearshire's case, ibid., 202.. Hinxman's case, ibid., 310, note (*a*). Fisher's case, ibid., 311, note (*a*). Rex *v.* Hollingshead, 4 C. & P. 242. Phillips *v.* Wimburn, 4 C. & P. 273. Where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result. 3 Stark. Ev. 786. Hence parol evidence cannot be received of the declaration of a prisoner taken under the statute, where the examination has been taken in writing. But if the statute had not made the taking an examination in writing a judicial proceeding, there is nothing, it is conceived, in the rules of evidence, which would make the statement reduced to writing primary evidence, to the exclusion of any collateral parol proof of what the prisoner declared. If several witnesses were to hear a confession, not made in the course of an examination under the statute, and one of them were to reduce it to writing, as it was being delivered, such writing would not exclude the testimony of the other witnesses. See *ante* p. 735.

tion was not taken in writing.

not sufficient for a witness to state that he did not see anything taken down in writing, (*o*) or that no examination was taken in writing, (*p*) but the magistrate's clerk must be called to prove that he did not take down in writing what the prisoner said. (*q*) But if in fact the examination was not taken in writing, parol evidence may be given of the prisoner's declarations. At the Lent Assizes for the county of Stafford, in 1790, one Hall and two others were tried and convicted on an indictment for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put Hall on his defence, the only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. The case was referred to the consideration of the Judges, whether this evidence of the confession was well received; and all the Judges, except Gould, J., were of opinion that the conviction was right. (*r*) So where it was proved that the magistrate before whom the prisoners were examined was very deaf, and did not take down what they said when before him; Taunton, J., permitted parol evidence to be given of their statements before the magistrate. (*s*) So a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced into writing. (*t*) And in *Rowland* v. *Ashby*, (*u*) Best, C. J., said, "My opinion is, that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by a magistrate."

Harris's case. Parol evidence may be given to add to the written examination of a prisoner taken by a magistrate.

And it has since been expressly held that parol evidence is admissible to add to the written examination of a prisoner statements made by him while before a magistrate, and which are not contained in such examination. Upon an indictment against Butler, Harris, and Evans, for stealing a ewe, the property of Bennett, it appeared that Harris, Butler, and Evans, were taken before a magistrate about stealing three sheep of Bennett, Pennell, and Price; at the meeting Bennett, Pennell, and Price, were all present. The magistrate identified the examinations, and said that was all that was taken

(*o*) Phillips *v.* Wimburn, 4 C. & P. 273, Tindal, C. J.

(*p*) Rex *v.* Isaac Packer, Gloucester Spr. Ass. 1829, MSS. C. S. G. In this case the witness stated that no examination was taken in writing, and Parke, J., said, "as all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." So in Rex *v.* Phillips, Worcester Sum. Ass. 1831, MSS. C. S. G., where a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain that that was so; Bosanquet, J., said that the justice's clerk ought to be called to show whether anything had been taken in writing, as it must be presumed that he had done his duty; and the clerk was accordingly called, and proved that nothing was taken in writing, and then parol evidence was received of what the prisoner said before the magistrate.

(*q*) It should seem on the same ground that where there is no magistrate's clerk present, the magistrate should be called to prove that he did not take the examination in writing. See Rex *v.* Harris, R. & M. C. C. R. 338, *infra*, where this course was adopted. C. S. G.

(*r*) Hall's case, cited by Grose, J., in Lambe's case, 2 Leach, 559. Rex *v.* Huet, 2 Leach, 821.

(*s*) Rex *v.* Shillcock and Barnes, Stafford Spr. Ass. 1832, MSS. C. S. G.

(*t*) Rex *v.* M'Carty, 2 Stark. Ev. 38. See also Rex *v.* Reason and Tranter, 16 How. St. Tr. 35, by Eyre, J.

(*u*) Ry. & Mood. N. P. C. 231.

down; that was what each of the prisoners said; it was all in his writing, he had no clerk; the informations were taken as to the three sheep before Evans and Harris were examined; he took down everything that they said that he heard. The papers produced contained everything as he believed that transpired before him, and he intended to take down all that was said to him, and he believed he did. The room was very full. The papers produced were the depositions of Pennell, Price, and Bennett, as to the stealing of their sheep respectively, and Butler's examination and confession as to each offence. The following were the examinations of Harris and Evans:—"J. Harris being called upon for his defence, voluntarily saith that he was concerned in stealing a sheep, the property of J. Pennell, but that J. Butler was the foreleader in the business." "W. Evans voluntarily saith that he did not kill the sheep, but that he helped to carry it away." A witness stated that Mr. C., the magistrate, examined Harris and Evans, and he wrote; that when Harris was asked about Bennett's sheep, Mr. C. was at the table with his paper and pen before him, but his hand was not going. What Harris said about Bennett's sheep was said to Mr. C. Mr. C. heard what Harris and also what Evans said about Bennett. He took down in writing what they said about Bennett's sheep, (*v*) what they said they said to Mr. C. Harris said he was connected with the taking of Bennett's sheep. Harris said they took a neddy out of the road, and put the sheep upon him. Evans said he helped to take the sheep, Bennett's sheep; this was addressed to Mr. C. Another witness said that he heard Harris say that he helped to take Bennett's sheep; that he addressed Mr. C.; that Harris said to Evans "speak the truth, you may as well speak the truth as not;" that Evans then said he helped to do it; he helped to take Bennett's sheep: what Evans said was addressed to Mr. C. The evidence of these two witnesses was objected to, but received, and, upon a case reserved upon the questions whether as Harris and Evans had made a confession as to Pennell's sheep, which had been taken down in writing by the magistrate, any confession as to Bennett's sheep could be supplied by parol evidence; and whether as the magistrate had taken down in writing everything he heard, and he intended to take down all that was said to him, and he believed he did, parol evidence could be given of anything else that was addressed to the magistrate; the Judges were unanimously of opinion that the evidence being precise and distinct was properly received. (*w*)

(*v*) *Quære*, whether this should not be "Pennell's sheep?" My MSS. note has no such statement of this witness, and "Bennett" might easily be printed erroneously instead of "Pennell." C. S G.

(*w*) Rex *v.* Harris, R. & M. C. C. R. 338, Lord Lyndhurst, C. B., Bosanquet, J., Taunton, J., and Gurney, B., *absentibus*. Mr. Phillipps, 2 Vol. Ev. 83, *et seq.*, contends that if a prisoner's statement, taken down in writing, is given in evidence against him, as containing an admission of some fact, or a confession of guilt, and the magistrate has omitted to insert some other material part of his statement, the counsel for the Crown will not be allowed to supply the omission by the evidence of witnesses; and mentions as the only authority in favour of this proposition Rex *v.* Mulvey, Lancaster Spr. Ass. 1831, Matth. Dig. 157. S. C. as Rex *v.* Maloney, Rosc. C. E. 56. This case is stated immediately after Rex *v.* Moore, *post*, p. 879, and the whole statement is, "but if it ought to have been taken down in writing and was not, it is inadmissible." Whether, therefore, there was any statement in writing by the prisoner, or at what time the statement proposed to be given in evidence was made, does not appear. Mr. Phillipps then proceeds to allege that Rex *v.* Harris "will be found, on an attentive perusal, not

Walter's case.

The following cases have since been decided with reference to the same subject. Where, on an indictment for larceny, the prosecutor stated that the prisoner, *when under examination* before a magistrate, made a confession of his guilt, and was about to state it; but, on referring to the depositions returned, it appeared that the prisoner was there stated to have said, "I decline to say anything;" Lord Abinger, C. B., was of opinion that the prosecutor's statement could not be received in evidence. (*x*)

Morse's case.

Where three prisoners were taken before the magistrate at the same time on the same charge, and each made a statement, which was taken down by the magistrate's clerk, but he had left a blank whenever either of the prisoners had mentioned the name of either of the other prisoners, conceiving that such mention of the name was not evidence against the person so mentioned, and it was proposed to supply these blanks by the parol evidence of the clerk; Patteson, J., said, "I think I ought not to receive the parol evidence. I think that the rule ought not to be extended. In the present case the statement professes to be a complete account of what took place; and I am of opinion that supplementary evidence ought not to be received." (*y*) So where an examination of a prisoner on oath was not allowed to be given in evidence, and it was proposed to give in evidence what the prisoner said which was not taken down, and *Rex* v. *Harris*, (*yy*) cited; Gurney, B., said, "it is very dangerous to

to bear upon the point in question, nor even afford an argument against the proposition above maintained;" and, after stating the facts of that case, adds, (in a note, p. 85) "It is not to be inferred from this decision that parol evidence can be given of anything else that was addressed to the magistrate. The proposed evidence was receivable, being *distinct* (that is *distinct from the examination produced*, and *distinct from the offence therein mentioned*), this is quite different from its being in addition to the examination. The examination produced related to *another offence*, and was not admissible as evidence in this prosecution; the only reason of its being produced doubtless was to show that the confession, which it was proposed to prove by the evidence of the two witnesses, was not *included* in the examination, but *altogether* omitted; for that purpose, and that only, it was proper and indispensable to produce the written examination. The point decided then was nothing more than this, that parol evidence might be given of a confession made by a prisoner before the committing magistrate, who took a written examination relating to *other distinct* charges, but which did not in any respect relate to the offence for which he was afterwards tried." It must be observed, however, that the learned author is in error in several points. In the first place, the term "distinct," coupled as it is with "precise," means "plain, clear, and unequivocal," and not what is suggested. In the next place, the examination of Evans, which was in answer to the three charges, all heard at the same time, only mentions "the sheep," without specifying which of the three. In any view of the case, therefore, the Judges must have held that parol evidence was admissible, to show *what* sheep Evans mentioned; and as the evidence of the two witnesses strongly tends to show that the statement of Evans related to the sheep of Butler, the inference is that the Judges held that it was allowable to add to the examination of Evans that he stated that the sheep therein mentioned belonged to Butler. Lastly, as the examination of each of the prisoners was a *single* statement "in defence" of three charges, the case does decide that parol evidence is admissible to add to the statement of each prisoner in answer to the charge of stealing Bennett's sheep; and it is just the same as if the statement had been, "as to Pennell's sheep I say so and so; and as to the others I decline to say anything." C. S. G.

(*x*) Rex *v.* Walter, 7 C. & P. 267. The ground of this decision is not stated, and it may have been that the very learned Chief Baron considered the evidence proposed as *contradicting* the statement of the prisoner returned by the magistrate, as the confession proposed to be given in evidence was said to be made "when the prisoner was under examination," and not during the time the witnesses were being examined against him. See the observations in note (*f*), *post*, p. 880.

(*y*) Reg. *v.* Morse, 8 C. & P. 605, *ante*, p. 856.

(*yy*) *Supra*, note (*w*).

admit such evidence, and I think it ought not to be done in this case." (z)

Statements and remarks of the prisoner while the witnesses are being examined against him.

The general rule respecting confessions is that "a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the magistrate's, or even after he has entered the house of the magistrate for the purpose of undergoing his examination," (a) or even whilst the witnesses are being examined against him, and it is only to the period of time during which the magistrate is taking the prisoner's examination, that the written statement of the prisoner can apply.—Any remarks or statements therefore made by the prisoner after the inquiry before the magistrate has begun and whilst the witnesses are being examined may be received in evidence, although the prisoner's examination is afterwards taken in writing.

Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate, if he had been attending; and the magistrate proved the examination of the prisoners before himself, and the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in evidence. (b) So "an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial." (c) So where a man and woman were before the magistrates on a charge of burglary, and in the course of the examination of a witness a glove was produced, which had been found on the man with part of the stolen property in it, on which the man said "she gave me the glove but she knew nothing of the robbery;" the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statement in the depositions or examination of the prisoner; Erskine, J., held that what the man said might be proved by parol evidence. (d)

Parol evidence of a prisoner's answer to a magistrate's question while the witnesses were being examined.

Parol evidence may be given of a question asked by a magistrate in the course of the examination of a witness, and of the prisoners' reply to it, neither the one nor the other being taken down in writing. On the examination of a prisoner on a charge of murder, one of the witnesses stated that she had bought a pot of the prisoner, upon which one of the magistrates asked what sort of a pot it was, and the prisoner, although the question was not particularly addressed to him

(z) Rex v. Lewis, 6 C. & P. 161, *ante*, p. 856. Assuming the rejection of the examination to have been correct, because it was on oath, the rejection of the parol evidence was clearly correct, as that statement was on oath also. C. S. G.

(a) Per Grose, J., in delivering the judgment of the Judges in Lambe's case, 2 Leach, 552.

(b) Rex v. Johnson and Spiers, Gloucester Spr. Ass. 1829, MSS. C. S. G. This case was relied upon at the trial of Rex v. Harris, *supra*, by the counsel for the crown. MS. C. S. G.

(c) Rex v. Moore, Matth. Dig. C. L. 157, Parke, B.

(d) Reg. v. Hooper, Gloucester Sum. Ass. 1842. The clerk to the magistrates could

made an answer. It was submitted that no evidence could be given of what passed before the magistrate except the depositions. Coleridge, J. "What the magistrate himself said would not be taken down. That may certainly be asked." It was then submitted that the statement made by the prisoner and signed by the magistrate must be put in before it could be asked what the prisoner said. Coleridge, J. "There seems to be no necessity for putting in the written examination. It is not what the prisoner says when called upon for his defence that is asked, but an observation made in the course of the case, and as that would not be put down as part of his statement, I am clearly of opinion that it is receivable." The clerk to the magistrate then proved that he took down the examination of the witnesses, and that he took down what the prisoners said when they were asked what they had to say for themselves, but that he did not take down anything which either of the prisoners said before the witnesses had been all examined. Coleridge, J. "At the close of the evidence for the prosecution the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written examination; but if a prisoner says something while the witnesses are under examination that does not stand on the same ground. I shall receive the evidence." (*e*)

Statement made by a prisoner on the first day of his examination, but not returned by the magistrate.

And so where there were two investigations by the magistrates who committed the prisoner, and on the first occasion two witnesses were examined, and a statement was made by the prisoner, and taken down in writing, but it was not read over to the prisoner nor was he asked to sign it. The depositions of the witnesses were not taken formally till the second occasion, and the magistrate did not return with them the statement made by the prisoner on the first occasion; but on the contrary returned the following memorandum; "The prisoner, being advised by his attorney, declines to say anything." It was objected that as the magistrate returned that the prisoner had declined to say anything, it was not competent for the clerk, in contradiction of the magistrate's own account, to give in evidence that which purported to be a statement made before the magistrate. But Littledale, J., and Parke, B., were both of opinion that the evidence was admissible, although the magistrate might have neglected his duty in not returning what the prisoner said. And Parke, B. added, "let the effect of the evidence be what it may with the jury, it is clearly admissible. What a prisoner says is evidence against himself, whether the officer was right or wrong in not returning the statement, or furnishing a copy of it to the prisoner." (*f*)

If a written examination be produced on the part of the prosecution, as the examination of the prisoner taken in writing by the magistrate according to the statute, it has been said that the prisoner

not remember the observation, and it was proved by two policemen. MSS. C. S. G.

(*e*) Rex *v.* Spilsbury, 7 C. & P. 187.

(*f*) Reg. *v.* Wilkinson, 8 C. & P. 662. Rex *v.* Walter, *ante*, p. 878, was cited in support of the objection, and the reporters observe that the only difference between the cases is that in Reg. *v.* Wilkinson, the statement was made on a different day from the statement which the magistrate returned but it is conceived the true distinction between the cases is this, that the statement by parol in Rex *v.* Walter, evidently was made at the same time as the statement returned by the magistrate, and was in effect a contradiction to it. In Reg. *v* Wilkinson, the statement proposed to be given in evidence was made the first day, and the statement returned the second, the first therefore, could in no way contradict the latter statement. C. S. G.

is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. (*j*)

Signing by the magistrate and the prisoner.

The examination of a prisoner, when reduced into writing, ought to be read over to him, and likewise tendered to him for his signature. And by the late statute (*k*) the magistrate is expressly required to subscribe it: and it was usual so to do before the statute. The signature, however, of the prisoner is not required by the statute, and is only for precaution and for the facility of future proof. (*l*) In *Lambe's case*, (*m*) the question referred to the opinion of the twelve Judges was whether an examination, taken in writing by a committing magistrate, containing a confession of the prisoner's guilt, *not being signed by the prisoner or the magistrate*, was admissible in evidence. The examination, after being taken in writing, was read over to the prisoner, who said, "It is all true enough:" but upon the clerk's requesting him to sign it, he said, "No: I would rather decline that." A majority of the Judges were of opinion, upon principle as well as precedent, that the examination or paper writing was well received in evidence. Mr. Justice Grose, in delivering their opinion said, that it was clearly receivable in evidence at common law, and that there was nothing in the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, to render it inadmissible. Surely, as the learned Judge observed, if what a man says, though not reduced into writing, may be given in evidence against him, *à fortiori* what he says, when reduced into writing, and afterwards admitted by parol to be true, is admissible. But where the clerk of the magistrate stated that he took down the examination from the mouth of the prisoner, and that it was afterwards read over to him, and he was told he might sign it or not as he pleased, and he declined to sign it; Wood, B., was of opinion that the document could not be read: "In *Lambe's case*," said the learned Baron, "the prisoner, when the examination was read over to him, said it was true; and here, if the prisoner had said so, the case might have been different." (*n*) Where the solicitor for the prosecution, on the examination of the prisoner before a magistrate, at the desire of the latter, took minutes of the examination in writing, which were read over to the prisoner, who said, "It is all true;" but when they were read over to him again, after an interval of a few hours, said that part of them was not true, and refused to sign them; it was held that these minutes might be read in evidence. (*o*)

Examination not signed by the prisoner but admitted to be correct.

Where the prisoner did not sign or admit it to be correct.

What is the distinction in these cases.

The distinction in these cases appears to be, that if the prisoner admits the examination to be correct, the examination itself may be read in evidence; but if the prisoner declines to sign it, or does not admit it to be correct, the written examination cannot be read in

(*j*) 3 Stark. Ev. 787.
(*k*) 7 Geo. 4, c. 64, ss. 2, 3.
(*l*) 2 Phil. Ev. 79.
(*m*) 2 Leach, 552.
(*n*) Rex *v.* Telicote, 2 Stark. N. P. C. 483. Foster's case, 1 Lewin, 46. Hirst's case, ibid. See also Rex *v.* Bennet, 2 Leach 553, note (*a*). In Rex *v.* Jones, 7 C. & P. 239, upon an indictment for murder, the Court allowed evidence to be given of the examination of the prisoner before a magistrate, taken at several times, and reduced to writing by him: the prisoner had declined to sign it, on its being completed and read over to him; but acknowledged it contained what he had stated, although he afterwards said there were many inaccuracies in the statement he had given. The writing was not admitted as documentary evidence, but as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement.
(*o*) Thomas's case, 2 Leach, 637. See also Bradbury's case, ibid., 639, note (*a*).

evidence, but it may be used to refresh the memory of a witness who may state what the prisoner said. A statement made before a magistrate having been taken down in writing and read over to the prisoner, he was asked to sign it; he asked whether he was bound to sign it or not, and being told that he was not, he said he had rather not sign it; and Littledale, J., was clearly of opinion, both upon the cases and on principle, that the examination was not admissible. (*p*) So where the examination of a prisoner having been taken down in writing before a magistrate, he was neither asked to sign it, nor was it read over to him; Littledale, J., refused to allow the examination to be read in evidence. (*q*) So where a statement made by a prisoner before a magistrate was taken down by the clerk, and read over to the prisoner, but not signed by him, Patteson, J., thought that it would be the more safe course that this examination should not be read; but that the clerk to the magistrate by whom it was taken should refresh his memory from it. (*r*) But where a prisoner was before the magistrate on two days, and all that he said the first day was taken down in writing and read over to him, and he was asked whether it was correct or not, and he said it was; and on the second day he was asked to sign this statement, but he refused to do so; and it was objected that it was inadmissible, as he had refused to sign the examination; Bosanquet, J., said, "if minutes only of what a prisoner says are taken down, and not read over to him, although they could not be read as evidence against him, yet they might be used to refresh the memory of the witness as to what the prisoner said. In this case the prisoner admitted that the examination was correct; where that is the case I have always understood that it was a settled point that the examination should be received." (*s*)

Examination taken down in writing, and used to refresh the witness's memory.

Where the prisoner had been examined before the Lords of the Council, and a witness took minutes of his examination, which were neither signed by him, nor read over to him after they were taken; it was held, that though they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of the examination. (*t*) And if an examination before a justice of the peace be taken in writing, under such circumstances of irregularity as preclude the writing from being itself given in evidence, yet it may be proved, as at common law, by some one who was present, as far as his recollection will enable him to state, that he heard the prisoner make the confession, and if he were the person who wrote down the examination, he may refresh his memory

(*p*) Rex *v.* John Sykes, Shrewsbury Lent Ass. 1830. Lambe's case, and Rex *v.* Telicote, *ante*, p. 881, were cited. MSS. C. S. G.

(*q*) Rex *v.* Samuel Wilson, Shrewsbury Spr. Ass. 1830, MSS. C. S. G. Neither in this case, nor in Rex *v.* Sykes, nor as far as appears in Rex *v.* Telicote, was it proposed to give evidence by parol of what the prisoner said. The only point, therefore, decided in these cases was that an examination neither assented to as correct, nor signed by the prisoner is not admissible *as an* examination duly taken under the statute before a magistrate. C. S. G.

(*r*) Rex *v.* Pressly, 6 C. & P. 183. It has been well observed, that in this case "it was of no practical importance which course was adopted, but there appears no reason for treating a prisoner's examination, which, although not signed by him, complies with all the requisites of the statute, as an informal document." Rosc. Cr. Ev. 58.

(*s*) Rex *v.* Uriah Daniel, Monmouth Spr. Ass. 1831, MSS. C. S. G.

(*t*) Layer's case, 16 How. St. Tr. 215.

with it. Thus, where the prisoner had refused to sign his examination before the magistrate, or to admit its truth; Bayley, J., allowed parol evidence to be given of the prisoner's statement, and permitted the magistrate's clerk to read over the examination to refresh his memory. (*u*) And in another case, Bayley, J., did the same thing, and further held, that if the clerk who took it down at the time could, on referring to it, recollect its contents, he might read it. (*v*) And so where on an indictment for murder, the examination of the prisoner by the coroner was inadmissible on account of an irregularity in the mode of taking it, and thereupon, for the prosecution, it was proposed to ask the coroner what the prisoner said on the occasion of his examination; and this was objected to, as being properly the subject of the writing, and if that was not admissible, the inferior evidence of the witness's recollection must be rejected; but Tindal, C. J., overruled the objection, and the coroner stated from memory so much of what the prisoner said as was inquired to. (*w*)

Where a prisoner had been examined before a magistrate, and his examination reduced into writing by the magistrate's clerk, but nothing appeared on the face of the paper to shew that it was an examination taken on a charge of felony, or that the magistrates who signed it were then acting as magistrates; Patteson, J., is reported to have said, "the clerk to the magistrates may be called to prove what the prisoner said, and refresh his memory from the paper." (*x*)

Statements made by prisoner before the conclusion of the examination of the witnesses.

We have seen that the appropriate time for taking the examination of a prisoner by a magistrate, is after the witnesses have been examined, and he has heard what they have to say. (*xx*) A statement, therefore, made by a prisoner before that time, although taken in writing, is not, properly speaking, an examination within the 7 Geo. 4, c. 64, and consequently is not admissible in evidence as an examination of the prisoner. But, although an opinion was once intimated, that "nothing which a prisoner stated before he knew what the evidence against him was, ought to be used to criminate him." (*y*) Yet it is clearly settled that any statement made by a prisoner, before a magistrate, and taken in writing, though inadmissible as an examination, may be proved by the person who took it down, he refreshing his memory by the written paper. The prisoner and his younger brother had been in custody since the 17th of May, and various depositions had been taken between that day and the 21st, on which day several depositions were taken in the presence of the prisoner, and the younger brother

(*u*) Dewhurst's case, 1 Lew. 47.
(*v*) Hirst's case, 1 Lew. 47.
(*w*) Rex *v.* Reed, M. & M. 403.
(*x*) Rex *v.* Tarrant, 6 C. & P. 182.
(*xx*) *Ante*, p. 874.
(*y*) Per Garrow, B., in Rex *v.* Fagg, 4 C. & P. 566. The statement of the prisoner in this case was made before the evidence in support of the charge had been gone through, and Garrow, B., strongly inclined to think it was inadmissible, and after making the observation stated in the text, censured the taking such a statement from the prisoner. The censure might well have been spared, as it is undoubtedly *the duty* of the magistrate to take down whatever a prisoner may say of his own accord at any time during the progress of the investigation of the case before him, and cases frequently occur where prisoners *volunteer* statements long before the witnesses against them have been examined. In Rex *v.* Mellor, Stafford Sum. Ass. 1833, each of the prisoners as soon as they got before the magistrate, made a statement, and upon such statement each of them was convicted before Gurney, B. C. S. G.

was about to state a confession made to him by the prisoner on the previous evening, when the prisoner interrupted him and made a full confession of his guilt, which the magistrate's clerk immediately reduced into writing, and it was read over to the prisoner, who put his mark to it, and it was attested by the clerk: "Taken and *signed* by the said B., in the presence of," &c. On subsequent days, other depositions were taken, some of them in the presence, some in the absence of the prisoner. It was objected, that the confession was inadmissible, first, because it was made before all the evidence was gone through, and on this point *Rex* v. *Fagg* (*y*) was relied upon; secondly, that some of the depositions were taken in the absence of the prisoner; thirdly, that there were interlineations and erasures; fourthly, that there was a false attestation; and lastly, that as the best evidence must be given, if the paper was inadmissible, the parol statement of the clerk was not receivable; but Gaselee, J., having consulted Lord Tenterden, C. J., said, "Lord Tenterden agrees with me, that the opinion of Mr. B. Garrow, in *Rex* v. *Fagg*, is much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable. He also agrees with me that the interlineations and erasures are cured by the attestation, which cannot be called a false attestation, though it would have been more regular to have said that the prisoner put his mark, as is customary in affidavits in the superior Courts. We are both of opinion that it is no objection that some of the depositions were taken in the absence of the prisoner. We are also both of opinion that the confession may be repeated, by the magistrate's clerk who heard it, and that he may refresh his memory by the aid of the written paper." (*z*)

It must not be on oath.

An examination before a magistrate must not be upon oath; and when an examination previous to committal purports to have been taken upon oath, evidence has been held inadmissible, to shew that in fact it was not so taken. (*a*)

Examination before a magistrate how proved.

It is said by Lord Hale, (*b*) and upon his authority it is so laid down in the subsequent Treatises on the subject, that an examination, taken before a magistrate, in order to be read in evidence against a prisoner must be proved on oath by the magistrate that took it, or the clerk that wrote it, to have been truly taken.

And where, at the close of the case for the prosecution, the examination of one of the prisoners was offered in evidence against him, and a person who was present, and saw the prisoner and the magistrate sign the examination, and heard the prisoner cautioned, was called to prove these facts; it was objected, upon the authority of Lord Hale, that this writing was inadmissible, unless either the magistrate or his clerk proved that the examination was properly taken; and Patteson, J., after saying that his own opinion was strongly opposed to such a doctrine, yielded nevertheless to the authority of Lord Hale, and refused to admit the examination, but added, that had it appeared that the question had mainly turned upon the admission or rejection of the examination, he would have received the evidence, and reserved the point, and that he by no means wished his present decision to be cited as a precedent. (*c*)

(*y*) *Supra*, p. 883.
(*z*) Rex v. Bell, 5 C. & P. 162.
(*a*) *Ante*, p. 855.
(*b*) 2 P. C. 52, 284.
(*c*) Rex v. Richards, 1 M. & Rob. 396, note.

Distinction between signature and mark of a prisoner.

Where on an indictment for larceny, it was proposed to put in the prisoner's examination before the magistrate, and to prove it by a by-stander; but the examination had the prisoner's mark to it only; Lord Denman, C. J., refused to receive the evidence, unless it were proved by the magistrate or his clerk; he observed that the necessity of proving the deposition in this manner had been doubted, but the distinction appeared to him to be, that where the examination of a prisoner before a magistrate is taken down in writing and signed with the prisoner's name, it need not be proved by the magistrate or his clerk: but if not signed by him, or if his mark only be attached to it, it is necessary to be proved by the magistrate or the clerk; for if the prisoner signs his name, this implies that he can read, and that he has read the examination and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read, or that he knows the contents, and no person can swear that the examination has been correctly read over to him, except the person who read it. (*cc*)

Attesting witness.

But where a constable swore that he heard the prisoner make her statement, and saw the magistrate take it down, and that it was read over to her by the magistrate, and she put her mark to it, after which the constable put his name to it as attesting the mark, and the magistrate signed the examination as taken before him; but the constable did not see the contents of the paper which the clerk read over; Vaughan, J., and Patteson, J., were of opinion that the examination was sufficiently proved; and Patteson, J., said that he was by no means satisfied that it was in any case necessary to call either the magistrate or his clerk. Some of the books did indeed so lay down the rule, and he had reluctantly yielded to their authority on a recent trial on the Western Circuit; (*d*) not, however, without expressing great doubt as to the propriety of such a rule. The present case was, however, quite distinguishable from that; here, there was an attesting witness, who had been called to prove the fact which he attested. He was clearly of opinion that the examination, so authenticated, was admissible in evidence against the prisoner. (*e*)

It is not necessary to call either the magistrate or

There are, however, many cases, some decided previously and some subsequently to those which have been mentioned, which show that it is not necessary to call either the magistrate or his

(*cc*) Rex *v.* Chappel, 1 M. & Rob. 395, Aug. 11, 1834. In Smith's case, 2 Lew. 139, a writing purporting to be the examination of a prisoner, and to bear his mark, was tendered in evidence, and the magistrate's signature proved by a bystander, who stated that the clerk was writing when the prisoner was examined, and when the examination was finished he repeated to the prisoner, apparently from the paper, what the prisoner had said, and the prisoner then put his mark to the paper; but whether the prisoner's statement was taken down correctly, or at all, he had no means of judging. Rex *v.* Chappel was cited, but Parke, B., was disposed to admit the examination, as he thought there was sufficient *primâ facie* evidence that the prisoner's examination was taken down in fact, as the law requires, and if so, that it must be presumed to have been taken down correctly, and read over correctly, until the contrary was proved. He conferred with Lord Denman, C. J., who entertained doubts about the propriety of his former opinion, and thought it fit for the consideration of the Judges; but as the examination was not essential in the present case, Parke, B., rejected it, intimating that in any case in which it was necessary he would admit it, and take the opinion of the Judges.

(*d*) Rex *v.* Richards, *supra*, note (*c*).

(*e*) Rex *v.* Hope, 1 M. & Rob. 396, note. S. C. 7 C. & P. 136, Feb. 4, 1834. In Rex *v.* Taylor, 7 C. & P. 136, note. tried before Patteson, J., a statement made by a prisoner similarly proved was read without objection.

his clerk to prove the taking of the examination.

clerk, who took down the prisoner's statement, but that it is sufficient to call a person who was present, to prove the taking of the examination and the signature of the magistrate. (*f*)

Thus, where on an indictment for murder, it appeared that the prisoner's examination had been taken down by the magistrate's clerk, who was not present to authenticate it when produced at the trial; and it was objected, that it could not be received in evidence, although the magistrate before whom it was taken had signed it, and was present to prove his signature: Holroyd, J., held it to be sufficient, and it was read. (*g*) And so where a constable, who was at the magistrate's whilst the prisoner was under examination, was in and out of the room backwards and forwards, and absent at a time as much as two or three minutes together, but saw the examination signed; Bolland, B., held that the examination was admissible, as it must be presumed that the magistrate had done his duty. (*h*) So where the examination produced purported to be the examination of the prisoner, and was signed by the magistrate and also by the prisoner; but there was no proof either that it was taken from the prisoner's mouth, or that he had stated the facts that were contained in it; Parke, J., was of opinion, that the proof of the two handwritings was sufficient, and he allowed the examination to be read in evidence. (*i*) So where the only evidence in Court, in addition to proof that it was the examination of the particular prisoner, was that of a person who knew the magistrate's handwriting, by which the examination was authenticated; Bosanquet, J., and Alderson, B., intimated an opinion, that the statement might be read on proof of the magistrate's handwriting, on the ground that the law required the magistrate to certify that it had been duly taken; and Alderson, B., likened it to the case of an affidavit, where proof of the magistrate's handwriting was evidence of the party's having been sworn. The learned Judges, in reference to Lord Hale's doctrine, (*j*) said, it could not be intended that the magistrate or his clerk must be called, on account of their office; but that any one who could show that the examination was duly taken would be sufficient. The confession, however, was not read, but the prisoner was convicted on other evidence. (*k*) So where the prisoner's statement before the committing magistrate was proved by a witness, who deposed to the signatures of the magistrate and prisoner; Lord Denman, C. J., held that it might be given in

(*f*) It should seem that proof of the magistrate's signature alone would not be sufficient, as that would only show that he had signed the examination of a person of the same name as the prisoner; but that there must be some evidence of the examination being that of the prisoner's. C. S. G.

(*g*) Hobson's case, 1 Lew. 66. 1823.

(*h*) Rex *v.* Thomas Haines, Shrewsbury Spr. Ass. 1830, MSS. C. S. G.

(*i*) Priestley's case, 1 Lew. 74. 1831.

(*j*) *Supra*, note (*b*), p. 884.

(*k*) Rex *v.* Foster, 7 C. & P. 148, Aug. 20, 1835. It is not stated whether the examination was signed by the prisoner, or whether the witness who proved that it was the examination of the prisoner heard it taken or read over to her. In Rex *v.* Spencer, 1 C. & P. 260, which was an indictment for perjury in an answer in Chancery, Lord Tenterden, C. J., said, "The courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn." The distinction between an affidavit and an examination of a prisoner consists in this, that the affidavit is prepared by or on the behalf of the party making it, the examination of a prisoner is taken down by the magistrate or his clerk; in the one case, therefore, the correctness of the statement depends on the party making the affidavit; in the other on the magistrate or his clerk. C. S. G.

evidence without calling the magistrate or his clerk. (*l*) So where neither the magistrate nor his clerk were in Court, but a constable swore that he was before the magistrate, and heard the statement of the prisoner read over to him by the clerk, and proved the handwriting of the magistrate to the depositions returned to the Court; Parke, B., allowed the prisoner's statement to be read in evidence against him. (*m*) So where on an indictment for attempting to set fire to a house, it appeared that the prosecutor was present at the examination before the magistrate, and proved that the prisoner made a statement, which was taken down and read over to her by the magistrate, and to which she made her mark, and the magistrate signed it, and the prosecutor knew the examination to be the same, as his own deposition, with his signature to it, was on the same piece of paper; Coltman, J., held that the statement might be given in evidence, without calling either the magistrate or his clerk. (*n*)

In serious cases the magistrate or his clerk should be present.

In all serious cases, however, it is expedient, as a matter of caution, that the magistrate or his clerk should be called to prove the correctness of what he took down, although it is not strictly necessary. (*o*)

So also where there are erasures or interlineations.

And if there be any erasures or interlineations in the examination, the person who took it down ought to be called to explain them. Upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner, by evidence of the handwriting of the latter, and by calling a person who was present at the examination; but it appearing that there were certain interlineations in the examination; Lord Lyndhurst said he thought that the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. (*p*)

As to the mode of giving the examination in evidence.

Where the examination of a prisoner has been regularly taken, and is regularly proved, it is read by the officer of the Court. But where the written statement of a prisoner before a magistrate is inadmissible by reason of any irregularity in the taking of it; (*q*) or because the prisoner neither assents to the correctness of the examination nor signs it; (*r*) the proper course is for the magistrate, (*s*) or his clerk, (*t*) who took down the statement in writing, to refresh his memory with it, and state what the prisoner said.

So where a statement is made before the time for taking the prisoner's examination, the proper course is for the person who took it down, to give evidence of what the prisoner said, refreshing his memory with his notes. (*u*)

(*l*) Rex *v.* Rees, 7 C. & P. 568, July 26, 1836.

(*m*) Rex *v.* Reading, 7 C. & P. 649, Dec. 16, 1836.

(*n*) Reg. *v.* Hearn, 1 Car. & Mars. 109, 1841.

(*o*) See Reg. *v.* Pikesley, 9 C. & P. 124, *post*, p. 898, and Reg. *v.* Wilshaw, 1 C. & Mars. 145, *post*, p. 898.

(*p*) Brogan's case, Rosc. Cr. Ev. 60, 1834. In Reg. *v.* Dwyers and others, tried for murder, Gloucester Sum. Ass. 1843, the deposition of the deceased was proved, and the name of one prisoner was interlined, and the clerk who proved the deposition explained that the deceased in the first instance did not speak to that prisoner, but after the examination had been all taken down, on his attention being directed to that prisoner, he identified him as one of the persons who had injured him. A stronger instance to show the necessity of the clerk's attending could hardly be conceived. C. S. G.

(*q*) Rex *v.* Reed, M. & M. 403, Tindal, C. J. Rex *v.* Bell, 5 C. & P. 162, *ante*, p. 884.

(*r*) See the cases, *ante*, p. 881.

(*s*) Rex *v.* Jones, Carr. Sup. 13. 7 C. & P. 239, note (*a*), *ante*, p. 881, note (*n*).

(*t*) Rex *v.* Watkins, 4 C. & P. 550, note (*b*), Bosanquet, J.

(*u*) Rex *v.* Bell, 5 C. & P. 162, *ante*, p. 884.

But if a statement is signed by a prisoner, or he makes his mark to it, it is the proper course for the officer of the Court to read it. (u)

Where the examination of a prisoner refers to the deposition of a witness.

Where the examination of a prisoner, put in on the part of the prosecution, expressly refers to the deposition of a witness, the prisoner has a right to have that deposition read in explanation of his examination. On the part of the prosecution, the examination of a defendant, taken before a magistrate, was put in, and in it the defendant stated, that the deposition of a witness, which had been taken at the same time, and before the same magistrate, was correct. Patteson, J., held that the deposition of the witness might be put in and read as a part of the defendant's statement, although the witness had been examined on the trial as a witness for the prosecution, and although possibly his deposition might have the effect of contradicting his evidence on the trial. (v) But unless the examination of a prisoner specifically refers to the deposition of a particular witness, putting in the examination of the prisoner on the part of the prosecution, will not entitle the prisoner to have any of the depositions read, although they were all taken before the prisoner made his statement. (w)

The circumstance of some part of the prisoner's statement being omitted by the magistrate, would not, it seems, render the examination inadmissible if it had been read over to the prisoner, and he has assented to its correctness. (x)

The prisoner is not to be precluded from shewing, if he can, that omissions have been made to his prejudice: for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions. Even the prisoner's signature ought not to estop him from proving, if he can, such omissions; if the truth is, that omissions were made to his prejudice, the fact should be proved, and the prejudice no longer suffered to exist. (y)

SECTION III.

Depositions.

Depositions before magistrates.

As examinations and depositions before magistrates originate from the same acts of Parliament, and are in some respects guided by the same decisions, it may be proper to consider the latter immediately after the former. From what has already been mentioned, (a) res-

(u) Rex v. Swatkins, 4 C. & P. 548, Patteson, J.

(v) Rex v. John, 7 C. & P. 324. The report does not state at whose instance the deposition was put in.

(w) Rex v. Pearson, 7 C. & P. 671. Law, Recorder, after consulting Patteson and Williams, Js.

(x) Joy, 93, citing Milward v. Forbes, 4 Esp. 170, where an examination of the defendant before commissioners of bankrupt was admitted in evidence by Lord Ellenborough, C. J., although it was proved that the defendant had said more than was taken down, the commissioners having taken down only what they considered relevant, upon the ground that the party having signed it after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him.

(y) 2 Phill. Ev. 85.

(a) *Ante*, p. 872, *et seq.*

pecting the examinations before magistrates, it has appeared that by the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony: and that by the 7 Geo. 4, c. 64, these statutes are repealed and re-enacted with an extension to misdemeanors, and the improvements already pointed out.

1 & 2 P. & M., c. 13.
2 & 3 P. & M., c. 10.
7 Geo. 4, c. 64.

Although there is nothing in these statutes providing that the depositions taken under them shall in any case be evidence, (*b*) yet from the construction of the two former by the highest authorities, and upon general principles of evidence it may now be considered as a settled rule, that if it be previously proved satisfactorily to the Court, that the witness is dead (*c*) or that he has been kept away by the practices of the prisoner, (*d*) his deposition may be given in evidence on the trial of an indictment: provided the deposition were duly taken upon oath (*e*) in the presence of the prisoner, when charged before a magistrate. And it has been said that if a witness is prevented from attending by sickness or is unable to travel, his deposition may be given in evidence. (*ee*) But it has been since decided that if a witness be too ill to attend the trial, but there is a probability that he may recover, his deposition is not admissible. The prosecutrix was so near her confinement as to be unable to attend at the assizes, and it was proposed to prove her deposition before the magistrate, and 1 *Hale*, 586, *Kel.* 55, were relied upon; Patteson, J., "That has been doubted by Mr. *Starkie* (*f*), and I think the evidence is not admissible" (*g*)

Witness dead or kept away by the prisoner.

Witness ill at the time of the trial.

But if there be a permanent inability to attend (*h*), as if the witness be so ill that there is no probability that he will ever be able to attend, his deposition is admissible. The prosecutrix was an old woman bed-ridden, and there was no probability that she would ever be able to leave her house again, and Gurney, B., allowed her examination to be read, saying, there would be no use in putting off the trial till another assizes, as there was no likelihood of her ever being able to attend. (*i*) Where a witness, who was examined before the magistrate, and had been bound over to give evidence, had since gone to

Permanent inability to attend.

(*b*) Mr. Starkie in a very able note to the case of Rex *v.* Smith, 2 N. P. C. 211, observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence upon the trials of felons. But the taking of them having been sanctioned by the legislature, they became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extrajudicial.*

(*c*) 1 Hale, P. C. 305. Bull. N. P. 242. 2 Phill. Ev. 71.

(*d*) Harrison's case, 4 St. Tr. 492, 5th Res. in Lord Morley's case, Kelyng, 55. Fost. Disc. 337.

(*e*) The statutes of Ph. & M. did not in terms require the informations to be taken upon oath: though it was considered necessarily incidental to the duty of a magistrate so to take them. But by the 7 Geo. 4, c. 64, ss. 2, 3, they are expressly required to be upon oath.

(*ee*) 2 Phill. Ev. 71. 1 Hale, P. C. 305. 2 Hale, P. C. 52. However this was doubted, upon very sensible grounds, by Mr. Starkie, 2 Evid. 383. In Lord Morley's case, *supra*, 6th Res., it was held that it was not sufficient to prove that all endeavours have been used in vain to find the witness.

(*f*) 2 Stark. Ev. 383.

(*g*) Rex *v.* Savage, 5 C. & P. 143, and MSS. C. S. G. The proper course in such cases is to move to postpone the trial upon an affidavit of the illness of the witness. Rex *v.* Osborn, 7 C. & P. 799, Bolland, B. C. S. G.

(*h*) Per Tindal, C. J. Rex *v.* Edmunds, 6 C. & P. 164.

(*i*) Rex *v.* Hogg, 6 C. & P. 176. Reg. *v.* Wilshaw, 1 C. & Mars. 145, Coltman, J., *post*, p. 898.

sea, and was not present at the trial, it was held that his deposition was not admissible, but upon the counsel for the prosecution consenting that it should be read, the Court were of opinion that it might be given in evidence. (*h*)

Witness insane at the time of the trial.

Where a witness, who was examined before the magistrate, is insane at the time of the trial, he is considered as in the same state as if he were dead, and his deposition may be given in evidence. (*i*) But in such a case it should be shown that he was not insane at the time his deposition was taken. Where on an indictment for murder it was clearly proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously, but there was no evidence as to the state of the mind of the witness at the time when he was examined before the coroner; and it was proposed to give his deposition in evidence, Park, J. A. J., said, "there is one positive objection, that the witness might be insane when he was examined before the coroner"; and the deposition was rejected. (*j*) But where on an indictment for night poaching and assaulting W. Rickards, it appeared that he was suffering from delirium and depression of spirits in consequence of a blow on the head, and his intellects were affected by the injury, but it was probable that he would recover; it was held that if he was actually insane at the time of the trial, his deposition taken in the presence of the defendant was receivable in evidence, although the insanity might be temporary; but the medical witness being unable to state that he was at the time of the trial in a state of insanity, the deposition was rejected. (*k*)

Witness at sea at the time of the trial.

It has been said that the deposition of a witness beyond the sea was admissible (*l*), but it has recently been held that the deposition of a witness, who had been examined before the magistrate, and who had since gone to sea, is inadmissible. (*m*)

Deposition must be duly taken,

It is a general principle of evidence, that to render a deposition of any kind admissible against a party, it must appear to have been taken on oath in a judicial proceeding, and that the party should have had an opportunity to cross-examine the witness. (*n*) Hence a deposition before a magistrate should be shewn to have been taken conformably to the statute, for otherwise it would be extrajudicial, (*o*)

and in the presence of prisoner.

and to have been taken in the presence of the prisoner, otherwise he could have had no opportunity for cross-examination. Thus in *Woodcock's case* (who was tried for the murder of his wife) where the magistrate, at the request of the overseers, visited the deceased, who had received a mortal blow, and was then at the poor house, and there in the absence of the prisoner, took her examination upon oath, and reduced it into writing; it was held by Eyre, C. B., that

(*h*) Reg. *v.* Hagan, 8 C. & P. 167, Bolland, B., and Coltman, J.

(*i*) Rex *v.* Eriswell, 3 T. R. 707, per Lord Kenyon, C. J., Ashurst, J., and Grose, J.

(*j*) Rex *v.* Charles Wall, Worcester Sum. Ass. 1830. See this case more fully stated, *post*, p. 893. In Rex *v.* Eriswell, *supra*, the pauper, whose examination was in question, had become insane after the examination was taken.

(*k*) Reg. *v.* Marshall, 1 C. & Mars. 147, Ludlow, Serjt., after consulting Coltman, J. It is not stated in the report when the blow on the head was inflicted.

(*l*) Bull. N. P. 242, and see *ante*, p. 817.

(*m*) Reg. *v.* Hagan, 8 C. & P. 167, Bolland, B., and Coltman, J.

(*n*) By Hullock, B., in Attorney General *v.* Davison, 1 M'Clel. & Y. 169.

(*o*) Rex *v.* Smith, 2 Stark. N. P. C. 211, note (*a*).

such an examination was not admissible as a deposition; for it was not taken as the statute directs, in a case where the prisoner was brought before a magistrate in custody; the prisoner therefore had no opportunity of contradicting the facts it contained. (*p*) So in *Dingler's case* (*q*) where the magistrate, at the desire of the parish officers, went to the deceased at the Infirmary, to which she had been taken for the purpose of receiving medical assistance, and there in the absence of the prisoner (*r*) took her deposition upon oath, which was reduced into writing, and her mark was set to it; the Court, on the authority of *Woodcock's case*, held that the deposition was inadmissible. (*s*) And it has also been held since the 7 Geo. 4, c. 64, that a deposition is inadmissible if it be taken in the absence of the prisoner. (*t*) But where the greater part of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the prisoner's presence; and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner, who was asked whether he chose to put any questions; it was held by Richards, C. B., that the deposition was admissible, and a great majority of the Judges upon a case reserved were of opinion that the evidence had been properly received. (*u*) So where upon an indictment against the prisoner as an accessory before the fact for inciting S. Wormsley to murder herself, it appeared that Wormsley was sworn, and her examination taken in writing in the absence of the prisoner, but that she was afterwards resworn in his presence, the deposition repeated, and she said it was all true, and that she had made her mark to it. The prisoner then put some questions to the deceased, and the magistrate's clerk swore that a memorandum at the foot of the deposition contained the substance of every question put and answer given; that the memorandum at the foot of the deposition was written on the following morning by the clerk at his office in the presence of

Dingler's case.

Smith's case.

Russell's case.

(*p*) 1 Leach, 500. It was admitted, however, as a dying declaration.

(*q*) 2 Leach, 561.

(*r*) It may be remarked that in these two cases, independently of the absence of the prisoner, the deceased being then alive, the charge of murder could not have been preferred: and as the statutes did not at that time extend to misdemeanors, the depositions might have been objected to as taken extra-judicially; but in Radbourne's case, 1 Leach, 457, a deposition of the deceased taken in the prisoner's presence was held by the twelve Judges admissible on the trial for murder.

(*s*) In addition to these authorities, may be mentioned the case of Rex *v.* Paine, 1 Salk. 281. S. C. 5 Mod. 163, cited by Lord Kenyon in Rex *v.* Eriswell, 3 T. R. 722, where upon a conference between the Judges of the K. B. and C. P., it was held that the deposition of a deceased witness was inadmissible, "the defendant not being present when they were taken before the mayor and so had lost the benefit of cross-examination." It is remarkable, that in the above mentioned case of Rex *v.* Eriswell, Grose, J., and Buller, J., were of opinion that depositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, might be read, and the latter Judge said it had been so determined by all the Judges in Radbourne's case. But on reference to the report of that case in 1 Leach, 457, it will be seen that the depositions were taken in the presence of the prisoner.

(*t*) Errington's case, 2 Lew. 142, Patteson, J.

(*u*) Rex *v.* Smith, Russ. & Ry. C. C. R. 339. S. C. 2 Stark. N. P. C. 208. Holt, N. P. C. 614. In a previous case, Rex *v.* Forbes, Holt, N. P. C. 599, where the constable stated, upon producing the deposition, that the prisoner was not present till a certain part of the deposition, distinguished by a cross, at which period he was introduced and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner, Chambre, J., refused to admit that part of the deposition previous to the mark.

the magistrate. The examination was objected to, as inadmissible under the 7 Geo. 4, c. 64, s. 2, being taken upon oath; but Vaughan, B., allowed it to be read, and also the interrogation of her by the prisoner, and her answer, which was also objected to. And upon a case reserved the Judges were clearly of opinion that the deposition was admissible. (*v*)

Different rule as to depositions before a coroner.

In this respect there is a very striking difference between depositions before a magistrate and before a coroner; for not only has it been settled, that if any witnesses who have been examined before the coroner are dead or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions may be read on the trial of the prisoner, (*w*) but the prevailing opinion seems to be that they are equally admissible *though the prisoner may have been absent at the time of taking the inquisition.* (*x*) The reasons given for this distinction usually are, that the examination before the coroner is a transaction of notoriety to which every one has right of access; (*y*) and that the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be duly and impartially taken. (*z*) But these reasons and the authorities for the doctrine are certainly not at all satisfactory, and (as it has been remarked by a very sensible writer, (*a*) who has collected and commented on the cases,) since the distinction is not warranted by the language of the legislature and is unfounded on principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be admitted. (*b*)

(*v*) Rex *v.* Russell, R. & M. C. C. R. 356, *ante*, vol. 1, p. 40. The objection to the deposition was founded upon the fallacy of treating it as an *examination* of a prisoner, and of applying the rule that an examination of a prisoner upon oath is not admissible against *such* prisoner, to the deposition of a prisoner taken on oath, and used as evidence against *another* prisoner, in whose presence it was taken. C. S. G.

(*w*) Lord Morley's case, Kel. 55. Thatcher's case, Sir T. Jones, 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124. Rex *v.* Stockley, 1 East, P. C. c. 5, s. 78, p. 310, *ante*, vol. 1, p. 620.

(*x*) 1 Phill. Ev. 372, 7th ed. Bull. N. P. 242.

(*y*) 3 T. R. 722. 1 Phill. Ev. 373, 7th ed., but in the case of Garnett *v.* Ferrand, 6 B. & C. 611; the Court expressed an opinion that the coroner might exclude particular persons, if he thought it necessary and proper so to do.

(*z*) Bull. N. P. 242.

(*a*) 2 Stark. Ev. 385

(*b*) The 1 & 2 Ph. & Mary, c. 13, s. 5, enacted, "that every coroner, upon any inquisition before him *found*, whereby any person shall be indicted for murder or manslaughter, or as accessory before the murder or manslaughter, shall put in writing *the effect of the evidence* given to the jury before him, being material: and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had." And by the 7 Geo. 4, c. 64, s. 4, (repealing the above-mentioned statute) it is enacted, "that every coroner, upon any inquisition before him *taken*, whereby any person shall be indicted for manslaughter or murder, or as an accessory before the fact, shall put in writing *the evidence* given to the jury before him, or as much thereof as shall be material; and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next Court of Oyer and Terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, *and every such coroner shall certify and subscribe the same evidence*, and all such recognizances, and also the inquisition before him taken and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court." It will be observed that the principal alterations enacted by the latter statute are, that the coroner is to put in writing the evidence instead of the effect of the evidence, as directed by the former: and that he is required to subscribe the evidence when taken.

and another learned writer, having formerly expressed a different opinion, observes, in his last edition, that "there appears to be no satisfactory reason why such a deposition should at the trial be received in evidence, under circumstances which would render every other kind of judicial depositions inadmissible. And it seems an unreasonable and anomalous proposition to hold that, on a trial for murder upon the coroner's inquest, a deposition taken before him in the absence of the prisoner, is receivable in evidence; but that if the trial take place on a bill of indictment, a deposition so taken before a magistrate, is not receivable. The same principle which excludes in the one case, ought, if it is just and sound, to exclude also in the other." (*c*)

Distinction between the position of a prisoner before a coroner and a magistrate.

A marked distinction exists between the situation in which a prisoner stands, when he is before a magistrate on a charge of felony or misdemeanor, and when he is present during the time a coroner is holding an inquest; and this distinction seems to have been acted upon in the following case. Upon an indictment for murder it was proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously; part of his deposition had been taken in the absence of the prisoner, and part in his presence, but the whole was read over in his presence; and it was proposed to give this deposition in evidence, and 1 *Phill. Ev.* 369, 373, referred to, in order to show that the deposition was admissible where the witness had become insane; and *Rex* v. *Smith*, (*d*) to show that reading the whole over in the presence of the prisoner, rendered it admissible. Park, J. A. J., "There is one positive objection, that the witness might be insane when he was examined before the coroner. Secondly, the 7 Geo. 4, c. 64, makes a strong distinction between magistrates and coroners. There is a charge made before a magistrate; but I cannot call it a charge before a coroner. In *Rex* v. *Smith* the deposition was taken in a common felony, and there the question was, whether a deposition taken on one charge could be evidence on another. I will not receive this deposition. I think it safer not to do so." (*e*)

(*c*) 2 Phill. Ev. 75. In the 7th ed., vol. 1, p. 372, *et seq.*, the learned author had contended for the admissibility of such depositions. Where in an action brought by the plaintiff against the defendant for running down his barge on the Thames, it appeared that a witness had been examined before the coroner on the inquiry concerning the death of the plaintiff's son, and since his examination had gone abroad; it was proposed on the part of the defendant to read his deposition, taken on oath, before the coroner; and this was objected to on the part of the plaintiff; Coleridge, J., was of opinion that under the circumstances the deposition ought to be admitted, and being properly proved, it was read in evidence. Sills *v.* Brown, 9 C. & P. 601. The report does not state whether the deposition was taken in the presence of the plaintiff, but probably it was, as he was the father of the deceased. It is probable, also, that the witness was produced by the father as prosecutor; but even if that were so, it is conceived that that would not make his deposition evidence against the father, the distinction being that an affidavit used by a party is evidence of the facts contained in it against such party, but neither the deposition nor the *vivâ voce* evidence of a witness is evidence against the party calling the witness. Brickell *v.* Hulse, 7 A. & E. 454. Gardner *v.* Moult, 10 A. & E. 464. C. S. G.

(*d*) *Infra*, note (*f*).

(*e*) Rex *v.* Charles Wall, Worcester Sum. Ass. 1830, MSS. C. S. G. The distinction taken by the learned Judge seems deserving much consideration. The ground on which a deposition before a magistrate is admissible is that the prisoner being there to answer a charge, has the *right* to cross-examine the witnesses. In many cases before coroners, even if the prisoner be present, there is no charge, and perhaps no suspicion, against him, and it may be doubted whether in strictness under any circumstances he has a *right* to cross-

Depositions admissible upon trial of a different offence.

If the depositions were duly taken in conformity to the statute, they are receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for any other offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard. (*f*)

Deposition need not be signed by deponent.

The statute does not require that the deposition should be signed by the person making it; nor is such signature necessary for its admissibility. Upon an indictment for a rape, all the Judges were of opinion that the deposition of a girl, since deceased, upon whom the offence had been committed, taken on oath before the committing magistrate, might be read in evidence, although it was not signed by her. (*g*)

Must be by magistrate.

The magistrate himself, however, by the 7 Geo. 4, c. 64, ss. 2 & 3, is required to subscribe the examinations and informations taken by him.

One signature to several depositions on the same sheet of paper.

Where the deposition of a prosecutor was regularly taken and read over in the presence of a prisoner, and he had an opportunity of cross-examining the prosecutor, and two other witnesses were examined at the same time, and the depositions of all three were on the same sheet of paper, the prosecutor's being first, and there was only one signature of the magistrate, which was at the end of the last deposition, but not in terms confined to it, being "sworn before me;" it was held that after the proof by the magistrate's clerk of the manner in which it had been taken, the deposition of the prosecutor was admissible. (*h*)

On different sheets.

But where one Winter, who had been examined and cross-examined before the magistrates, died before the trial, and his deposition was duly signed by the magistrates, but the cross-examination, which had taken place on a subsequent day, was not signed by the magistrates, but the depositions of two other witnesses on the prisoner's behalf, which had been taken at the same time with the cross-examination of Winter, were pinned up along with it, and the last sheet of the whole was signed by the magistrates; Alderson, B., after consulting Parke, B., said, if the magistrate's clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he must receive the whole in evidence, but neither the magistrate's clerk nor one of the magistrates being able so to state, the deposition as well as the cross-examination was rejected, although the magistrate stated that all the sheets were lying on the table when he signed them. (*i*)

examine the witnesses; and if there were no charge in fact made against him, his interference would be an unwarranted interruption of the proceedings. See the observations of Parke, B., in Melen *v.* Andrews, *ante*, p. 865. C. S. G.

(*f*) Rex *v.* Smith, Russ. & Ry. C.C.R. 339. S. C. 2 Stark. N. P. C. 208. Eleven of the Judges met. Abbott, J., thought the evidence ought not to have been received. Dallas, J., Graham, B., Richards, C. B., and Lord Ellenborough stated that they should have doubted of the admissibility of the evidence, but for the case of Rex *v.* Radbourne, 1 Leach, 457, see *supra*, p. 891, note (*r*).

(*g*) Rex *v.* Flemming, 2 Leach, 854, and see Rex *v.* Russell, *ante*, p. 892.

(*h*) Reg. *v.* Osborne, 8 C. & P. 113. Coleridge, J., after consulting Lord Abinger, C. B., said, "If it had been the case of an affidavit, it would have been bad, but that is on account of an arbitrary rule."

(*i*) Reg. *v.* France, 2 M. & Rob 207.

And since, as in the case of examinations, it will be intended that the magistrate, according to his duty, took the deposition in writing, parol evidence of the information is inadmissible, till it is shown that it was not reduced to writing. (*j*)

Parol evidence of a deposition.

"If the magistrate took the information regularly upon oath, in the presence of the prisoner, and subscribed it, but instead of taking all that was material, as he ought to have done in pursuance of the statute, omitted some material parts of the witness's statement, parol evidence of the parts omitted cannot be received: for the statement which has been omitted, though upon oath, and open to cross-examination, cannot be received as part of a judicial proceeding, the magistrate not having proceeded in conformity with the statutes, nor can such supplementary evidence be received upon general principles. (*k*) In the case of *Rex* v. *Thornton*, (*l*) on a trial for murder, Mr. J. Holroyd ruled that parol evidence could not be admitted, either to add to or vary a deposition." (*m*)

Evidence on the part of the Crown is not admissible to add to or vary a deposition.

Where on an indictment for perjury, alleged to have been committed on the hearing before a magistrate of an information for sporting without a game certificate, to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in; Park, J. A. J., held that a witness could not be called to depose to other things stated by the defendant when he was examined as a witness before the magistrate, but which were not contained in the written deposition. (*n*)

(*j*) Rex *v.* Fearshire, 1 Leach, 202.

(*k*) 2 Phill. Ev. 72. This paragraph was not in the 7th ed., where Rex *v.* Thornton is cited in the same brief manner as in the last ed. C. S. G.

(*l*) Warwick Sum. Ass. 1817. No such point appears to have occurred on this trial as reported by Mr. E. Holroyd.

(*m*) 2 Phill. Ev. 72. The case of Rex *v.* Thornton is so briefly stated that it is hardly possible to ascertain with precision what the ruling of the very learned Judge was. If the evidence were offered to contradict the deposition, it would seem to be properly rejected. If it were to add matters not contained in it, the decision seems questionable after the decision of Rex *v.* Harris, *ante*, p. 876, which is a stronger case. As the magistrate in taking depositions is at liberty to put only so much in writing as shall be material, there is no presumption that he has put down everything that the witness may have said; and instances so frequently occur, in which many things, which appeared before the magistrates perfectly immaterial, prove very important on the trial, that it may well deserve further consideration, if such a question were to arise, whether evidence were not admissible on the part of the prosecution to add to a deposition. C. S. G.

(*n*) Rex *v.* Wylde, 6 C. & P. 380. See *ante*, p. 666, note (*n*), and Rex *v.* Edmunds, 6 C. & P. 164, *ante*, p. 866. With reference to cases where the magistrate has not taken the evidence of a witness in writing, Mr. Phillipps observes, "if the magistrate has not taken in writing the information of a witness, it is clear that no proof can be admitted after his death of what he said before the magistrate; or if the magistrate took the information in writing but irregularly, as for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that after the witness's death parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with; the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evidence of a secondary or inferior nature." In this passage (which does not appear in the 7th edition), the observations must be taken to apply to "an examination taken in the presence of the prisoner," and taking them so to apply, it may admit of considerable doubt whether they are well founded. The deposition of a witness is not admissible because it is in writing under the statute, but because it is taken in the presence of the prisoner, and he has had an opportunity of cross-examining the witness; and it is conceived that at common law the rule is well established, that the testimony of a deceased witness, who has been examined upon oath on a former occasion in a proceeding between the same parties, on the same subject matter, is admissible in a subsequent proceeding between the same parties relative to the same subject matter, and may be proved by any one who heard the evidence given. And this rule extends to criminal as well as civil proceedings, see *ante*, p. 752.

Depositions in cases of treason.

Although the 7 Geo. 4, c. 64, s. 3, has extended the admissibility of depositions, taken before a justice, so as to include those taken on a charge of a misdemeanor, yet as regards high treason the law remains the same as under the statutes of Philip and Mary, and, therefore, on an indictment for treason they continue inadmissible. (*o*)

Deposition may be used to contradict witness.

One of the objects of passing these statutes was to enable the Judge and jury before whom the prisoner is tried, to see whether the evidence of the witnesses at the trial is consistent with the account given by them before the committing magistrate; (*p*) and therefore an information, when judicially and regularly taken, may be used on the part of the prisoner, when the informant gives his evidence at the trial, to contradict his testimony. Thus it was admitted in *Lord Stafford's case*, (*q*) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the deposition and the evidence given in Court *vivâ voce*. And not only on the part of the prisoner, but of the crown, depositions may be so used, even for the purpose of impeaching the credit of a witness called for the prosecution. Thus in *Oldroyd's case*, (*r*) where the counsel for the crown, by the direction of the Judge, unwillingly called the prisoner's mother, (her name being on the back of the indictment, as having been examined

Oldroyd's case.

Now in all criminal prosecutions the Queen is considered as the prosecutrix, both before the magistrate and on the trial. The parties, therefore, before the magistrate, and on the trial, are the same, and consequently the evidence of a deceased witness examined in the presence of the prisoner before the magistrate might, at common law, be proved by parol on the trial of the prisoner. But the statute having required the magistrate to put the evidence in writing, such writing is the best evidence of what the witness said. It is submitted, however, that in case no part of the evidence were taken down, parol evidence would be admissible of what the witness said. The statute has directed the examination of a prisoner to be taken in writing, and yet if that be not done parol evidence is admissible, because such parol evidence was admissible at common law. Lambe's case, 2 Leach, 552. The observations of the Judges in this case furnish a strong argument by analogy in support of the view here contended for. It might be further contended that what was said by a witness in the presence of a prisoner before a magistrate was admissible at common law, as a statement made in the prisoner's presence, to which he not only might reply, but which he was called upon expressly to answer. See Rex *v.* Edmunds, 6 C. & P. 164, where Tindal, C. J., admitted evidence of what a deceased prosecutor swore in the presence of the prisoner on an examination before a magistrate for committing the assault, from the effects of which the deceased died, "as producing an answer and like any other conversation." And see the observations of Parke, B., in Melen *v.* Andrews, *ante*, p. 865. C S. G.

(*o*) 2 Phill. Ev. 70. Fost. 337. 1 Hale, 306. The 9 Geo. 4, c. 30, s. 2, enacts, "that every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder."

(*p*) See the judgment delivered by Grose, J., in Lambe's case, 2 Leach, 558. 2 Phill. Ev. 76.

(*q*) 3 St. Tr. p. 131. 2 Phill. Ev. 76.

(*r*) Russ. & Ry. C. C. R. 88. In Wright *v.* Beckett, 1 M. & Rob. 414, Lord Denman, C. J., after citing this case, observed, "This decision does not incur the danger of collusion, as the parties who conducted the prosecution neither called nor contradicted the witness. But it proves that a former declaration may be given in evidence to contradict what the same witness has sworn to on the trial, notwithstanding the danger of that declaration being believed, and acted on as evidence in the cause; and it prepares the mind for considering the very question now before us. For the prosecutor would have undoubtedly been justified in expecting the evidence in court to agree with that given before the coroner, and in summoning the witness into the box with that expectation. If he had done so, and had heard her with astonishment gainsay the deposition from which he examined her, could he have been prevented from neutralising the evidence, and defeating the attempted fraud by laying that deposition before the jury." See the cases collected in the section "of impeaching the credit of witnesses."

by the grand jury,) and her evidence was in favour of the prisoner, Graham, B., ordered her deposition before the coroner to be read, for the purpose of affecting the credit of her testimony by showing its variance from the deposition. And the twelve Judges held, that it was competent for the Judge to do so: and Lord Ellenborough, C. J., and Mansfield, C. J., thought the prosecutor also had the same right.

Boyle's case.

And where a witness for the prosecution, on being examined, gave a different account of the transaction from what he had deposed to before the committing magistrate, and the counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to on the part of the prisoner; Bayley, J., after consulting Holroyd, J., admitted the proposed contradiction. (*s*) And so where a witness on the trial gave a different account of the transaction from that which she gave before the magistrate, Coleridge, J., on the application of the counsel for the prosecution, allowed the two depositions made by the witness before the magistrate to be identified as such, and then read to the witness, and she was examined upon them by the learned Judge. (*t*)

Hallett's case.

Tunnicliffe's case.

But where a witness, who had been examined before a magistrate, gave a statement in Court more favourable to the prisoners than that which he had made before the magistrate, and it was proposed on the part of the prosecution to put in his deposition, and *Oldroyd's case* was relied upon; it was objected that the opinion there expressed was extrajudicial, and that the counsel for the prosecution had no right to call a witness, and in case he gave evidence against the prosecution, to discredit him. Bolland, B., said "I do not think the case cited is an express authority. I agree that I can only look at the deposition as destroying the credit of the witness, and therefore I shall not allow the deposition to be read." (*u*)

Ball's case.

So where a witness called for the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house as stated by the prosecutor, and in order to do away with the effect of the evidence of the witness, which, if believed, disproved the whole case for the prosecution, it was proposed, on the part of the prosecution, to prove that the statements made by the witness before the magistrate, were wholly inconsistent with the account given at the trial; the evidence was rejected, and per Erskine, J., "You cannot put in evidence for the purpose of discrediting your own witness. You may call other witnesses to prove the facts denied by this witness, and incidentally contradict her, and show her to be unworthy of credit; but you cannot call a witness or give evidence not otherwise admissible for the purpose of discrediting your own witness." (*v*)

Depositions

Before depositions can be read against the prisoner, it has been

(*s*) Rex *v.* Boyle, cited in Wright *v.* Beckett, 1 M. & Rob. 422, by Lord Denman, C. J., who added, "I am bound to add that that eminent Judge has no remembrance of this decision, and find on debating the matter with him, that his present opinion is against it. But I cannot help thinking that Rex *v.* Oldroyd appeared to him when cited, as it does to me, a conclusive authority for the principle now under controversy."

(*t*) Reg. *v.* Hallett, 9 C. & P. 748.

(*u*) Rex *v.* Tunnicliffe, Stafford Spr. Ass. 1830, MSS. C. S. G. The learned Baron also refused to permit the clerk to the magistrate to prove that the deposition was correctly taken in order to give the learned Baron himself grounds for cross-examining the witness.

(*v*) Reg. *v.* Ball, 8 C. & P. 745, Erskine, J., after consulting Patteson, J.

before justice of peace, how proved.

said, that it must be proved by the justice or coroner who took them, or the clerk that wrote them, that they were truly taken. (*w*)

But it has been held that a deposition may be proved by any person who was present and saw it taken. The depositions in a capital case were proved to have been signed by the magistrate, but it appeared that not having any clerk he took them himself; and it being necessary to read them in evidence to contradict a witness; Parke, B., said, that in so serious a case it was very desirable that the magistrate himself should be present to prove the correctness of what he took down, although in point of law it was not absolutely necessary. (*x*) So where the prosecutor, being quite infirm and bedridden, and not likely ever to bear a journey to the assizes, a constable proved that he saw the magistrate take down what the prosecutor said in the presence of the prisoner, and that the deposition was all in the handwriting of the magistrate, except the cross at the bottom of it, which the constable saw the prosecutor make; and it was objected that the deposition ought not to be read without calling either the magistrate or his clerk; Coltman, J., "It is very proper, as a matter of caution, that the magistrate or his clerk should be called in all cases where it can be conveniently done, but I think it is not necessary in point of law." (*y*)

Proof of deposition in order to examine upon it.

Where it was proposed to prove the deposition of a witness in order to cross-examine her upon it, and neither the magistrate nor his clerk were at the assizes, and the witness denied her mark to the deposition; but a constable, who was present before the magistrate when the witness was examined, proved the signature of the magistrate, but was not sure that he saw the witness make her mark to it, though he recollected seeing the pen in her hand, and heard her deposition read over to her, and believed the deposition to be the same that was read over to her, and his own deposition immediately followed it; Coleridge, J., held that the deposition might be read to the witness to examine her upon it. (*z*)

As to the manner of taking down the evidence of the witnesses by magistrates.

The 7 Geo. 4, c. 64, s. 2, provides that magistrates shall take "the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as *much thereof as shall be material*, into writing." Consequently a magistrate is not bound by law to return all that is stated, but only all that is material to the felony. (*a*) However, since the passing of the Prisoners' Counsel Bill it has become of great importance that the depositions of witnesses should be as fully and accurately taken as they conveniently may be, in order that the witnesses may neither be liable to the imputation of having made a different statement in Court from what they made before the magistrate, nor of having stated facts in Court which were not mentioned before the magistrate. In a case where several witnesses were cross-examined, as to minute variances between their testimony in Court and their depositions taken before the magistrate; Parke, B., observed, "Magistrates are

(*w*) 2 Hale, P. C. c. 52, 284. See England's case, 2 Leach, 770, as to proof of depositions before coroners.

(*x*) Reg. *v.* Pikesley, 9 C. & P. 124.

(*y*) Reg. *v.* Wilshaw, 1 C. & Marsh. 145.

(*z*) Reg. *v.* Hallett, 9 C. & P. 748. Coleridge, J., said, "Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?"

(*a*) Per Alderson, B., Rex *v.* Coveney, 7 C. & P. 667.

required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto in many cases confined themselves to what they deemed material, but, in future, it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the Prisoner's Counsel Bill, has shown us how much time is occupied in endeavouring to establish contradictions between the testimony of witnesses and their depositions, in the omission of minute circumstances in their statements made before the magistrates, as well as in other particulars." (*b*)

Where a policeman stated a conversation between himself and a prisoner, which was material to the charge, and made against the prisoner, and stated that he had told the magistrate the same conversation, though it did not appear in the depositions; and the counsel for the prisoner complained of this as unfair, as it did not give the prisoner what the law intended it should, *viz.*, an account of the whole evidence against him given before the magistrate; Lord Denman, C. J., said, that he thought the observation well founded, with respect to the omission in the depositions, and that the magistrate ought to have returned all that took place before him with respect to the charge, as the object of the Legislature, in granting prisoners the use of the depositions, was to enable them to know what they had to answer on their trial. (*c*)

If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate, and returned to the Judge. (*d*)

Every deposition taken by a magistrate ought to be returned, whether the witness be bound over or not.

It is the duty of magistrates to return to the Court at which the prisoner is to be tried, all depositions that have been taken at all the examinations that have taken place respecting the offence which is to be the subject of the trial. Where a witness was examined before a magistrate several times: at the first examination, no person was specifically charged with the offence, but what was said was taken down in writing; and this witness was taken into custody, and while in custody as an accused person he made another statement, which was also taken down by the same magistrate; and on a subsequent day, the present prisoner having been apprehended, the witness was again examined as a witness; Alderson, B., observed, "I have none of these depositions but the last. Every one of them ought to have been returned to me, as it is of the last importance that the judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the Judge all the depositions that have been made at all the examinations that have taken place respecting the offence which is to be the subject of the trial." (*e*)

And it is equally the duty of the magistrate to return the depositions of witnesses who are not bound over; as, for instance, the

(*b*) Rex *v.* Thomas, 7 C. & P. 817.
(*c*) Rex *v.* Grady, 7 C. & P. 650.
(*d*) Rex *v.* Potter, 7 C. & P. 650, note. Gaselee, J., and Vaughan, B.
(*e*) Rex *v.* Simons, 6 C. & P. 540.

depositions of witnesses called by the prisoner to prove an *alibi.* (*f*) But if the deposition of a witness has been taken after the prisoner has been committed, and in his absence, such examination ought not to be returned *as one of the depositions,* for nothing should be returned *as a deposition* against a prisoner, unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition. (*g*)

Of the expediency of taking and returning the examination of the prisoner's witnesses.

It is highly expedient to the furtherance of the ends of justice, that whenever prisoners offer to produce witnesses before the magistrate, in answer to the charge made against them, such witnesses should be regularly examined on oath, and their statements taken down in writing, and returned with the depositions. Whether the evidence so adduced be true or false, it is very important that it should be received and taken down. If it be true, it may be so clear, positive and distinct as to explain or contradict the evidence adduced in support of the charge, in such a manner as completely to satisfy the magistrates that there is "no sufficient ground for judicial inquiry" into the guilt of the party charged; in which case he ought to be discharged; or the evidence "adduced on behalf of the party charged" may, in the opinion of the magistrates, "weaken the presumption" of the party's guilt, but there may "notwithstanding appear to them to be sufficient ground for judicial inquiry" into the party's guilt; in which case the magistrates should admit the prisoner to bail. (*h*) And even if the evidence so adduced should not produce either of these results, still it is important for the sake of the prisoner, that his witnesses should be examined, and their depositions returned, as he is thereby freed from the suggestion often made at the trial, that the case endeavoured to be proved before the jury has been concocted since the examination before the magistrate; and if, as has been suggested, (*i*) the deposition of a witness, examined on behalf of a prisoner before the magistrate, would be admissible in evidence for the prisoner on his trial, in case of the death of such witness, it is but reasonable that the prisoner should have the depositions of his witnesses taken, in order to be used in case of such an event. On the other hand, if the evidence adduced be false, it is essential for the ends of justice that it should be heard and taken down, in order that the prosecutor may have the means before the trial of investigating the facts deposed to, and the opportunity of testing the statements of the witnesses, by comparing those made on the trial with those made before the magistrate; and, moreover, the taking the depositions would serve as a

(*f*) Rex *v.* Fuller, 7 C. & P. 269, Vaughan, J.

(*g*) Per Lord Denman, C. J., Reg. *v.* Arnold, 8 C. & P. 621. Strictly speaking, the words of the very learned Chief Justice only show that such an examination should not be returned AS a *deposition*, and it may perhaps be going too far to infer from them that such a statement should not be returned at all. It is conceived if the examination, however irregularly taken, were signed by the witness, it might be used for the purpose of contradicting him in the same way as any other instrument signed by him. It is conceived that magistrates have no jurisdiction to administer an oath *after a prisoner has been committed,* and in his absence, and that it may admit of doubt whether the administering such an oath would not render a magistrate liable to indictment under the 5 & 6 Wm. 4, c. 62, s. 13. See Reg. *v.* Nott, 1 C. & Marr. 288, *ante*, p. 673. Woodcock's case, 1 Leach, 500, and the judgment of Grose, J., in Rex *v.* Eriswell, 3 T. R. 707. C. S. G.

(*h*) See the 7 Geo 4, c. 64, s. 1, *ante*, p. 873, note (*e*), which shows what the duties of magistrates are in these circumstances.

(*i*) See the reporters' note, 7 C. & P. 270.

check upon the prisoner, against setting up a different defence on the trial, and upon the witnesses against improving their tale between the time of their examination before the magistrate and the trial. (*i*)

Depositions upon interrogatories by consent.

Depositions are also sometimes taken in criminal cases, by the consent of the prosecutor and defendant, when a material witness is about to leave the country, or resides abroad. (*j*) But if the trial comes on before his departure, or after his return, the depositions cannot be read. (*k*)

Depositions in India.

Where an indictment or information is exhibited in the King's Bench, for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of the 13 Geo. 3, c. 63, s. 40 and s. 44. This statute enacts, that the Court may award a writ of mandamus to the Judges of the Courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the Court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *vivâ voce*.

In cases of offences committed by public servants abroad.

In the case of a prosecution for an offence committed abroad by any person employed in the public service, the depositions of witnesses resident abroad may be obtained in the way pointed out by the 42 Geo. 3, c. 85.

(*i*) Among the numerous cases which have given rise to these remarks, the following may be mentioned: A prisoner was indicted for stealing a number of watches at Cheltenham; when taken before the magistrates, he produced a number of witnesses from London, and proposed to have them examined; this was refused; and upon the trial he produced the same witnesses, and their evidence, if true, proved that at the time the watches were stolen, the prisoner and the witnesses were dining at a particular house in London, keeping the wedding day of the occupier of the house; on the part of the prosecution nothing was known of the witnesses or the house, and consequently there was little means for testing their credibility; the result was that the prisoner was acquitted; and in a short time afterwards it was well ascertained that the whole story was a fabrication, and might easily have been proved on the trial to have been such, if it had been known that such a defence had been intended, and that must have been known if the witnesses had been examined before the magistrates. C. S. G.

(*j*) Rex *v.* Morphew, 2 M. & S. 602. The Court of K. B. allowed them to be read, on an indictment for perjury, by the consent of the defendant. Anon. 2 Chit. R. 199.

(*k*) Tidd. 362. 2 Phill. Ev. 94.

CHAPTER THE FIFTH.

OF WITNESSES.—WHAT FACTS WITNESSES MAY DISCLOSE, AND WHAT ARE PRIVILEGED COMMUNICATIONS.—HOW WITNESSES ARE TO BE EXAMINED.—HOW THE CREDIT OF WITNESSES MAY BE IMPEACHED.—HOW MANY WITNESSES ARE SUFFICIENT.—HOW THE ATTENDANCE OF WITNESSES IS TO BE COMPELLED AND REMUNERATED.—OF ACCOMPLICES.—AND WHAT WITNESSES ARE COMPETENT TO GIVE EVIDENCE.

SECTION I.

Of Privileged Communications, and other Matters which a Witness may not Disclose.

Privileged communications.

A witness is to be sworn to speak the truth, the *whole* truth, and nothing but the truth. But this form of oath, absolute as it seems, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge, which, by the law of the land, founded on considerations of justice, and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his attorney, solicitor, or counsel, and matters connected with the government of the country. (*a*)

Between client and attorney, or counsel.

The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause

(*a*) It seems, however, to have once been thought necessary to vary the form of the oath on an occasion of this sort. In the case of Spark *v.* Middleton, 12 Vin. Abr. Ev. B. a, 4, p. 38. 1 Keb. 505, Mr. Aylott having been counsel for the defendant, desired to be excused to be sworn on the general oath as witness for the plaintiff to give the whole truth in evidence, which the Court after some dispute, granted, and that he should only reveal such things as he either knew before he was counsel, or that came to his knowledge since by other persons; and the particulars to which he was to be sworn, were particularly proposed, *viz.*, what he knew concerning the will in question; whether he knew anything of his own knowledge.

in which they were engaged is entirely concluded. (*b*) The privilege of not being examined on such subjects is the privilege of the client, and not of the attorney or counsel; (*c*) and it never ceases. "It is not sufficient," said Mr. J. Buller, (*d*) "to say that the cause is at an end: the mouth of such a person is shut for ever." And it makes no difference that the client is not in any shape party to the cause before the Court. (*e*)

Rule confined to legal advisers.

The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. (*f*) No other, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. (*g*) Thus, where the prisoner, being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, that confession was permitted by Buller, J., to be given in evidence on the trial, and the prisoner was convicted and executed. (*h*) So a confession to a Popish priest has been held not to be privileged. (*hh*) So a banker, (*i*) steward, servant, or private friend, is bound to disclose a communication, however confidential. (*j*) And in a case where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office, not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an act of Parliament, it was held that he was bound to give his testimony; and that the evidence which a witness was called upon to give in a court of justice, was to be considered as an implied exception in the act. (*k*) An arbitrator cannot be permitted to disclose, in an action for a malicious holding to bail, what transpired before him upon the examination of the parties themselves, or on an inspection of the plaintiff's books, upon the principle that the parties themselves could not have been examined in the former cause, nor the plaintiff compelled to produce his books; (*l*)

Arbitrator.

(*b*) Lord Say and Seale's case, 10 Mod. 41. Wilson *v.* Rastall, 4 Term Rep. 753, in the judgment of Buller, J. Sloman *v.* Herne, 2 Esp. N. P. C. 695. Rex *v.* Withers, 2 Campb. 578. Parkhurst *v.* Lowten, 2 Swanst. 194, 221. Richards *v.* Jackson, 18 Ves. 474.

(*c*) 10 Mod. 41. Bull. N. P. 284. But if the client waive his privilege, the witness may be examined. Merle *v.* More, R. & M. N. P. C. 390. But he is not considered as waiving it by calling his attorney as a witness. 1 Phill. Ev. 163, citing Waldron *v.* Ward, Styl. 449. Vaillant *v.* Dodemead, 2 Atk. 524.

(*d*) 4 T. R. 759.

(*e*) Rex *v.* Withers, 2 Campb 578.

(*f*) 4 T. R. 758. Rex *v.* Duchess of Kingston, 11 St. Tr. 246.

(*g*) Ibid.

(*h*) Rex *v.* Sparkes, cited in Du Barrè *v.* Livette, Peake R. 78, in which latter case Lord Kenyon said he should have paused before he admitted such evidence. But the point, that confessions to clergymen are not privileged, has been fully established by the recent decision in Rex *v.* Gilham, *ante*, p. 848. In Broad *v.* Pitt, 3 C. & P. 518, Best, C. J., after recognising this decision said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them, I shall receive them in evidence."

(*hh*) Butler *v.* Moore, M'Nall. Ev. 253, as cited 1 Phill. Ev. 165. Where a witness had taken an oath to a prisoner that he would not reveal what the prisoner should tell him; Patteson, J., said, "These oaths are very wrong and wicked, but still they are not binding, and every person except counsel and attornies is compellable to reveal what they may have heard; and counsel and attornies are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected;" and admitted the confession. Rex *v.* Shaw, 6 C. & P. 372.

(*i*) Lloyd *v.* Freshfield, 2 C. & P. 329.

(*j*) Vaillant *v.* Dodemead, 2 Atk. 524. Lord Falmouth *v.* Moss, 11 Price, 455.

(*k*) Lee *v.* Birrell, 3 Campb. 337.

(*l*) Habershon *v.* Troby, 3 Esp. 38, by Lord Kenyon.

but he may be called to prove what matters were claimed before him on a reference: (*m*) he cannot, however, be admitted or called on to give evidence of any concessions made by one party during the reference for making his peace, and getting rid of the suit, although, as to regular admissions by the parties, there is no objection to his testimony. (*n*) A person who acts as an interpreter, (*o*) or agent, (*p*) between the attorney and his client, or the attorney's clerk, (*q*) cannot be called on to reveal a confidential communication, for they stand precisely in the same situation as the attorney himself, and are considered as his organs. So a barrister's clerk cannot be called to prove his master's retainer. (*r*)

Interpreter.

Agent.

Clerk.

Person consulted as an attorney not being one.

It has been held, that a person who is consulted confidentially on the supposition of his being an attorney, when in fact he is not one, is compellable to answer. (*s*) And propositions which the attorney of one party has been professionally entrusted to make to another party, may be proved by another witness who was present when they were delivered. (*t*) And an attorney may be called upon by a plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. (*u*) And communications made to a person, by profession an attorney, but not employed as an attorney in the particular business which is the subject of inquiry, are not privileged, though they may have been made confidentially. (*v*)

Attorney not consulted as such.

Where two parties employ

Where two parties employ the same attorney, a communication by one to him in his common capacity is not privileged, but may be

(*m*) Martin *v.* Thornton, 4 Esp. 181, by Lord Alvanley.

(*n*) Slack *v.* Buchannan, Peake N.P.C. 6. Westlake *v.* Collard, Bull. N. P. 236. Martin *v.* Thornton, 4 Esp. 181. It is said in Bull. N. P. 284, that a trustee shall not be a witness to betray the trust; and a case is cited, Holt *v.* Tyrrel, where the defendant pleaded to debt on bond, the statute of buying and selling offices, and upon the trial, a witness was called to give an account upon what occasion the bond was given, and Lord C. J. Holt refused to admit him, because he was privately entrusted by both parties to make the bargain, and to keep it secret. But this is contrary to the later authorities, and may be considered to have been overruled by the Duchess of Kingston's case, and Wilson *v.* Rastall, *ubi supra.*

(*o*) Du Barrè *v.* Livette, Peake, N. P.C. 78.

(*p*) Parkins *v.* Hawkshaw, 2 Stark. 239.

(*q*) Taylor *v.* Forster, 2 C. & P. 195. See Webb *v.* Smith, 1 C. & P. 337.

(*r*) Foote *v.* Hayne, Ry. & Mood. N. P.C. 165.

(*s*) Fountain *v.* Young, 6 Esp. 113.

(*t*) Gainsford *v.* Grammar, 2 Campb. 10.

(*u*) Griffith *v.* Davies, 5 B. & Ad. 502. And per Parke, J., "This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In Gainsford *v.* Grammar, the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party."

(*v*) Wilson *v.* Rastall, 4 T. R. 753, 760, and see *post*, p. 910. In a trial at Nisi Prius, at Westminster, an attorney who had drawn an agreement between a sheriff and his under-sheriff, being produced to prove a corrupt agreement between them, was not compelled to discover the matter, and per Holt, C. J., it seems to be the same law of a scrivener; and he cited a case where upon a covenant to convey as counsel shall advise, *et consilium non dedit advisamentum* being pleaded, conveyances made by the advice of a scrivener being tendered and refused, was allowed to be good evidence upon this issue; for he is a counsel to a man, with whom he will advise, if he be instructed and educated in the way of practice, otherwise of a gentleman, parson, &c., Anonymous Skinn. 404. And in Turquand *v.* Knight, 2 M. & W. 98, it appeared that Knight had applied to an attorney to procure him a loan of money, and it was contended that where an attorney was employed to raise money, that was not such an employment as brought him within the rule; and that here he was acting as a scrivener only. Lord Abinger, C. B., said, "As to the point of this document being brought to him in the character of a scrivener, Lord Nottingham laid it down that he would not compel a scrivener to disclose the communications made to him." Harvey *v.* Clayton, 2 Swanst. 221 *n.*

used by the other. (*w*) And where a party employs an attorney who is also employed by the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. (*x*)

the same attorney.

It now remains to be considered, what sort of communications made to an attorney, solicitor, or counsel by his client are entitled to protection. A very eminent writer on the Law of Evidence (*y*) has laid it down, that the privilege of the client is not confined to cases only where he has employed the attorney in a suit or cause, but extends to all such communications as are made by him to the attorney in his professional character and with reference to professional business. And this opinion has been confirmed by the Court of Common Pleas, in the case of *Cromack* v. *Heathcote*, (*z*) where it was held that an attorney, to whom an application had been made to draw an assignment of goods which he declined to do, could not be allowed to disclose that circumstance, a question having arisen whether an assignment, subsequently drawn by another attorney, was fraudulent. And in that case a very learned person (*a*) said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to disclose any information thus communicated to him to the prejudice of his client. And Sir J. Leach, Vice Chancellor, in *Walker* v. *Wildman*, (*b*) considered the protection to extend to every communication made by the client to his counsel, or attorney, or solicitor, for professional purposes. (*c*) And although Lord Tenterden, C. J., on several occasions, both before and since the case of *Cromack* v. *Heathcote*, expressed at Nisi Prius, a contrary opinion; (*d*) yet it is now clearly settled that the privilege of professional confidence is not limited to cases, in which a suit is in contemplation, (*e*) but that the client's privilege extends much beyond communications in respect of a suit. (*f*) Thus, where it was proposed to ask an attorney whether a person had not applied to him to draw a conveyance; Parke, J., refused to allow the question to be asked, saying, "I am of opinion that the privilege applies to all cases, where the client applies to the attorney in his professional capacity, and an application to draw a deed is, I think, of that description." (*g*)

What sort of communications between attorney and client are privileged.

(*w*) Baugh *v.* Cradocke, 1 M. & Rob. 182, Patteson, J. Cleve *v.* Powel, 1 M. & Rob. 228, Lord Denman, C. J., saying, "either party has a right to the disclosure."

(*x*) Perry *v.* Smith, 9 M. & W. 681, per Parke, B.; in which case it was held that the same attorney having been employed upon the sale of an estate by the vendor and purchaser, a communication from the purchaser to the attorney, asking him for time to pay the purchase money, was not privileged. See Griffith *v.* Davies, per Parke, J., *ante*, p. 904, note (*u*).

(*y*) Phillipps on Evidence, 7th ed. 143.

(*z*) 2 Brod. & Bing. 4.

(*a*) Richardson, J.

(*b*) 6 Madd. 47.

(*c*) And from the cases of Brard *v.* Ackerman, 5 Esp. 120, and Robson *v.* Kemp, 5 Esp. 52, it appears that Lord Ellenborough, C.J., was of the same opinion.

(*d*) Wadsworth *v.* Hamshaw, 2 Brod. & Bing. 5, note (*a*). Manning's Dig. 374. Williams *v.* Mundie, R. & M. N. P. C. 34.

(*e*) 1 Phill. Ev. 168.

(*f*) The opinion of Lord Chancellor Brougham, Tindal, C. J., Lord Lyndhurst, C. B., and Parke, B., in Greenough *v.* Gaskell, Mylne & K. 98, as stated 4 B. & Ad. 876, per Parke, B.

(*g*) Doe *d.* Shellard *v.* Harris, 5 C. & P. 592. The learned Baron also held in the same case that the attorney could not be asked whether the party had asked his advice for a lawful or for an unlawful purpose, saying, "there is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or unlawful purpose, without one being told what it was. It might be that the party asked if a particular

The rule is correlative with that which governs the summary jurisdiction of the Courts over attornies.

In a late case, (*h*) Alderson, B., said, "The rule seems to be correlative with that which governs the summary jurisdiction of the Courts over attornies. In *Ex parte Aitken*, (*i*) that rule is laid down thus: 'Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction.' So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Thus communications made in relation to the sale and purchase of estates are protected; an attorney, therefore, who has been employed in the purchase and sale of estates, cannot be asked as to a communication made to him by the party who employed him. (*j*) So an attorney who, being resorted to by a borrower to raise money for him, peruses on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them. (*k*)

On sale of estates.

The privilege extends to all knowledge however obtained.

A communication made to a solicitor, if confidential, is privileged in whatever form made, if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words. (*l*) For the privilege extends to all knowledge that the attorney obtains, which he would not have obtained but for his being consulted professionally by his client. (*m*)

Attorney not allowed to produce documents, &c., deposited with him by his client.

An attorney will not be allowed to produce a deed which has been deposited with him confidentially in his professional character: and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus a copy of a deed which had been obtained from one who had formerly been entrusted with the original in his professional character as an attorney, is not good secondary

thing could legally be done." The learned Baron also said, that Williams *v.* Mundie was overruled by Greenough *v.* Gaskell. In Bowman *v.* Norton, 5 C. & P. 177, Tindal, C. J., held that a conversation between a client, who afterwards became bankrupt, and his attorney's clerk on the subject of his affairs was a privileged communication, and could not be given in evidence in an action by his assignees for the purpose of showing his motives.

(*h*) Turquand *v.* Knight, 2 M. & W. 98.

(*i*) 4 B. & Ald. 47. See also *Ex parte* Yeatman, 4 Dowl. P. R. 304.

(*j*) Mynn *v.* Joliffe, 1 M. & Rob. 326, Littledale, J.

(*k*) Doe *d.* Peter *v.* Watkins, 3 Bingh. N. C. 421, and per Tindal, C. J., "It would be of dangerous consequence if where the same professional man is resorted to by lender and borrower he is permitted to disclose the communications made to him on either side." And see Taylor *v.* Blacklow, 3 Bing. N. C. 235.

(*l*) 1 Phill. Ev. 169, citing Robson *v.* Kemp, 5 Esp. R. 54, where it was held that an attorney could not give evidence as to the fact of the destruction of an instrument, which he had been admitted in confidence to see destroyed. In Wheatley *v.* Williams, 1 M. & W. 533, it was held that an attorney is not compellable to state when examined as a witness, whether a document shown to him by his client in the course of a professional interview, was then in the same state as when produced on the trial, *e. g.* whether it was then stamped or not; and per Lord Abinger, C. B., "Suppose an attorney, when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to produce it? If, therefore, a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication."

(*m*) Per Alderson, B., in Wheatley *v.* Williams, *supra*.

evidence against his client. (*n*) But this case has been doubted. (*nn*) Where a vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared, and the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft; which remained afterwards with the vendor's attorney; the Court of King's Bench held that such draft was confidentially deposited with the latter by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (*o*) And even if an attorney has on one occasion produced a deed entrusted to him by a client under the erroneous compulsion of one tribunal, he will not be bound to produce it before another tribunal. An attorney who had received a deed from his client, had been compelled to produce it by commissioners of bankrupt, and had afterwards received it back from them under an undertaking to produce it again if required; but Tindal, C. J., held that the production of the deed had originally been improperly obtained from the witness by the commissioners, and that he might refuse to produce it in an action brought by the assignees of the bankrupt, under whose commission he had been compelled to produce it. (*p*)

Doe v. Seaton.

Nixon v. Mayoh.

So on a prosecution for the forgery of a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner, was not compelled or allowed to produce it, although subpœnaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged to be forged. (*q*) But this case has since been doubted. On an indictment for forging a will a solicitor stated that he was applied to by the prisoner to act as his solicitor in raising some money; and that he was the solicitor of the prisoner in raising the money as well as of Williams in the advance of it; that the prisoner made an application to him; it was objected that this was a privileged communication, as the party was the solicitor for the prisoner, and the preceding case was relied upon. Patteson, J., "I think that the case cited is not law; and that the solicitor may be examined to show what was the transaction between the parties, and what led to that transaction; but I will reserve the point for the consideration of the Judges, if I should hereafter think it necessary to do so." The witness then stated that the prisoner proposed to mortgage some land, which had been left him by his aunt, and that the prisoner told him the title deeds had been burnt, but that he gave him a paper which he said was his aunt's will. It was again objected that as the will had been delivered to the witness by the

Smith's case. Forged note.

Avery's case. Forged will.

(*n*) Fisher v. Heming, MS. 1 Phil. Ev. 170, Bayley, J. See also Copeland v. Watts, 1 Stark. N. P. C. 93.

(*nn*) "I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document, communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?" per Parke, B., in Lloyd v. Mostyn, 10 M. & W. 478, where it was held that a copy examined with a bond, produced for the purpose of admission under a judge's order, was admissible, although the attorney who held the bond was not bound to produce it on the trial.

(*o*) Doe *d.* Strode v. Seaton, 2 A. & E. 171.

(*p*) Nixon v. Mayoh, 1 M. & Rob. 76.

(*q*) Rex v. Smith, *cor.* Holroyd, J., MS. 1 Phil. Ev. 171.

prisoner while he was attorney for the prisoner, he ought not to produce it; Patteson, J., "I think he is bound to do it." The will was produced and read, and it was the will that was alleged to be forged. (*r*)

In the case of *Rex* v. *Dixon* (*s*) it was held by Lord Mansfield, and the rest of the Court, that an attorney, who had been served with a *subpœna duces tecum* out of the crown-office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which subpœna had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. (*t*) A barrister cannot be called to prove what was stated by him on a motion before the Court. (*u*) And the Attorney-General, if questioned as to the reasons for filing an *ex officio* information, may refuse to answer. (*v*)

Counsel.

Attorney-General.

How far the privilege extends, and as to what facts an attorney may be examined.

The privilege does not attach to everything which the client says to his attorney; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is necessary it becomes privileged, (*w*) but if it is not it may be disclosed. Thus an attorney may be examined like any other witness to a fact which he knew before his retainer, that is before he was addressed in his professional character, (*x*) or where he has made himself a party to the transaction, (*y*) or where he is questioned to a collateral fact which he might have known without being intrusted as the attorney in the cause. (*z*) Thus he may prove his client's handwriting though the knowledge was obtained from witnessing his execution of the bail bond in the action. (*a*) And he may be called to prove his client's identity. (*b*) And if he is a sub-

(*r*) Reg. *v.* Avery, 8 C. & P. 596. The indictment charged the intent to be to defraud Williams and the attorney in different counts. The prisoner was convicted, but no sentence passed on the indictment for forgery, the prisoner being sentenced on an indictment charging the transaction as a false pretence. Mr. Phillipps, vol. 1, p. 171, observes, that "the distinction between this case and Rex *v.* Smith is obvious. In Reg. *v.* Avery, the prisoner deposited the instrument in the hands of his solicitor, not with reference to a suit, nor with reference to any transaction resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In the case of Rex *v.* Smith, on the contrary, the instrument was deposited with the solicitor for the purpose of a suit in which he consulted him professionally as a matter in confidence between him and his solicitor, and solely for his own interest. The two cases, therefore, are not inconsistent, and the one does not overrule the other."

(*s*) 3 Burr. 1687, cited by Lord Ellenborough in Amey *v.* Long, 9 East, 485.

(*t*) See also Laing *v.* Barclay, 3 Stark. 38, where it was held by Abbott, C. J., that a solicitor under a commission of bankrupt was not bound to produce the proceedings under the commission in a collateral action, where the production might tend to the detriment of his clients; see also Harris *v.* Hill, 3 Stark. N. P. C. 140. S. C. 1 Dowl. & Ry. N. P. C. 17. Rex *v.* Upper Boddington, 8 Dowl. & Ry. 726.

(*u*) Curry *v.* Walter, 1 Esp. 456, *cor.* Eyre, C. J., who said it was at the option of counsel whether he would give his testimony or not. A Court of equity will compel the production of a case submitted to counsel, but not his opinion on it. Preston *v.* Carr, 1 Younge & Jervis, 175.

(*v*) Rex *v.* Horne, 11 St. Tr. 283.

(*w*) Per curiam Gillard *v.* Bates, 6 M. & W. 547. There an attorney was sued for work and labour in issuing an execution, and the defence was that he was employed by B., and not by the defendant, and it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he, the plaintiff, had been employed by B. to issue the execution in question, and that this was not a privileged communication.

(*x*) Cuts *v.* Pickering, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 41. 1 Phil. Ev. 166.

(*y*) Duffin *v.* Smith, Peake N. P. C. 108. Robson *v.* Kemp, 5 Esp. 52.

(*z*) Bull. N. P. 284. 1 Phil. Ev. 175.

(*a*) Hurd *v.* Moring, 1 Carr. & P. 372., ruled by Abbott, C. J.

(*b*) Studdy *v.* Saunders, 2 Dow. & Ry. 347, but see Parkins *v.* Hawkshaw, 2 Stark. N. P. C. 239.

scribing witness to a deed he may be examined concerning the execution. (*c*) Or if the question be about a razure in a deed or will, he may be examined whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; (*d*) but he ought not to be permitted to discover any confessions which his client may have made to him on such head. (*e*) So if the attorney were present when his client was sworn to an answer in Chancery, upon an indictment for perjury he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secresy committed to him by his client. (*f*) So the attorney of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers; (*g*) for the privilege only extends to confidential communications from the client, and not to those from collateral quarters, although made to him in consequence of his character as an attorney. (*h*) So an attorney conducting a cause in Court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and so let in his declarations. (*i*) So an attorney may be called and asked whether he has not a particular document in his possession, notice to produce having been given, in order to let in secondary evidence if the document is not produced. (*j*) So an attorney who prepares deeds which are granted on an usurious consideration, may be called as a witness to prove the usury: for that does not come to his knowledge in the character of an attorney, he being as it were a party to the original transaction. (*k*) And where an action on a promissory note had been compromised by the defendant's paying part of the money and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the defeasance thereof, the plaintiff told his attorney in the suit, that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction: it was held, that the attorney was admissible to prove this conversation in an action to recover back the money. (*l*) The communication, said

(*c*) Doe *v.* Andrews, Cowp. 846. Robson *v.* Kemp, 4 Esp. 235 S. C. 5 Esp. 52. For if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an attorney: his signature binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: by Lord Ellenborough, 5 Esp. 54.

(*d*) But see Wheatley *v.* Williams, 1 M. & W. 533, *ante*, p. 906, note, where it was said that this passage must apply to a case where an attorney has his knowledge independently of any communication from his client.

(*e*) Bull. N. P. 284.

(*f*) Bull. N. P. 284, 285. But he is not bound to speak to the particulars of a bill of exchange intrusted to him by his client; for the existence of such a bill is not a mere fact, but consists of circumstances, which he came to be acquainted with from the delivery of the bill to him by his client. Brard *v.* Ackerman, by Lord Ellenborough, 5 Esp. 120.

(*g*) Spencely *v.* Schulenburgh, 7 East, 357.

(*h*) So (*semble*) a letter written by an attorney to his client, and produced with the client's signature endorsed upon it, is evidence against the client. Assignees of Meyer *v.* Sefton, 2 Stark. N. P. C. 274. So an admission of a debt made by an attorney to the adverse party, by direction of his client, is not privileged. Turner *v.* Railton, 2 Esp. 474.

(*i*) Levy *v.* Pope, Moo. & Mal. 410, Parke, J.

(*j*) Bevan *v.* Waters, Moo. & Mal. 235, Best, C. J. So an attorney's clerk may be asked whether he has not received a particular paper from his client. Eicke *v.* Nokes, Moo. & Mal. 303, Lord Tenterden, C. J.

(*k*) Duffin *v.* Smith, Peake N. P. C. 108, by Lord Kenyon.

(*l*) Cobden *v.* Kendrick, 4 T. R. 432.

Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Brewer's case.

Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr. G. or any other solicitor, whether the punishment of forging a bill is the same where the name of the parties are entirely fictitious, as where the names are those of real persons; it was held that this letter was not a privileged communication, as the relation of client and attorney did not exist between the prisoner and G. (*m*)

Communications between attorney and client not privileged if not professional.

The privilege is also confined to communications to the attorney in his character of attorney; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested; it was held that the attorney might prove all these facts, in order to show an act of bankruptcy, in an action by his client's assignees. (*n*) So in the case of *Annesley* v. *Lord Anglesea*, (*o*) it was held, that a conversation which passed between Lord A. and his atttorney twenty years ago, respecting the prosecution of the plaintiff for murder, was not privileged, since it was not matter of professional confidence.

Cross-examination of an attorney.

If an attorney or counsel be called by his own client to give evidence he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally; but the cross-examination must not extend beyond that matter. (*p*)

Informers.

There are, besides these professional communications, a number of cases of a particular description, in which, for reasons of public policy, information is not permitted to be disclosed. Courts of justice will not permit witnesses to be asked the names of those, from whom they receive information as to frauds on the revenue. (*q*) In all the trials for high treason of late years, the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the Judges. (*r*) "If the name of an informer," said Buller, J., in *Hardy's case*, "were to be disclosed, no man would make a discovery, and public justice would be defeated." And this privilege not only protects the actual informer himself, but those questions, which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive goverment, or for the service of the police, is not al-

Agent of go-

(*m*) Rex *v.* Brewer, 6 C. & P. 363, Park, J. A. J.

(*n*) Bramwell *v.* Lucas, 2 B. & C. 745.

(*o*) 9 St. Tr, 391, before the Barons of the Exchequer in Ireland, 1743.

(*p*) Vaillant *v.* Dodemead, 2 Atk. 524.

(*q*) By Dallas, C. J., in Home *v.* Bentinck, 2 Brod. & Bing. 162. Hardy's case, 24 How. St. Tr. 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and if untrue, may be considered malicious and actionable. Robinson *v.* May. 2 Smith, 3.

(*r*) 2 Brod. & Bing. 162.

lowed to reveal the name of his employer, or the nature of the connexion between them; (*s*) or the names of any persons to whom he has communicated his information for the purpose of its being transmitted, (*t*) whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government. (*u*)

vernment or police.

Upon the same ground the Attorney-General of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province. (*v*) So the orders given by the governor of a foreign colony to a military officer under his command, ought not to be produced. (*w*) So Abbott, C. J., refused to admit in evidence the report of a military Court of inquiry, in an action of libel by an officer, respecting whose conduct the Court had been appointed to inquire; and his decision was confirmed on error in the Exchequer Chamber. (*x*) And Lord Ellenborough, C. J., would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then secretary of state, or his Lordship's answer, to be produced as evidence. (*y*) In *Watson's case*, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate. (*z*)

Official communications.

Questions contrary to state policy.

But a letter written by a private individual to a public officer (the chief secretary of the postmaster-general) complaining of the misconduct of a person under him, does not fall within the preceding cases. They were all cases of communications made by and between ministers and officers of government, and in the course of the discharge of a public duty by the person making the communication. Here the letter was written by a private individual, having no public duty in writing it. (*b*)

In the *case of the Seven Bishops*, the clerk of the privy council was compelled to state what passed in the council chamber, and even what was said by the King himself, although the counsel for the crown objected to it. (*c*) And the same evidence was allowed in *Lord Strafford's case*. (*d*) But in *Layer's case*, (*e*) it seems to have been considered that the minutes taken before the privy council were not to be divulged; and the two other cases above cited were decided under the strong feelings, which the circumstances of the times had produced, and the latter in particular has been considered as a very unwarrantable departure from law and justice. (*f*)

Transactions of privy council.

A clerk attending upon a grand jury, shall not be compelled to reveal that which was given them in evidence; (*g*) and the jurors themselves are bound by oath not to disclose what passes before them; but it has been held that a grand juryman may be called

Grand jury.

(*s*) 24 How. St. Tr. 753. 1 Phill. Ev. 178.

(*t*) 24 How. St. Tr. 811.

(*u*) By Abbott, J., in Rex *v.* Watson, 2 Stark. 136. Stone's case, as cited by Lord Ellenborough, C. J., ibid.

(*v*) Wyatt *v.* Gore, Holt, N. P. C. 299, ruled by Gibbs, C. J. 1 Phill. Ev. 181.

(*w*) Cooke *v.* Maxwell, 2 Stark. N.P.C. 185.

(*x*) Home *v.* Lord F. C. Bentinck, 2 Brod. & Bing. 130.

(*y*) Anderson *v.* Hamilton, (n.) 2 Brod. & Bing. 156.

(*z*) 2 Stark. 148.

(*b*) Blake *v.* Pilfold, 1 M. & Rob. 198, Taunton, J.

(*c*) 4 St. Tr. 346.

(*d*) 1 St. Tr. 723.

(*e*) 6 St. Tr. 288.

(*f*) 1 Phil. Ev. 182.

(*g*) 12 Vin. Abr. Evidence B., *a*, 5.

to prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath. (*h*) But where the grand jury returned a bill of indictment containing ten counts for forging and uttering the acceptance of a bill of exchange with an indorsement "a true bill on both counts;" Patteson, J., would not allow one of the grand jury to be called as a witness, after the prisoner's trial had commenced, and after the grand jury had been discharged, to explain their finding. (*i*) And the Court of King's Bench have refused to receive an affidavit from a grand juryman as to the number of grand jurors, who concurred in finding a bill. (*j*)

Evidence before the grand jury.

But where a gentleman of the grand jury heard a witness swear in Court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury; and he immediately communicated the circumstance to the Judge, who, upon consulting the Judge in the other Court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury to be tried upon the testimony of the gentlemen of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This was a privilege which might be waived by the crown. (*k*)

A witness may be asked what he said before the grand jury.

In *Watson's case*, (*l*) a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury, and Lord Ellenborough, C. J., said, "He had considerable doubt upon the subject; he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer." But it has since been held that a witness for the prosecution in a case of felony may be asked on cross-examination whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. (*m*)

House of Commons.

A witness was not allowed by Lord Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his Lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of his oath, to reveal the councils

(*h*) Sykes *v.* Dunbar, Selw. N. P. 1059, per Kenyon, C. J.

(*i*) Reg. *v.* Cooke, 8 C. & P. 582.

(*j*) Rex *v.* Marsh, 6 A. & E. 236.

(*k*) Christian's Note, 4 Bl. Com. 126. There appears to be very little weight in the reason assigned for the concealment even before the Prisoner's Counsel bill passed, because the prisoner had in far the greater number of cases heard the evidence of the witnesses before the magistrate, and there is still less weight now since the prisoner is entitled to copies of the depositions. And the oath itself seems not to apply to the facts proved before the grand jury; as far as regards this subject, it is "the King's counsel, your fellows and your own you shall keep secret." 4 Chitt. Cr. L. 183. C. S. G.

(*l*) 32 How. St. Tr. 107.

(*m*) Reg. *v.* Gibson, 1 C. & Mars. 672, Parke, B. It has recently been held that when the grand jury have found a bill, the Judges before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn before they went before the grand jury, and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. Reg. *v.* Russell, 1 C. & Mars. 247. Gurney, B., and Wightman, J., and Wightman, J., added, that Lord Denman, C. J., and himself had decided the same point the same way on the Northern Circuit.

of the nation; (n) but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer. (o)

SECTION II.

How Witnesses ought to be examined, and what Questions they may be asked, and compelled to answer.

Before a witness is examined, he must be sworn in open Court. The proper method of administering the oath, and the objections which may be made previous to the administration of it, will be hereafter considered. (p) And the proper time and mode of objecting to the competency of a witness, whether on the *voire dire*, or at a later stage of the trial, will be discussed in the last section of this chapter. (q)

Examination in chief.

Leading questions.

After a witness has been regularly sworn, the party who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by *Yes* or *No*, would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. (r)

What are not leading questions.

Thus in an action of assumpsit against two, in order to prove that the defendants were partners, the first witness was asked, whether one of them had interfered in the business of the other. And upon this question being objected to as leading, Lord Ellenborough ruled, that it might properly be asked. (s) An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making himself a partner. So where the witness called to prove the partnership of the plaintiffs, could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognise them, if suggested to him, Lord Ellenborough, (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names,) ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. (t)

Pointing out prisoners.

Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness, (a post-boy, who had been employed to drive one of the actors in the fraud,) to identify De Berenger with that person; and Lord Ellenborough held, that for this purpose, the counsel for the prosecution might

(n) Plunkett v. Cobbett, 5 Esp. 137. 29 How. St. Tr. 71, 72.
(o) 5 Esp. 137.
(p) *Post*, p. 970.
(q) *Post*, p. 987.
(r) Nicholls v. Dowding and Kemp, 1 Stark. N. P. C. 81. 2 Phill. Ev. 403.
(s) 1 Stark. N. P. C. 81.
(t) Acerro v. Petroni, 1 Stark. N. P. C. 100.

point out De Berenger to the witness, and ask him whether he was the person. (*u*) So in *Rex* v. *Watson*, (*v*) tried at bar, upon its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the Court held, that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his Lordship, it would be impossible ever to come to a direct contradiction. (*w*)

Leading in chief to contradict former witness of adverse party.

When, upon cross-examination, a witness has denied having used particular expressions, or having made a particular statement to A. B., who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining A. B. in chief as his own witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly, where a witness of the plaintiff's, in cross-examination had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them; Abbott, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief. (*x*) However, a very able writer, (*y*) has with great force endeavoured to shew, that leading questions under such circumstances are irregular.

Where not allowable.

But this rule does not apply to conversations which are evidence themselves. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied; and Erskine, J., held that a person, who was called to prove that the witness had said what he had denied, could not be examined by the counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way by asking what had passed. (*z*)

Leading an adverse witness.

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court may deem it right

(*u*) 1 Stark. Ev. p. 170.
(*v*) 2 Stark. N. P. C. 128.
(*w*) Courteen *v.* Touse, 1 Camph. 43. 2 Phill. Ev. 405.
(*x*) Edmonds *v.* Walter, 3 Stark. N.P.C. 7.
(*y*) 2 Phil. Ev. 404, 405. The practice, however, is perfectly well settled as stated in the text. C. S. G.
(*z*) Hallett *v.* Cousens, 2 M. & Rob. 238.

to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the Judge to determine how far he will allow the examination in chief to be by leading questions. (*a*) And where an issue had been directed by the Court of Chancery, with power to examine the parties; Best, C. J., held that the defendant stood in a situation which of necessity made him adverse to the plaintiff, by whom he was called, and that the counsel for the plaintiff might, as a matter of right, cross-examine him. (*b*) But in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and demeanour, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination. (*c*)

Cross-examination.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief in respect to leading questions.

Leading questions.

If the witness betrays a zeal against the cross-examining party, or shews an unwillingness to speak fairly and impartially, he cannot, it should seem, be led too much. (*d*) But where the witness on the other hand discovers an anxiety to serve the cross-examining party, although the Courts do not usually exclude the counsel, on cross-examination, from putting leading questions, it is obvious that evidence so obtained is very unsatisfactory, and is open to much observation. (*e*) And, although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back. (*f*)

What may be

A witness cannot be asked, upon cross-examination, questions

(*a*) 2 Phill. Ev. 403. In Bastin *v.* Carew, R. & M. N. P. R. 127, Abbott, C. J., allowed the cross-examination of an adverse witness, and said, "I mean to decide this, and no further—that in each particular case there must be some discretion in the presiding Judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice." Reg. *v.* Chapman, 8 C. & P. 558, Lord Abinger, C. B. Reg. *v.* Murphy, 8 C. & P. 297, Coleridge, J.

(*b*) Clarke *v.* Saffery, R. & M. N. P. R. 126.

(*c*) 2 Phill. Ev. 404, citing Reg. *v.* Ball, 8 C. & P. 745, where a witness called on the part of the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house on the night when the offence was committed, and it appeared that she was intimately acquainted with the prisoner, and that the prosecutor had informed against her for keeping her beer-house open at improper hours; and on its being submitted that these facts raised such an inference of hostility towards the prosecutor, and of bias in favour of the prisoner, as to entitle the counsel for the prosecution to cross-examine her; Erskine, J., said, "I think that the situation in which this witness stands towards either party does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such a nature as to make it appear that she was an unwilling witness."

(*d*) 2 Phil. Ev. 406.

(*e*) Mr. Starkie, in his Treatise on Evidence, vol. 1, p. 188, mentions that he has heard Lord Tenterden express himself to this effect more than once.

(*f*) By Buller, J., in Hardy's case, 24 How. St. Tr. 755, referring to a rule laid down on the day before by Eyre, C. J., to the same effect.

asked on cross-examination.

Questions must not be irrelevant.

which are not in any way relevant to the matters in issue; (*g*) neither is a question allowed to be asked, which, if answered affirmatively, would be wholly irrelevant to the issue, for the purpose of discrediting the witness if he answers in the negative, by calling other witnesses to disprove what he says; (*h*) but this subject will perhaps be more conveniently discussed in a subsequent section, (*i*) concerning the modes of impeaching the credit of a witness; (*j*) in which place will also be considered the obligation of a witness to answer questions tending to subject him to a criminal prosecution or degrading to his character. It is, however, proper to mention in this place how far a witness is compellable to answer a question, whereby he may subject himself to a civil action, or charge himself with a debt. Considerable doubts had been entertained upon this subject, before the 46 Geo. 3, c. 37; for the settlement of which it was thereby declared and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue, (the answering of which has no *tendency* to expose him to a penalty *or forfeiture of any nature whatsoever*) by reason only, and on the sole ground that the answering such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other persons. (*k*) This statute, however, does not affect the right, which the parties to a suit have, of declining to give evidence for the opposite party: and, therefore, upon an appeal, a rated inhabitant of the appellant parish (being considered a party to the appeal) cannot be compelled, even since the statute, to give evidence when called upon by the respondents. (*l*) And the witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate; for the statute implies, that a witness may legally refuse to answer a question which has a tendency to expose him to a forfeiture of any nature whatsoever. (*m*)

Obligation of witness to answer, where the answer might subject to a penalty or prosecution, or degradation.

To a civil suit.

Assumptions not allowable in cross examination.

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made, (*n*) or put a question which assumes a fact not in proof. (*o*)

Cross-examination as to

It is not allowable upon cross-examination, to ask a witness as to the contents of written instruments, (*p*) although they are shown

(*g*) A cross-examination as to a fact otherwise irrelevant, is not warranted by the circumstance that the adverse counsel opened it, without any attempt at proof. Lucas *v.* Novosilieski, 1 Esp. N. P. C. 296.

(*h*) *Post*, p. 936.

(*i*) Sec. 3.

(*j*) *Post*, p. 936.

(*k*) There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c., under a *subpœna duces tecum*. For if a *subpœna duces tecum* is served, the party must bring his deeds into Court in obedience to the subpœna, although if he states that they are his title deeds, no Judge will ever compel him to produce them. Pickering *v.* Noyes, 1 B. & C. 263.

(*l*) Rex *v.* (Inhab.) Woburn, 10 East, 395. But this decision was before the 54 Geo. 3, c. 170, and the 3 & 4 Vict. c. 26, which provide that no rated inhabitant of a parish shall be deemed an incompetent witness for or against such parish.

(*m*) 2 Phil. Ev. 420.

(*n*) Hill *v.* Coombe, *cor.* Abbott, J., Manning's Digest, tit. *Witness*, pl. 236.

(*o*) Doe *v.* Wood, *cor.* Abbott, J., ibid., pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in the Queen's case. See the printed evidence.

(*p*) Sainthill *v.* Bound, 4 Esp. 74. Howell *v.* Lock, 2 Campb. 14.

to be in the possession of the opposite party, and notice has been given to the opposite party to produce them. (*q*) Under what circumstances a cross-examination as to the contents of a written document, for the purpose of impeaching the credit of a witness, is allowable, will be considered hereafter in the fourth section of this chapter. (*r*)

written instruments; for the purpose of contradiction.

Upon the trial of Kroehl, Gibson, and Koech, (*v*) for a conspiracy, where the three defendants defended separately, Koech alone called witnesses, and examined to a conversation between himself and Kroehl. The counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when the counsel for the prisoner Kroehl objected, on the ground, that the effect might be to bring out a new case against Kroehl, although he had called no witnesses, and after the case for the Crown was finished: but Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration, whether the counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Cross-examination of witness called by one of several defendants alone.

If a witness be called merely for the purpose of producing a written instrument, he need not be sworn, and unless sworn, he is not subject to cross-examination. In an action for maliciously, and without probable cause, making a charge of felony before a justice of the peace against the plaintiff, and causing him to be apprehended, the plaintiff's counsel having called upon the justice to produce the information taken by him, which was accordingly produced, was proceeding to prove the information by the justice's clerk; when it was insisted by the defendant's counsel, that he should be allowed to cross-examine the justice, who had produced the examination: but Holroyd, J., held that this could not be done, and that the plaintiff's counsel might proceed to prove the examination in the regular manner. (*w*) And so on an indictment for perjury, where a sheriff's officer had been subpœnaed to produce a warrant of the sheriff; Littledale, J., ordered him to do so without being sworn. (*x*) But where upon an indictment for perjury, the attorney for the prosecution was called and sworn, and produced a copy of a declaration in an action brought by the defendant against the prosecutor, though he was not asked any question on the part of the prosecution; Abbott, C. J., held, that the defendant was entitled to cross-examine him. (*y*) And if a witness be called, though it be through necessity, for the purpose of the mere formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. (*z*) So it was once held, that if a witness has been called by one party, and sworn, the other may cross-examine him, though no question has been asked him in chief. (*a*) But it has been since held that if a witness be called

Who may be cross examined.

(*q*) Graham *v.* Dyster, 2 Stark. N. P. C. 23. Sideways *v.* Dyson, ibid., 49.

(*r*) *Post*, p. 931.

(*v*) 2 Stark. N. P. C. 343.

(*w*) Simpson *v.* Smith, 2 Phill. Ev. 397. See also Davis *v.* Dale, M. & M. 514. Evans *v.* Moseley, 2 Dowl. P. R. 364. Perry *v.* Gibson, 1 A. & E. 48. Summers *v.* Moseley, 4 Tyrw. 158.

(*x*) Rex *v.* Murlis, M. & Mal. 515.

(*y*) Rex *v.* Brooke, 2 Stark. N. P. C. 472.

(*z*) Morgan *v.* Brydges, 2 Stark. N.P.C. 314.

(*a*) Phillipps *v.* Eamer, 1 Esp. 356. But where in an action by the assignees of a bankrupt, the petitioning creditor was called for the purpose of producing the bill

under a mistake, and the mistake be discovered before any question is put to him by the counsel who calls him, he is not liable to cross-examination, although he has been sworn. (*b*) And so where a witness being sworn was asked only one immaterial question, and his evidence stopped by the Judge, it was held that the opposite party had no right to cross-examine him. (*c*)

Calling witnesses whose names are on the back of the indictment.

Although the counsel for the prosecution are not bound to call every witness, whose name is on the back of the indictment, it is usual for them to do so, and if they decline, the Judge, in his discretion, may, and generally will call them, and the defendant may cross-examine them. (*d*)

of exchange on which the action was founded, and sworn: Lord Ellenborough would not allow the defendant to cross-examine him, since he could not have been permitted to have given evidence for the plaintiff. Reed *v.* James, 1 Stark. N.P.C. 132.

(*b*) Wood *v.* Mackinson, 2 M. & Rob. 273, where the witness was called and sworn, and the counsel said he had been misinstructed as to what the witness was able to prove, and Coleridge, J., said "the more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of the counsel or the officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness." Rush *v.* Smyth, 4 Tyrw. 675. 1 C., M. & R. 94. Clifford *v.* Hunter, 3 C. & P. 16.

(*c*) Creevy *v.* Carr, 7 C. & P. 64, Gurney, B.

(*d*) Rex *v.* Simmonds, 1 C. & P. 84, Hullock, B. Rex *v.* Whitbread, ibid., note (*a*). In Rex *v.* Beezley, 4 C. & P. 220, Littledale, said that the counsel for the prosecution ought to call all the witnesses on the back of the bill; and in many cases on the Oxford Circuit learned Judges have directed the counsel for the prosecution to call every witness on the back of the bill, and it has been treated as if the counsel for the prisoner had a right to have them all called by the counsel for the Crown, in order to enable him to cross-examine them. Indeed the cases have gone further than this; as it has been held on several occasions that witnesses, not on the back of the bill, but who were acquainted with the facts of the case, ought to be called on the part of the prosecution. In Reg. *v.* Holden, 8 C. & P. 606, on an indictment for murder, Patteson, J., directed the daughter of the deceased, whose name was not on the back of the indictment, to be called, saying, "every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." And in the same case it appearing that there had been a *post mortem* examination of the body of the deceased by a surgeon who was examined, and another surgeon who was in Court, and that there was some difference of opinion as to the cause of the death; Patteson, J., said, "as the surgeon is in Court, I shall insist upon his being examined. He is a material witness, who is not called on the part of the prosecution, and as he is in Court I shall call him for the furtherance of justice." And he was called and examined by the learned Judge. In Reg. *v.* Chapman, 8 C. & P. 558, Lord Abinger, C. B., directed the name of the brother of the prisoner, who was present at the time when the murder was alleged to have been committed, to remain on the back of the bill, and said the counsel for the prosecution would best discharge his duty by calling him as a witness on the trial. See also Reg. *v.* Orchard, ibid., note (*b*). In Rex *v.* Bodle, 6 C. & P. 186, Gaselee, J., and Vaughan, B., held that it was in the discretion of the Judge whether a witness whose name is on the back of the indictment should be called for the prisoner's counsel to examine him before the prisoner was called on for his defence; and the father of the prisoner having been examined before the coroner, and bound over to give evidence at the assizes against the prisoner for murder, the learned Judges held that the father ought to be called; and he was called, and asked as to statements he had made respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself; and it was held that as the father had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call witnesses to contradict him as to the different accounts he had given respecting the murder. In Reg. *v.* Vincent, 9 C. & P. 91, Alderson, B. held that the calling such a witness in felony was discretionary, but it was a discretion always exercised, and he thought it might well be exercised in a case of misdemeanor. It seems that where a witness is so called and examined by the counsel for the prisoner, the counsel for the prosecution has a right to examine him. Rex *v.* Beezley, 4 C. & P. 220, *infra*, note (*j*). But it is said to have been decided that where the counsel for the prosecution declines to call the witness, and he is called by the Judge, the counsel for the prosecution has not the right to examine the witness. By Clarkson, in Rex *v.* Harris, 7 C. & P. 581. C. S. G.

It is reported to have been ruled by Lord Kenyon, (*e*) that where a witness has been examined by one party, and cross-examined by the other, and the latter has afterwards occasion to call the same witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But it has been very properly remarked, (*f*) that the mode of examination under such circumstances is in truth regulated, according to the disposition and temper manifested by the witness, by the discretion of the presiding Judge. (*g*)

Witness of one party afterwards called by the other.

Where on an indictment for burglary, there was no counsel for the crown, Taunton, J., after the examination of witnesses to facts on the part of the prisoners, recalled a witness for the prosecution, and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying, that although he as Judge had recalled the witness for the purposes of justice, he thought it right that the prisoner's counsel should have the opportunity of cross-examining the witness again. (*h*)

Witness recalled by the judge.

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the Court, who will put it to the witness, or decline to do so, at its discretion. (*i*)

Re-examination.

Where a witness whose name was on the back of the indictment was called by the counsel for the crown, by the direction of the Judge, in a case of murder, but asked no question by him, and on being cross-examined by the counsel for the prisoner, stated many facts in the prisoner's favour; and the counsel for the crown proposed to ask the witness as to something that had occurred at an earlier part of the day on which the deceased was killed; Littledale, J., held that this could not be allowed. This was strictly a re-examination, and no question could be put which did not arise out of the cross-examination. If the prosecutor's counsel did not choose to examine in chief, he could not be allowed to lie by, and see what the prisoner's counsel did on cross-examination, and then enter into a fresh examination of the witness, as to new facts against the prisoner. (*j*)

Re-examination of a witness called by the direction of the Judge.

The same principle is observed, with reference to the conduct of the entire case, as to the restriction on the evidence in reply to the defendant's case. After the close of the case for the defendant, the general rule is, that the evidence in reply must bear directly or indirectly upon the subject matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. (*k*) This is the general rule, made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the Judge whether it ought to be strictly enforced or remitted, as he may

Evidence in reply must be confined to the contradiction of the evidence for the defence.

(*e*) Dickinson *v.* Shee, 4 Esp. 67.

(*f*) 1 Stark. Ev. 188.

(*g*) See also the observations of Abbott, C. J., in Bastin *v.* Carew, Ry. & Mood. N. P. C. 127.

(*h*) Rex *v.* Watson, 6 C. & P. 653.

(*i*) 2 Phill. Ev. 408. See *post*, p. 937, as to re-examining a witness who has been cross examined respecting his former statements and declarations.

(*j*) Rex *v.* Beezley, 4 C. & P. 220.

(*k*) 2 Phill. Ev. 408.

think best for the discovery of truth and the administration of justice. (*l*)

Stimpson's case.

Where on an indictment for larceny, the case for the crown rested merely on the fact of the stolen property being found in the house of the prisoner soon after it was lost, and a witness for the defence proved that the prisoner bought the property from a third person, who was called by the counsel for the crown to prove not only that the prisoner did not buy the property of him, but that he saw the prisoner steal it; it was held that his evidence was only admissible as far as it went to destroy the case set up on the part of the prisoner, that is to show that the prisoner did not buy the property of him. (*m*)

Hilditch's case.

So where the defence of the prisoners was an *alibi*, *viz.*, that they were at a public-house a considerable distance from where the offence was committed, and it was proposed on the part of the crown to prove in reply that the prisoners were seen near the spot at which the robbery was committed, and that, therefore, they could not have been in the public-house; Taunton, J., rejected the evidence, saying, "proving that the parties were near the place at which the offence was committed is evidence in chief, and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence, which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution." (*n*)

Briggs' case.

But where, on a similar indictment, a similar defence was set up; Alderson, B., permitted a person, who had been robbed on the road near the place where the prosecutor was robbed, to prove not only that he saw the prisoner there, but the whole circumstances under which he met the prisoner. (*o*)

Briggs *v.* Aynsworth.

And so where in an action for an injury occasioned by the defendant through negligently driving a carriage, the plaintiff's witnesses described the carriage as having been driven by the defendant when the accident occurred at Layton, and other witnesses spoke to the defendant having been seen in the neighbourhood of Layton about the time in question; and the defendant called witnesses to prove that, at the time in question, he was at Richmond, and the plaintiff then tendered other witnesses to show that the defendant was not at Richmond, but at Layton; Lord Denman, C. J., held that it would, perhaps, have been more correct had the plaintiff, in the first instance, called the witnesses then tendered, but he did not think that he could, even at this period of the cause, exclude the evidence from the jury, which certainly went to contradict the defendant's *alibi*. (*p*)

Findon's case.

And where on an indictment for horse stealing, the defence was an *alibi*, which went to show that the prisoner, on the 7th and 8th of March, was at places many

(*l*) 2 Phill. Ev. 408.

(*m*) Rex *v.* Stimpson, 2 C. & P. 415, Garrow, B. Mr. Phillipps observes, "this was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong evidence that he did not buy them." 2 Phill. Ev. 410.

(*n*) Rex *v.* Hilditch, 5 C. & P. 299.

(*o*) Reg. *v.* Briggs, 2 M. & Rob. 199. Rex *v.* Hilditch does not appear to have been cited in this case. It may have been thought in this case that the evidence of the second robbery was not essential on the part of the prosecution until the alibi was set up, and that that rendered the proof of the second robbery essential. See the cases collected, *ante*, p. 774, *et seq.* C. S. G.

(*p*) Briggs *v.* Aynsworth, 2 M. & Rob. 168. See a learned note to this case by the reporters. And see Reg. *v.* Frost, 9 C. & P. 159.

miles from the place where the horses were stolen, and on the 9th returned home; Tindal, C. J., permitted a witness to be called to prove that the prisoner, when taken into custody on the 10th of March, said that he had been at home ever since the Wednesday before. (*q*)

Examination of witnesses generally, with reference to written documents.

It has already been remarked, that a witness cannot be cross-examined as to a written document, in the possession of the party who calls him; (*r*) and the rule is general, that a witness cannot either be examined in chief or cross-examined as to the contents of a written document, not produced: yet, in civil cases, he has sometimes been allowed to be examined as to the general result from a great number of documents, too voluminous to be read in Court. (*s*)

Written instruments used to refresh the memory.

A witness may refresh his memory by means of a written instrument, which cannot itself be legally produced in evidence. Mr. Phillipps (*ss*) divides the cases in which a witness may be allowed to refresh his memory into three classes. First, where the writing serves only to revive or assist the memory of the witness, and to bring to his mind a recollection of the facts. Secondly, where the witness recollects having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it, he knew the contents to be correct. Thirdly, where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but, nevertheless, enables him to swear to a particular fact, from the conviction of his mind on seeing a writing which he knows to be genuine. In the first class of cases, where the memory of the witness has been revived by the previous inspection of the writing, it is not necessary, as a condition of the admission of his oral testimony, that the writing should be produced in Court; but the absence of it might afford matter of observation. (*t*) In the two last classes of cases the writing must be produced. (*u*)

Where, in order to prove the taking of a tenement, a witness produced a book containing an entry made by him of the terms of the taking, and stated that he had no memory of them but from the book, without which he should not of his own knowledge be able to speak to the facts, but on reading the entry he had no doubt that the facts really happened; the Court held that the witness might look at the entry to refresh his memory, and give parol evidence of the letting. (*v*) So, where a receipt for money has been given on unstamped paper, it may be used by the witness, who saw it given, to refresh his memory. (*w*) And where a witness, who had received money and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C. J., to be read over to him in Court, (he being informed that the paper was in his handwriting,) in order to refresh his memory. (*x*) So to prove an act of bank-

(*q*) Rex *v.* Findon, 6 C. & P. 132.

(*r*) *Ante*, p. 917.

(*s*) Meyer *v.* Sefton, 2 Stark. N. P. C. 276. Roberts *v.* Doxon, Peake, N. P. C. 83.

(*ss*) 2 Phill. Ev. 411.

(*t*) 2 Phill. Ev. 411.

(*u*) 2 Phill. Ev. 412. Doe *v.* Perkins, 3 T. R. 754.

(*v*) Rex *v.* St. Martin's, Leicester, 2 A. & E. 210.

(*w*) Rambert *v.* Cohen, 4 Esp. 213.

(*x*) Catt *v.* Howard, 3 Stark. N. P. C. 3. See also Jacob *v.* Lindsay, 1 East, 460.

ruptcy committed some years back, a deposition made at the time by an aged witness, was allowed by Lord Kenyon to be read to him for the same purpose. (*y*)

Rule as to memorandum to refresh the memory.

The general rule is, that a witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the fact to which it relates: but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing. (*z*) Although in general, the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand. (*a*) So where a witness on looking at a written paper has his memory so refreshed that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. (*b*) But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (*c*)

By a copy of a paper.

It has been held that a witness will not be allowed to refresh his memory with a copy of a paper, though the copy was made by himself, and though the writing might have been used for the purpose. Thus, it has been held that a witness cannot refresh his memory by a copy of an original memorandum, made by him six months after he wrote the original, although the original was so covered with figures as to be illegible. (*d*) But it is said that in analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original is lost. (*e*) And two cases are reported, where it is said to have been held that a witness might refresh his memory by a copy. (*f*) And where a clerk to a tradesman entered the transactions in trade as they occurred into a waste-

(*y*) Vaughan *v.* Martin, 1 Esp. N. P. C. 440.

(*z*) Doe *v.* Perkins, 3 T. R. 749. See Henry *v.* Lee, 2 Chit. Rep. 124.

(*a*) Burrough *v.* Martin, 2 Campb. 112. The entries were in a log-book.

(*b*) 2 Phill. Ev. 413, citing the Duchess of Kingston's case, 20 How. Sta. Tr. 619, and other cases. In Lawes *v.* Reed, 2 Lew. 152, Alderson, B., held that a witness might refresh his memory from the notes of counsel taken on his brief at a former trial; and he mentioned Balme *v.* Hutton, where a witness had been allowed to refresh his memory from a note taken by Parke, B. He, however, observed that the witness must afterwards speak from a refreshed memory, and not merely from the notes.

(*c*) 2 Phill. Ev. 413.

(*d*) Jones *v.* Stroud, 2 C. & P. 196, Best, C. J.

(*e*) 1 Stark. Ev. 179, and see 2 Phill. Ev. 416.

(*f*) Tanner *v.* Taylor, cited in Doe *v.* Perkins, 3 T. R. 749, where a witness produced a copy of a day-book which he had left at home; and Legge, B., held that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make oath of it; but if he could not from recollection swear any further than as finding the matters entered in the book, then the original should have been produced. And Anonymous, 1 Lew. 101, where Bayley, J., is reported to have held that a witness cannot give a copy of a shop-book in evidence to prove facts contained in the shop-book, but if he was originally acquainted with the facts he might refer to such copy to refresh his memory.

book from his own knowledge; and the tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were copied; it was held that the clerk might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for; as the entries in the ledger were in the nature of entries made by the clerk himself. (*g*) A witness cannot refresh his memory by extracts made by another person from minutes or memoranda made by the witness himself. (*h*)

At what time the memorandum must be made.

It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness or by another with his privity at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact. (*i*) When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness. (*j*)

The adverse party may look at the memorandum.

Examination as to opinion.

The general rule is, that a witness must not be examined as to his opinion, for his testimony must be confined to evidence of facts: but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus, in a civil case, in an inquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour. (*k*) So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (*l*) Where the question is, whether a seal has been forged, seal-engravers may be called to show the difference between a genuine impression, and that supposed to be false. (*m*) So on an indictment for forging a will, which, together with writings

Questions of skill and judgment.

(*g*) Burton *v.* Plummer, 2 A. & E. 341. In this case, Patteson, J., said, "The copy of an entry, not made by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether the paper be produced as evidence in itself, or used merely to refresh the memory."

(*h*) 2 Phill. Ev. 414, citing a case mentioned by Lord Kenyon, C. J., in Doe *v.* Perkins, 3 T. R. 752.

(*i*) 1 Stark. Ev. 177. 2 Phill. Ev. 414.

(*j*) By Eyre, C. J., in Hardy's case, 24 How. St. Tr. 824. 2 Phil. Ev. 411. Sinclair *v.* Stevenson, 1 Carr. & P. 582. But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. Ibid., per Best, C. J. If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it. Rex *v.* Ramsden, 2 C. & P. 604, by Lord Tenterden. Howard *v.* Canfield, 5 D. P. R. 417.

(*k*) Folkes *v.* Chad, MS. 1 Phil. Ev. 291, 7th ed., cited by Buller, J., in Goodtitle *v.* Braham, 2 T. R. 498. So the opinion of a person conversant with the business of insurance may be asked as to whether the communication of particular facts would have varied the terms of insurance, though not what his conduct would have been in the particular case. Berthon *v.* Loughman, 2 Stark. N. P. C. 258, *cor.* Holroyd, J., but see *contra* Durrell *v.* Bederley, Holt, N. P. C. 286, by Gibbs, C. J.

(*l*) Thornton *v.* Royal Exchange Assurance Company, Peake, N. P. C. 25. Chaurand *v.* Angerstein, ibid., 43. Beckwith *v.* Sydebotham, 1 Campb. 117.

(*m*) By Lord Mansfield in Folkes *v.* Chad, *ubi supra*. *Ante*, p. 395.

in support of it, it was suggested had been written over pencil marks, which had been rubbed out; an engraver who had examined the paper with a mirror and traced the pencil marks, was held competent to give evidence of what he had discovered upon such examination. (*n*) So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post-office, have been allowed to state their opinion, whether a particular writing is in a genuine or imitated character. (*o*) But the authority of these cases has been shaken by the case of *Gurney* v. *Langlands*, (*p*) in which an issue having been directed to satisfy the Court of King's Bench as to the forgery of a signature to a warrant of attorney; Wood, B., refused to admit the evidence of an inspector of franks at the post-office, who, having never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not a genuine signature, but an imitation. On a motion for a new trial, the Court refused to disturb the verdict, some of the Judges expressing doubts, whether the evidence was admissible, and all of them considering it, if admissible, not entitled to any weight. (*q*)

Medical men.

In criminal cases, the opinions of medical men of science are very frequently employed as evidence. A physician who has not seen the patient, may, after hearing the evidence of others, be called to prove on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. (*r*) The testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established by others, and without being personally acquainted with the facts. (*s*) Thus, where on a trial for murder the medical witnesses called on the part of the prosecution ascribed the death to strangulation, other medical men called on behalf of the prisoner were allowed to give their opinion that from the evidence they had heard upon the trial the death did not arise from strangulation, although they had not seen the body of the deceased and had no means of forming a judgment of the cause of his death, except from

(*n*) Reg. *v.* Williams, 8 C. & P. 434, Parke, B., after consulting Tindal, C. J.

(*o*) Goodtitle *v.* Braham, 4 T. R. 497. Rex *v.* Cator, 4 Esp. N. P. C. 117, 145. Stranger *v.* Searle, 1 Esp. 14.

(*p*) 5 B. & A. 330. *Ante*, p. 394, and see Doe *d.* Mudd *v.* Suckermore, *ante*, p. 820.

(*q*) See also the case of Cary *v.* Pitt, Peake Ev. App. 84, in which Lord Kenyon refused to receive the evidence of an inspector of franks at the post-office, as to whether he thought the defendant's acceptance a genuine handwriting, or otherwise; and his Lordship said, that though such evidence was received in Revett *v.* Braham, he had in his charge to the jury, laid no stress upon it. Mr Baron Wood, in his report in the case of Gurney *v.* Langlands, observed, "Opinions of skilful engineers, mariners, &c., may be given in evidence on matters depending upon skill, viz., as to what effect an embankment in a particular situation may have upon a harbour, or whether a ship has been navigated skilfully: because in such cases the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief to that effect."

(*r*) Peake Ev. 190.

(*s*) 1 Stark. Ev. 175.

the evidence given in Court. (*t*) So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death. (*u*) So in a case of murder, (*v*) where the defence was insanity, the twelve Judges were unanimous in thinking that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the Judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, *viz.*, whether, from the other testimony given in the case, the act as to which the prisoner was charged, was, in his opinion, an act of insanity. (*w*) And it has been since held that a physician who had heard the whole evidence on a trial for murder might be asked whether the facts and appearances proved showed symptoms of insanity. (*x*)

Opinion as to law of another country.

A person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. (*y*)

Separate examination of witnesses.

It is usual for the Court, at the instance of either party, in criminal as well as civil cases, to make an order that the witnesses, intended to be examined on either side, shall remain out of Court during the examination of the other witnesses; (*z*) and it has been held that if any person be present contrary to that order, he cannot, on any account, be permitted to be examined, (*a*) although he be the attorney in the cause. (*b*) But in a late case, (*c*) Littledale, J., said, that an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. And it appears now to be settled that it is in the discretion of the Judge whether he will allow the witness to be examined if he has been in Court in defiance of an order to withdraw. (*d*)

Counsel may not cross-examine if defendant ad-

Upon the trial of a misdemeanor, the defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel

(*t*) Rex *v.* Shaw, Stafford Spr. Ass. 1834, *cor.* Patteson, J. S. C. 6 C. & P. 372.

(*u*) 1 Phil. Ev. 290, 7th ed.

(*v*) Rex *v.* Wright, Russ. & Ry. C.C.R. 456.

(*w*) It seems that in Reg. *v.* M'Naughton, such questions were allowed to be asked. 29 Law Mag. 396.

(*x*) Rex *v.* Searle, 1 M. & Rob. 75.

(*y*) Rex *v.* Wakefield and others, *cor.* Hullock, B., Murray's ed., p. 238, in which case a gentleman at the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the Scotch law. See *ante*, p. 810.

(*z*) The order is made, on the application of a prisoner as an indulgence, not as a matter of right. 1 Chit. Cr. L. 618. 1 Burn. Just. tit. *Evidence*, p. 999.

(*a*) Attorney-General *v.* Bulpit, 9 Price, 4.

(*b*) Rex *v.* Webb, *cor.* Best, J., MS. Mann. Dig. p. 324.

(*c*) Pomeroy *v.* Baddeley, R. & M. N. P. C. 430. And it is now the ordinary course to permit, not only attorneys, but professional or scientific persons, to remain in Court, the rule being considered as not applying to witnesses of those descriptions. C. S. G.

(*d*) Parker *v.* M'William, 6 Bingh. R. 683. Beamon *v.* Ellice, 4 C. & P. 585, Taunton, J. Rex *v.* Colley, M. & M. 329, where Littledale, J., after consulting Gaselee, J., said it depended on the circumstances of the case whether such a witness ought to be examined. In Rex *v.* Wylde, 6 C. & P. 380, Park, J. A. J., rejected a witness, saying, "I will always in a criminal case reject a witness remaining in Court after all the witnesses on both sides have been ordered to leave it."

dresses the jury.

may argue for him any points of law that arise, and may suggest the questions to be put to the jury. (*e*)

The Judge may examine witnesses after case closed and objection taken.

Though the counsel for the prosecution has closed his case, and the counsel for the prisoner has taken an objection as to a defect in the evidence, the Judge is at liberty to make any further inquiry of the witnesses he thinks fit, in order to answer the objection. In *Rex* v. *Remnant*, (*f*) on a case reserved for the opinion of the Judges, none of them seemed to have any doubt but that it was competent and proper for the Judge to do so.

SECTION III.

How the Credit of Witnesses may be impeached.

Method of impeaching credit of witness.

There are four methods by which a person may impeach the credit of a witness who is called against him, besides the disproval of the facts stated by the witness. 1. By cross-examination. 2. By proof of statements made by him previous to his examination, inconsistent with his present evidence. 3. By proof of his acts and declarations touching the matters in issue. 4. By general evidence of his character.

1. By cross-examination of the witness as to his own conduct, &c.

1. As to impeaching the credit of a witness by cross-examination. If a witness be asked a question, for the purpose of showing him unworthy of credit, the answer to which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge, (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a penalty or criminal proceeding) he is not obliged to answer. (*g*) So far has this principle been carried, that in an action for a libel, which was published by the defendant in a voluntary affidavit, sworn extrajudicially before a magistrate, it was held that the magistrate's clerk was not bound to answer whether he wrote the affidavit, and delivered it to the magistrate; because, as it was said, the bare copying out of a libel is criminal. (*h*) So a witness is not bound to answer whether he wrote an advertisement referring to libellous letters which a prosecutor had received; and though he is bound to answer whether he

Questions tending to criminate.

(*e*) Rex *v.* White, 3 Camph. 98, *cor.* Lord Ellenborough. Rex *v.* Parkins, R. & M. N. P. C. 166, *cor.* Abbott, C. J.

(*f*) Russ. & Ry. C. C. R. 136.

(*g*) See the cases collected, 2 Phil. Ev. 417. 1 Stark. Ev. 190. See also *ante*, p. 916, as to the obligation to answer where the answer might subject to a civil suit. The protection is not confined to questions where the answer would lead to an immediate conclusion of guilt, but extends to all questions that tend to criminate the witness, "and the reason is that the party would go from one question to another, and though no question might be asked, the answer to which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him." Per Lord Tenterden, C. J. Rex *v.* Slaney, 5 C. & P. 213. Thus, where a witness in an action by the indorsee against the drawer of a bill, where the defence was usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held that he was not bound to answer the question. Cates *v.* Hardacre, 3 Taunt. 424.

(*h*) Maloney *v.* Bartley, 3 Camph. 210. Rex *v.* Slaney, 5 C. & P. 213.

knows in whose handwriting it is, he is not bound to name the person, as it may be himself. (*i*) An accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected for such offences. (*j*) So a witness in custody upon a charge of felony cannot be asked, "Have you not *said* that you committed the offence, for which you are now in custody?" (*k*) But although a witness is not compellable to answer questions of this description, it should seem that such questions may legally be asked. (*l*) As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them. In *Cooke's case*, (*m*) on an indictment for high treason, the prisoner, in order to challenge a juryman, asked him if he had not said he was guilty and would be hanged. Lord Chief Justice Treby overruled the question, and said, "You may ask upon the *voire dire*, whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value: but that you may ask a juror or witness every question that will not make him criminous, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So, persons have been excused from answering, whether they have been committed to Bridewell as pil-

Such questions may be asked.

Questions tending to degrade.

Authorities that they need not be answered.

Cooke's case.

(*i*) Rex *v.* Slaney, 5 C. & P. 213, Lord Tenterden, C. J.

(*j*) West's case, MS. 2 Phil. Ev. 419. A witness who answers questions tending to criminate himself on his examination in chief, is bound to answer on the cross-examination, though his answer may implicate his life. Per Dampier, J. Manning's Index, tit. *Witness*, pl. 222. See also East *v.* Chapman, Mood. & Malk. 47. S. C. 2 C. & P. 570, and in Dixon *v.* Vale, 1 C. & P. 278, Best, C. J., laid it down that if a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object that any further question has a tendency to criminate him.

(*k*) Rex *v.* Pegler, 5 C. & P. 521, Park, J. A. J., and Littledale, J.

(*l*) See the observations of the Judges in Rex *v.* Watson, 2 Stark. 149, *et seq.* Rex *v.* Holding and Wade, O. B. 1821, *cor.* Bayley, J., MS. Archb. Crim. Pl. 150. S. C. 1 Archb. Pract. 193. Harris *v.* Tippet, 2 Campb. 637, *cor.* Lawrence, J. *Contrà*, Rex *v.* Lewis, 4 Esp. N. P. C. 225. M'Bride *v.* M'Bride, ibid. 242; but see 2 Phil. Ev. 426. Indeed, if the imputation contained in a question is so connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited *must* be asked whether he has been guilty of the offence imputed, *post*, p. 931, 937. And Lord Tenterden has ruled that the counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture; such objection belongs to the witness only. Thomas *v.* Newton, 1 Mood. & Malk. 48, note (*a*) to East *v.* Chapman.

(*m*) 4 St. Tr. 748. 2 Phil. Ev. 423.

dresses the jury.

The Judge may examine witnesses after case closed and objection taken.

may argue for him any points of law that arise, and the questions to be put to the jury. (*e*)

Though the counsel for the prosecution has o[illegible] the counsel for the prisoner has taken an ob[illegible] in the evidence, the Judge is at liberty to m[illegible] of the witnesses he thinks fit, in order to s[illegible] *Rex* v. *Remnant*, (*f*) on a case reserv[illegible] Judges, none of them seemed to have [illegible] competent and proper for the Judge [illegible]

[illegible] er; [illegible] questions [illegible] e expressions [illegible] tainly very strong [illegible] ompellable to answer [illegible] discrediting him: at the [illegible] such a decision was not ne-

SE[illegible]

How the Credi[illegible]

Method of impeaching credit of witness.

There are four me[illegible] es. In the first (*Cooke's case*) credit of a witness v[illegible] scredit a witness, but to exclude a of the facts state[illegible] *er's case*), the object of the examina- 2. By proof of st[illegible] ness unworthy of credit, but incompetent tion, inconsister[illegible] the last case (*Sir John Friend's*), there acts and declar[illegible] on to the question, on the ground that the evidence of h[illegible] ct the witness to penalties. There are two

1. By cross-examination of the witness as to his own conduct, &c.

1. As to j[illegible] at Nisi Prius, in accordance with the doctrine laid If a witne[illegible] ief Justices in the above cases. In *Rex* v. *Lewis*, (*p*) unworthy [illegible] indictment for an assault, the prosecutor in the course him to [illegible] amination, was asked if he had not been in the House of charge [illegible] on in Sussex, and Lord Ellenborough, C. J., interposed, of the [illegible] aid, that that question should not be asked; that it was for-

Questions tending to criminate.

proc[illegible] settled by the Judges, among whom were Treby, C. J., and cir[illegible] well, J., both of whom were great lawyers, that a witness was b[illegible] not bound to answer any question, the object of which was to degrade, or render him infamous. *M'Bride* v. *M'Bride* (*q*) was an action of assumpsit, in which a woman being called as a witness for the plaintiff, the counsel for defendant was proceeding to examine her as to her living in a state of concubinage with the plaintiff, but Lord Alvanley interposed, and said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His Lordship added, "I do not go so far as others may. I will not say a witness shall not be asked to what may *tend* to disparage him, that would prevent an investigation into the character of a witness, which it may often be of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness."

O'Coigley and O'Connor's case.

In the trial of *O'Coigley* and *O'Connor*, (*r*) for high treason, where a witness was asked, on cross-examination, how many informations he had laid, for the purpose of throwing an imputation

(*n*) 6 St. Tr. 259. 2 Phill. Ev. 424.
(*o*) 4 St. Tr. 606. 2 Phill. Ev. 424. 1 Stark. Ev. 194.
(*p*) 4 Esp. 225.
(*q*) 4 Esp. N. P. C. 242.
(*r*) 26 How. St. Tr. 1353.

on informer, whereupon he appealed to the pro-
it was held that the question should not be
v another.

s must be mentioned that of *Rex* v. Hodgson's case.
ndictment for a rape upon Harriet
her evidence, she was cross-exa-
o put these questions to her,
ection with other persons?"
nection with a particular
was not obliged to
lowed the objection,
answer them, as they
d on a case reserved, the
ction was properly allowed. (*t*)
ing authority. (*u*)

e the following authorities in fa- Authorities that they must be answered.
e witness is compellable to answer
isgrace or disparage. In *Rex* v. *Ed-*
ation to bail the prisoner, who was charged Rex v. Edwards.
one of the bail was asked whether he had not
ry for perjury? This question was objected to, as
inate him: but the Court overruled the objection,
e was no impropriety in the question, as the answer
subject him to any punishment; and the bail admitting
t, he was rejected. In the case of *Frost* v. *Holloway*, (*w*) the Frost v. Holloway.
sel in cross-examining a witness, asked him whether he had not
een tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, C. J., whether he was bound to answer such a question. Lord Ellenborough, C. J., said, "If you do not answer the question I will commit you;" adding, "you shall not be compelled to say, whether you were guilty or not." This occurred at the sittings after Hil. Term, 1818; and it would appear, that his Lordship had changed his opinion, as to the obligation on the witness to answer, since his decision in *Rex* v. *Lewis*, as above mentioned. In *Cundell* v. *Pratt*, (*x*) Best, C. J., said, "Until I am told by the House of Lords that I am wrong, the rule I shall always act on is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer." (*y*) Cundell v. Pratt.

And in *Roberts* v. *Allatt*, (*z*) where in an action on a bill of exchange the defence was that the bill was drawn and accepted for the Roberts v. Allatt.

(*s*) Russ. & Ry. C. C. R. 211. But see Rex v. Barker, 3 C. & P. 589.

(*t*) See also Dodd v. Norris, 3 Camph. 519. S. P. mentioned by Lord Ellenborough as having been decided by all the Judges. It may be observed, that besides degrading the witness, her answer might have subjected her to punishment in the spiritual court. In Rex v. Pitcher, which was an indictment against a female prisoner for stealing from the person, Hullock, B., would not allow the prosecutor to be asked, on cross-examination, whether any thing improper passed between him and the prisoner at the house where he lost the property. 1 C. & P. 85.

(*u*) See the cases, *ante*, p. 784.

(*v*) 4 T. R. 440.

(*w*) MS. 2 Phil. Ev. 428.

(*x*) Mood. & Malk. 108.

(*y*) See also 1 Arch. Pract. 193. Arch. Cr. Pl. 150, where a MS. case of Rex v. Holding and Wade is cited, in which Bayley, J., held that all questions must be answered except those the answer to which may subject the witness to punishment.

(*z*) Moo. & Malk. 192.

balance of an account of stockjobbing transactions, and one of the parties to the transaction objected to answer the question, on the ground that his answer might subject him to penalties under the stockjobbing acts; but the transaction had taken place more than three years before the trial, and the witness did not know that any proceeding had been commenced against him; Lord Tenterden, C. J., held that the witness was bound to answer the questions put to him.

If the witness declines to answer, it can have no effect on the jury.

Assuming that a witness be not compellable to answer degrading questions, it seems allowed, (as in the case of criminating questions, see *ante*, p. 927,) that the questions may legally be asked. (*a*) If the witness declines answering questions tending either to criminate or degrade him, it seems hardly possible to avoid coming to a conclusion almost as unfavourable to his credit as if he had admitted the misconduct imputed to him in the question: but in *Rex* v. *Watson*, (*b*) Holroyd, J., said that he had understood the rule to be that if you propose a question to a witness and he declines to answer it, his not answering it can have no effect on the jury. And in *Rose* v. *Blakemore*, (*c*) where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C. J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. And in *Lloyd* v. *Passingham*, Lord Eldon expressed a similar opinion. (*d*)

Witness's answer conclusive.

If the question be of a tendency to criminate or degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence; (*e*) that is, if the question be merely collateral to the point in issue; for if it be relevant to it, and the witness deny the thing imputed, evidence may be called to contradict. Thus, where a witness for a prosecution in larceny had been asked in cross-examination, whether he had not been charged with robbing his master, and

(*a*) See 1 Stark. Ev. 197.

(*b*) 2 Stark. N. P. C. 157, 158.

(*c*) Ry. & Mood. N. P. C. 382.

(*d*) 16 Ves. 64. See the note of the Reporters in Rose *v.* Blakemore, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

(*e*) Rex *v.* Watson, 2 Stark. R. 149, 151, 158. Rex *v.* Clarke, 2 Stark. R. 244, per Holroyd, J., Harris *v.* Tippett, 2 Campb. 637, *cor.* Lawrence, J. For the Court will not try a collateral question whether the witness has been guilty of the misconduct imputed to him. However, in this case of Harris *v.* Tippett, which has been relied upon by very high authorities in support of the general rule, (see Rex *v.* Watson, 2 Stark. 155, 158,) it may be perhaps doubted whether the decision of the learned Judge in this particular instance was correct, although the principle laid down by him undoubtedly is so. The witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff from attending the trial; the question therefore, it may be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See the Queen's case, 2 B & B. 311, *post*, p. 936, and see the cases where a prosecutrix in rape, and a daughter in an action for seduction, have been contradicted by other witnesses, *ante*, p. 784.

whether he had not afterwards said he would be revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former, his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced, that they were spoken by the witness. (*f*)

Privilege of the witness only.

The privilege of refusing to answer is the privilege of the witness, and not of the party; for that reason, Lord Tenterden, C. J., refused to allow counsel to support, by argument, the privilege as belonging to the party whom he represented. (*g*)

If a witness answers any questions on cross-examination on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout. (*h*) And so if a witness voluntarily answers questions tending to degrade him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be. (*i*)

Rule that best evidence possible must be given not applicable to cross-examination to discredit: *semble.*

The rule which requires the best evidence to be produced, of which the nature of the thing is capable, is, it should seem, in some degree relaxed in regard to cross-examination for the purpose of discrediting a witness; for the rule is to be understood as applicable only to the proof of the issue or some fact material to the issue. (*k*) Thus it is usual in practice to ask in cross-examination an accomplice or other witness, who appears against a person on a criminal prosecution, whether he has not been tried for some offence; although the fact of his having been tried for such an offence is partly matter of record, and, therefore, according to the general rule, not to be proved without the record, which is the highest species of proof. (*l*)

2. By proof of contradictory statement.

A foundation must be laid on cross-examination.

2ndly. The credit of a witness may be impeached by giving evidence of his having said or written touching the cause, what is at variance and inconsistent with his testimony on the trial. (*m*) But in order to lay a foundation for such discrediting evidence, it is necessary first to ask the witness, whom it is proposed to discredit, by proof of contradictory *verbal* statements, upon cross-examination, whether he has made the statement or declaration, or held the conversation which it is intended to prove. (*n*) Thus, if a witness, on being examined in chief as to some transaction supposed to have occurred between certain persons, should admit, that he had heard of such a thing, but does not know its cause, it would be irregular

(*f*) Yewin's case, 2 Campb. 638, see also the Queen's case, 2 Brod. & Bing. 313, and *post*, p. 936.

(*g*) 2 Phill. Ev. 418, citing Thomas *v.* Newton, M. & M. 48 *n.*

(*h*) East *v.* Chapman, M. & Malk. 46, Lord Tenterden, C. J.

(*i*) Per Dampier, J., Winchester Sum. Ass. 1815, Mann. Ind. Witness, 222.

(*k*) 1 Phil. Ev. 301, 7th ed.

(*l*) 1 Phil. Ev. 301, 7th ed. 2 Phill. Ev. 428, last ed. But if the object is, not merely to discredit, but to exclude the witness altogether on the ground of his conviction for a crime, the conviction must be regularly proved by the production of the record, *post*, p. 974.

(*m*) De Sailly *v.* Morgan, 2 Esp. N.P.C. 691. Christian *v.* Combe, 2 Esp. 489. See *ante*, p. 896, as to the depositions of a witness before a magistrate being used for this purpose. In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for having smuggled goods in his possession, he gave a different account of the matter, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said. Rex *v.* Howe, 1 Campb. 461. S. C. 6 Esp. 125.

(*n*) The Queen's case, 2 Brod. & Bing. 299. Carpenter *v.* Wall, 11 A. & E. 803.

to prove his having made a declaration respecting the cause, in order to shew his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction for the purpose of shewing, that he must have remembered it: (*o*) for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the Court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation and reminding him of it, in order to call up all the powers of his memory as to the transaction. (*p*) And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place, and person involved in the supposed contradiction; because when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. Where, therefore, a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person, or conversation; Tindal, C. J., refused to allow a witness to be asked whether on a particular occasion the witness had told him that he was in partnership with the defendant. (*q*)

Mode of laying a foundation for proof of contradictory statements.

Proof of contradictory statements in writing.

With respect to the mode of proceeding where a contradictory statement formerly made by the witness in writing is proposed to be produced to discredit him some important rules were laid down

(*o*) The Queen's case, 2 Brod. & Bing. 299.

(*p*) 2 Brod. & Bing. 300. Abbott, C. J., in delivering the opinion of the Judges, added, that in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 Brod. & Bing. 314.

(*q*) Angus *v.* Smith, M. & Malk. 473. The witness was allowed to be recalled, and asked the particular question; and the same rule was laid down by Parke, B., in Crowley *v.* Page, 7 C. & P. 789, *post*, p. 936, note (*p*), and in Rex *v.* Pearce, Gloucester Spr. Ass. 1829, MSS. C. S. G. Learned Judges have in many instances allowed witnesses to be recalled in order to lay a foundation for the admission of such contradictory evidence. In Reg. *v.* Harris, Salop Spr. Ass. 1842, upon an indictment for murder, the prisoner had no counsel, and in his defence to the jury he alleged certain statements to have been made by the principal witness for the prosecution, and imputed that his son, who could prove the statements, had been prevented from attending to give evidence for him; and Patteson, J., stopped the trial, and ordered the son to be sent for, at the same time directing that no communication should be made to him of the matters as to which he was going to be examined. The prisoner having no attorney, and the son not having been examined by any one as to what statements he had heard the witness make, a difficulty arose as to the mode which was best to be adopted in the examination of the son, and the cross-examination of the witness, and the following mode was adopted as the best under the peculiar circumstances of the case:—The son was first examined by the editor, at the request of the learned Judge, as to what he had heard the witness say, the witness being kept out of Court during such examination, and then the witness was called in and cross-examined by the editor as to the statements which the son had sworn that he had made. The jury acquitted the prisoner, although the evidence for the prosecution was very strong. This case has been mentioned as it may serve as a guide for the practice in cases where the prisoner wishes to call witnesses to prove contradictory statements made by witnesses for the prosecution, without having laid the ground for so doing in a proper manner. C. S. G.

in the House of Lords in the *Queen's case.* (r) A witness named Louisa Dumont, who had been called on the behalf of the prosecution, was asked upon cross-examination whether she had not made particular statements, which the counsel read to her out of a supposed letter to her sister; it was objected that the letter itself should be put in before any use could be made of its contents: and thereupon the following question was proposed to the Judges: Whether in the Courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shewn to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter? The Judges answered this in the negative; and Abbott, C. J., stated their reasons to be that the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence: the proper course, therefore, was to ask the witness whether or no that letter was of the handwriting of the witness. If the witness admits this, the cross-examining counsel may, at his proper season, read that letter as evidence. (s) A second question was at the same time put to the Judges, part of which was, whether the Court would allow a witness in case he should not admit that he did or did not write the same, to be examined to the contents of such letter. (t) To which the learned Judges gave an answer in the negative, for the same reason which led them to give the answer to the first question, *viz.*, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

The witness must not be cross-examined as to the contents, but the paper must be shown him, and he must be asked if it is his writing.

If he admits it, it may be read as part of the evidence on the other side.

If he does not admit it, he cannot be cross-examined to its contents.

If, however, a paper written by the witness is proved to have been lost or destroyed, (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the paper,) it would be reasonable and proper to allow the counsel to cross-examine the witness as to the contents of such letter. (u)

Where the paper is lost.

A witness, who has been examined before commissioners in a bankruptcy, may be asked whether he had mentioned a fact, which he had just mentioned, before the commissioners, without putting his examination into his hand, as the object is to show that he did not mention the fact, and he may admit that if he chooses; if he does not ask for the examination to refresh his memory, he may answer without it if he chooses. (v)

If the counsel who cross-examines puts a paper into the witness's hand, and puts questions on it, and anything comes of the questions

(r) 2 Brod. & Bing. 286.

(s) Id. ibid. But if he suggests to the Court that he wishes to have the letter read immediately in order to found certain questions upon its contents, that cannot be well or effectually done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read, but considering it as part of the evidence of the counsel proposing it and subject to all the consequences of its being so considered. Ibid. 289, 290.

(t) The other part of the question was, whether when a letter is produced in the Court below, the Court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part; and the Judges were of opinion that it should be answered in the affirmative.

(u) 2 Phill. Ev. 439.

(v) Ridley v. Gyde, 1 M. & Rob. 197, Tindal, C. J.

founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the cross-examination founded on the paper entirely fails, the opposite counsel has no right to look at it. (*w*) And if the counsel in cross-examining a witness put a letter in his hands, and after asking if he wrote it, desire him to read it, and then put questions upon it, such counsel is not bound to have the letter read until after he has addressed the jury. (*x*)

Cross-examination as to statements made before committing magistrates.

We have seen, (*y*) that by the rules of the Judges, which were promulgated soon after the passing of the Prisoners' Counsel Act, a witness for the crown cannot, upon his cross-examination, be asked whether he did or did not in his deposition make such or such a statement, or whether he did or did not make such a statement before the magistrate, until after his deposition has been read. These rules have been acted upon with great strictness in practice, and it seems fully settled, that a counsel for a prisoner can neither ask a witness as to anything contained in his deposition, or anything not contained in the deposition, without first putting in the deposition to show what the witness did state. (*z*) And so strictly has this practice been adhered to, that it has been held that a prisoner's counsel cannot be permitted to ask a witness whether he had ever made a particular statement before, but that the question ought to be qualified by adding, "except when you were before the magistrate," or "the coroner," as the case may be. (*a*)

Where, however, a witness admitted that he had been cross-examined by the prisoner's attorney when he was before the magistrate, the counsel for the prisoner was permitted to question him as to the answers he gave, it appearing to the Judge that no cross-examination of the witness was returned by the magistrate. (*b*)

In one case it seems to have been considered a fitting course for the Judge to look at the depositions while the witnesses were under examination, and question them as to any discrepancy between them and their evidence; (*c*) but in other cases learned Judges have refused, where counsel were employed by the prisoner, to look at the depositions at all. (*d*)

In a case where it was proved that the depositions had been

(*w*) Reg. *v.* Duncombe, 8 C. & P. 369, Lord Denman, C. J.

(*x*) Holland *v.* Reeves, 7 C. & P. 36, Alderson, B.

(*y*) *Ante*, p. 815.

(*z*) Reg. *v.* Taylor, 8 C. & P. 726. Erskine, J. Reg. *v.* Holden, 8 C. & P. 606, Patteson, J. Rex *v.* Edwards, 8 C. & P. 26, Littledale, J., and Coleridge, J., and see the cases, ibid., 31, note (*a*)

(*a*) Reg. *v.* Holden, *supra*. Reg. *v.* Shellard, 9 C. & P. 277, Patteson, J.

(*b*) Rex *v.* Edwards, *supra*.

(*c*) Rex *v.* Edwards, *supra*. This is a course which has not unfrequently been adopted in cases where the prisoner has had no counsel, and in such cases appears highly expedient, as prisoners rarely have copies of the depositions unless they are defended by counsel, and even if they had, probably would not be able properly to avail themselves of any contradictions that might arise; and it is to be remembered that the depositions are returned to the Judge for the express purpose of enabling him to judge as to the accuracy of the witnesses. C. S. G.

(*d*) Rex *v.* Thomas, 7 C. & P. 817. Parke, B., as stated 8 C. & P. 27, and that statement is correct. Reg. *v.* Holden, *supra*. In both these cases the counsel for the prisoner requested the Judge to look at the depositions, and the object was to avoid putting in the depositions, and if the Judge had in those cases looked at the depositions, and questioned the witnesses upon them, it would have been indirectly getting rid of the effect of the rules themselves. It is a very different question whether the Judge may not in his discretion question a witness as to discrepancies which strike his mind, and either have not struck the counsel for the prisoner, or if so, have been considered by him not of such importance as to induce him to put in the depositions, and so give the counsel for the crown the reply. C. S. G.

regularly taken against the prisoner before the magistrates, and returned to the proper officer, and that officer proved that he had made diligent search after them, and could not find them; Patteson, J., held that the prisoner's counsel might cross-examine from copies of them, which were proved by the magistrate's clerk to be correct. (*e*)

Depositions lost.

But the rules only apply to what are strictly depositions taken in the regular course before a magistrate. Where, on an indictment for a rape, it appeared that the prosecutrix had twice charged the prisoner with the offence, and that on the first occasion the prosecutrix was sworn and her statement taken down, but not read over to her or signed either by the magistrate or the prosecutrix, and after this examination the prisoner was discharged, but was afterwards again apprehended, and committed by other magistrates; Coleridge, J., after conferring with Gurney, B., held that the counsel for the prisoner might ask the prosecutrix whether she had not said certain things on the first occasion when she was so examined without producing the writing which had been taken down. (*f*)

Where the rules do not apply.

A very distinguished writer on the law of evidence, (*g*) has stated his opinion, that the determination of these points has left the question still open, whether counsel may be allowed to cross-examine a witness as to his having given a different account of the transaction, or as to his having written a letter containing a different account; because, in the Queen's case, the question put to the witness related to a variety of particular expressions, and entire passages, supposed to be contained in a letter, and the letter, which was supposed to contain such expressions, had been actually produced, and shown by the counsel: whereas the question, proposed above, is quite general, namely, whether the witness has given any account in his letters, or otherwise, differing from his present account, and the question is proposed without any reference to the circumstance, whether the letter is or is not in existence, or whether it has or has not ever been seen by the cross-examining counsel. (*h*) And the eminent author above alluded to, argues with great force and ability, that such a question may be asked with propriety. (*i*)

Whether a witness may be asked on cross-examination the general question, whether he has written a different account. *Query.*

In order to lay a foundation for contradicting a witness, the questions asked upon cross-examination must, in some way, be relevant to the matter in issue. Thus, in an action for usury, the person with whom the contract, alleged to be usurious, had been made, was produced as a witness for the plaintiff, and the counsel for the defendant proposed to cross-examine him as to other contracts he had made with other persons, which were not usurious; intending, if the witness answered in the affirmative, to draw the conclusion that he had made the same contract with the defendant, and if the witness denied the nature of those other contracts,

What questions may be asked to lay a foundation for contradictory evidence.

(*e*) Reg. *v.* Shellard, 9 C. & P. 277.

(*f*) Reg. *v.* Griffiths, 9 C. & P. 746.

(*g*) 1 Phil. Ev. 299, 7th ed.

(*h*) Mr. Phillipps applies the same reasoning to another resolution of the Judges, during the same proceedings, viz., that if a witness be asked whether he has represented such a thing, they should direct the counsel to ask whether the representation had been made in writing or words. This opinion of the Judges, the above learned writer conceives to have been founded on the supposition that the witness's letter was actually in the possession of the cross-examining counsel, and on the circumstance of the question relating to particular expressions, supposed to have been contained in the letter. See 2 Phill. Ev. 400.

(*i*) 1 Phil. Ev. 299, 7th ed., *et seq.* See also 1 Stark. Ev. 203, *et seq.*

to call evidence to prove the contrary, and thereby destroy the witness's credit. But Lord Ellenborough refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue in the cause; and the Court of King's Bench were afterwards all of opinion, that he had acted properly; and they laid down the rule, that it is not competent for counsel on cross-examination to question the witness concerning a distinct collateral fact, which, if answered affirmatively, is wholly irrelevant to the matter in issue, for the purpose of discrediting him, if he answers in the negative, by calling other witnesses to contradict him. (*j*) It need hardly be observed, if a question be wholly irrelevant, and therefore improperly asked on cross-examination, and the witness nevertheless give an answer to it, the cross-examining party may not call evidence to contradict that answer; but it is further to be remarked, that many questions may be asked with propriety on cross-examination, which are irrelevant to the matter in issue, yet are allowable because they go to the credit of the witness: but the distinction is, as to the right to call evidence to contradict answers given to questions put to shake a witness's credit, that if the questions go merely to his credit, and are in other respects collateral to the issue, evidence cannot be called to contradict the answers; if they not only go to his credit, but are also connected with the subject of inquiry, then it is allowable to call witnesses to contradict. Thus, if a witness be asked on cross-examination, whether he has been guilty of a crime, or any conduct which would discredit him as a witness, but is unconnected with the matters in issue, and he denies it, his answer is conclusive; (*k*) but if the imputed misconduct be relative to the subject of inquiry, as, if a witness for the crown be asked whether he had not said that he would be revenged on the prisoner, and would soon fix him in gaol, (*l*) or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution, (*m*) then evidence may be called to contradict him, if he denies the words or declaration imputed to him; and if the witness declines to give any answer to such a question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. (*n*)

In what cases evidence may be called to contradict.

When the witness declines to answer.

In one case, where a witness said on cross-examination that he had no recollection of a certain declaration one way or the other, without expressly denying it, Tindal, C. J., held that a person could not be called to prove such declaration; as he had never heard such evidence admitted in contradiction, except when the witness had expressly denied the declaration. (*o*) But in a later case where a witness neither admitted nor denied a verbal statement, Parke, B., held that evidence was admissible to show that the witness had made such a statement. (*p*)

(*j*) Spencely *v.* De Willott, 7 East, 108.

(*k*) *Ante*, p. 930.

(*l*) Yewin's case, 2 Campb. 638.

(*m*) The Queen's case, 2 Brod. & Bing. 311.

(*n*) The Queen's case, 2 Brod. & Bing. 313, 314.

(*o*) Paine *v.* Beeston, 1 M. & Rob. 20.

(*p*) Crowley *v.* Page, 7 C. & P. 789.

3rdly. The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject matter of inquiry. (*q*) And the rules above stated, as to the necessity of a previous cross-examination of the witness whom it proposed to discredit, apply equally to this method of discrediting him as to the last. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness; in this case also it has been determined that the witness should be previously questioned to such declarations, or such acts, on the cross-examination; (*r*) for in one case as well as the other an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact. Thus, where the witness's moral character is relevant to the issue, expressions of the witness may be proved without the previous inquiry, if they tend merely to disgrace the witness by showing that he has made unbecoming declarations; but even if they be of such a nature the introductory question must not be dispensed with, if they tend likewise to contradict some part of the witness's evidence. Therefore in an action for seducing the plaintiff's daughter, which the daughter proves, the defendant cannot give evidence that she has talked of another person as her seducer and the father of her child, unless she be first asked on cross-examination whether she ever used those expressions. (*s*)

3. By proof of witness's acts and declarations touching the cause.

Previous cross-examination necessary.

After a witness has been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus, if that which the witness has stated in answer to the question on his cross-examination, arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were. (*t*) And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination. (*u*)

Re-examination.

But this, it should seem, is the limit of such a re-examination. Lord C. J. Abbott, in delivering his opinion in the Queen's case, said, "I think the counsel has a right, upon a re-examination, to

The learned Baron said, "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so you could never contradict a witness who said he could not remember."

(*q*) The Queen's case, 2 Brod. & Bing. 311.

(*r*) 2 Brod. & Bing. 311.

(*s*) Carpenter *v.* Wall, *supra*, 11 A. & E. 803.

(*t*) 2 Brod. & Bing. 295.

(*u*) Ibid.

ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and, also, of the motive, by which the witness was induced to use those expressions: but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." (*v*)

His Lordship afterwards observed, "I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But, the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive, under which he made them; but, when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent." (*w*)

But the reasoning and the grounds of the supposed distinction have been since considered by the Court of Queen's Bench, and after full consideration that Court overruled the distinction, and adopted the more safe and intelligible principle that the office of re-examination is to be confined to showing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers ought not to be admitted. (*x*)

(*v*) 2 Brod. & Bing. 297.

(*w*) 2 Brod. & Bing. 297, 298. The other Judges, except Mr. Justice Best, agreed with the Lord Chief Justice; but the Lord Chancellor and Lord Redesdale were of the same opinion with Mr. J. Best, and differed from the other Judges, inasmuch as they thought that the entire conversation ought to be admitted, not as evidence of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

(*x*) 2 Phill. Ev. 443, citing Prince *v.* Samo, 7 A. & E. 627, where in an action for a malicious arrest, a witness called for the plaintiff stated on cross-examination that the plaintiff had instituted a prosecution for perjury against a witness examined against him in the action in which he had been arrested, and that the plaintiff had said that he had been remanded by the Insolvent Debtors' Court; on his re-examination it was proposed to ask him whether the plaintiff had not also on the trial of the indictment sworn, that the advance in question was a gift and not a loan; and Lord Denman, C. J., ruled that the question could not be put, and the Court held that the ruling was right.

Thus where an accomplice being cross-examined with a view to throw discredit on his testimony, confessed that he had committed two robberies the same night as the one charged in the indictment and on re-examination it was proposed to ask him as to the particular circumstances attending those robberies, and the persons in whose company they where committed, in order to show that the prisoners were the persons; Littledale, J., refused to allow it, observing that the cross-examination having been only with a view to the witness's discredit, it was not competent to the counsel for the prosecution, on re-examination, to ask questions not arising out of such cross-examination, in order to criminate the prisoners. (*y*)

4. By proof of witness's character.

4thly. The credit of a witness may be impeached by proof of his general character. It is now completely settled with respect to this mode of discrediting a witness, that general evidence only, and not evidence as to particular facts, can be employed; (*z*) for if it were allowable to give evidence of particular collateral facts to affect his credit, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice given to him.(*a*) The proper mode, therefore, of examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath. (*b*) In order to answer this question negatively it is not necessary that the witness should ever have heard such person give evidence on oath, as the real question is whether the witness has such a knowledge of the person's character and conduct as enables him conscientiously to say that it is impossible to place any reliance on any statement that such person may make. (*c*) It has been held upon an indictment for perjury that a witness for the defendant could not be asked whether from having heard a witness for the prosecution give evidence on the trial of a former cause, be considered that the testimony of that witness could be relied on; nor whether he ever heard him commit perjury; nor whether he would not believe the witness because he had heard him commit perjury; as the witness must speak from the general character. (*d*)

Where upon an indictment for stealing money, it was opened on the part of the crown that an accomplice and one Mercer would be called as witnesses; Parke, J., both before and after those persons were called, allowed the prisoner's counsel to ask the other witnesses for the prosecution whether the accomplice and Mercer were not persons of very bad character. (*e*)

In answer to such evidence against character, the other party

(*y*) Fletcher's case, 1 Lew. 111.

(*z*) Rex *v.* Watson, 2 Stark. N. P. C. 149. Bull. N. P. 296. 2 Phil. Ev. 430. 1 Stark. Ev. 211

(*a*) Bull. N. P. 296.

(*b*) Mawson *v.* Hartsink, 4 Esp. N.P.C. 102.

(*c*) Rex *v.* Bispham, 4 C. & P. 392, Parke, J., and Garrow, B.

(*d*) Rex *v.* Hemp, 5 C. & P. 468, Lord Denman, C. J.

(*e*) Rex *v.* Nichols, 5 C. & P. 600.

may cross-examine the witness as to his means of knowledge, and the grounds of his opinion; or may attack his general character. (*f*)

Where a witness on cross-examination stated that he had become bail for a witness who had been previously examined, and he believed it was on a charge of keeping a gaming-house; in order to prevent any impression being thereby made against the character of the previous witness, Gaselee, J., and Taunton, J., allowed the previous witness to be recalled, and asked whether the charge of keeping the gaming-house was in fact a true charge or not. (*g*)

Character of witness, how supported.

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses. (*h*) Thus, in a case where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible. (*i*) But if the character of a witness has been impeached, (although, according to some authorities, upon cross-examination only,) evidence on the other side may be given in support of the character of the witness by general evidence of good conduct. (*j*) So in a case where two attesting witnesses to a will, which was impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, it was held allowable to call evidence to the general good character of the deceased witnesses: (*k*) and Lord Ellenborough, in approving of that decision, observed, that if they had been alive, they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of shewing what credit was to be given to their attestation. (*l*) Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities. (*m*) The better opinion seems to be that such evidence is not admissible, except in cases where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; there, in order to repel such imputation, it may be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. (*n*)

Party may not discredit his own witness,

If a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to

(*f*) 1 Stark. Ev. 212.

(*g*) Rex *v.* Noel, 6 C. & P. 336.

(*h*) Bishop of Durham *v.* Beamont, 1 Campb. 207. 1 Stark. Ev. 221.

(*i*) 1 Campb. 207.

(*j*) 1 Stark. Ev. 221. Bate *v.* Hill, 1 C. & P. 100. Rex *v.* Clarke, 2 Stark. N. P. C. 241, where the prosecutrix, upon an indictment for an attempt to commit a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution: *cor.* Holroyd, J., but see Dodd *v.* Norris, 3 Campb. 519.

(*k*) By Lord Eldon in Doe *v.* Stephenson, 3 Esp. 284. By Lord Kenyon in Doe *v.* Walker, 4 Esp. 50. Provis *v.* Reed, 5 Bingh. R. 435.

(*l*) 1 Campb. 210.

(*m*) Gilb. Ev. 135. Bull. N. P. 294.

(*n*) 2 Phil. Ev. 445. 1 Stark. Ev. 221. See also the opinion expressed by Bayley, J., in Wihen *v.* Law, 3 Stark. N. P. C. 63. See also *ante*, chap. 1, s. 3. *Of Hearsay Evidence*

show that that witness is not to be believed on his oath: (*o*) for that would be to enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. (*p*) But if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses; and to show that the facts which his own witness had stated contrary to his interests were otherwise; (*q*) for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental, and consequential only. (*r*) Still a party is not at liberty to set up so much of his witness's testimony as makes for him, rejecting and disproving so much as makes against him. (*s*)

by proof of his character: but he may prove his case by other witnesses.

Whether it be competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial, is a question on which there has been some difference of opinion. Such a contrary statement, it is clear, can only be admitted, if admissible at all, for the purpose of neutralising or raising doubt and suspicion as to those parts of the witness's testimony with which the contrary statement is a variance. (*t*) In *Wright* v. *Beckett*, (*tt*) which was an action of trespass, the plaintiff, having called four witnesses to prove that the plaintiff and his predecessors had immemorially exercised acts of ownership over the place in question, called a fifth person with a view to establish the same fact; he, however, contradicted the other four witnesses, and the plaintiff's counsel thereupon asked him whether he had not given a different account of the facts to the plaintiff's attorney two days before; this question was objected to on the ground that its obvious tendency was to discredit the witness. But Lord Denman held that the question might be put. The witness gave an evasive answer to the question. The plaintiff's attorney was then called, and although the course was objected to, proved that the witness had given him, upon the occasion referred to, an account of the facts different from that given by him to the Court, and that he took down in writing the account so given, and that he read it over to the witness, who said it was correct; and this account he read to the jury. And the jury were told that they were not to look upon the statement given to the attorney as evidence of the facts therein stated; but only by way of neutralising the effect of the evidence which the witness had unexpectedly given in Court. And after argument, on a motion for a new trial, on the ground that the evidence of the attorney had

Whether a party may prove contrary statements made by his own witness.

Wright v. Beckett.

(*o*) Ewer v. Ambrose, 3 B. & C. 750. Bull. N. P. 297.

(*p*) Bull. N. P. 297.

(*q*) 3 B. & C. 749, 750, 751. Friedlander v. The London Assurance Company, 4 B. & Ad. 193. Richardson v. Allan, 2 Stark. N. P. C. 334. Alexander v. Gibson, 2 Campb. 555. Particularly where the witness is forced on a party by law: as for instance, a subscribing witness to a will or deed. Thus in Lowe v. Jolliffe, 1 W. Bl. 365, the subscribing witness to a deed swore to the testator's insanity; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in Pike v. Badmering, cited in 2 Stra. 1096, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(*r*) Bull. N. P. 297.

(*s*) 2 Campb. 556.

(*t*) 2 Phill. Ev. 450.

(*tt*) Wright v. Beckett, 1 M. & Rob. 414.

been improperly received, and time taken to deliberate, Lord Denman, C. J., held that the course adopted at the trial was correct; but Bolland, B., was of the contrary opinion. (*u*) And in an action on the warranty of a horse, where a witness, who was necessarily called by the plaintiff to prove a resale of the horse, although subpœnaed by the defendant, stated a great many facts on cross-examination tending to show that the warranty had not been broken; Lord Denman, C. J., held that the plaintiff's counsel might ask the witness on re-examination whether he had not been living with the defendant, and the defendant's witnesses, since he had been in the assize town; his Lordship referred to the preceding case, in which he had expressed an opinion, formed after much consideration, that the plaintiff might show that the witness had given a different account of the matter, by which different account he had been induced to call him, and stated that he remained of the same opinion; and thought, on the same principle, that a party calling a witness might examine him as to any fact tending to show that he had been induced to betray that party. (*v*)

Dunn *v.* Aslett.

But where, in order to prove a plea of fraud and covin in obtaining a bond, the defendant called a witness who had taken part in giving the bond, who on cross-examination said that the transaction of giving the bond was, as far as he knew, an honest and correct transaction, and on re-examination the defendant's counsel was allowed to ask the witness whether he had not told the defendant's attorney that it was a shameful transaction, which he denied, and the counsel then proposed to call the attorney, and ask him whether he had so said; and this was objected to. Parke, B., said "Upon consideration, I think the evidence inadmissible. My doubt at first was, whether, as the fact was elicited in cross-examination, the witness was not made for this purpose the witness of the plaintiff: and whether, as to this particular fact, not asked to in chief, the party calling him might not show he had given a different account. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is to discredit the witness. It goes to his general credit to show that he has given a different account of the matter before; and it is a clear rule that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence to call testimony to discredit him." (*w*)

Holdsworth *v.* Mayor of Dartmouth.

And so where a witness called for the plaintiff failed to prove the facts expected, and on cross-examination stated very important facts for the defendant, by whom she appeared also to have been subpœnaed, and it was proposed in re-examination to ask her as to a statement she had made to the plaintiff's attorney; Erskine, J., said, "I am decidedly of opinion that you cannot ask the question. Mr. B. Parke has, I know, so ruled: and I recollect ruling the same way myself on the Oxford Circuit, with the approbation of Mr. J. Patteson, whom I consulted; and I have since talked with several

Winter *v.* Butt.

(*u*) See this case commented on with great ability, 2 Phill. Ev. 454, *et seq.*

(*v*) Dunn *v.* Aslett, 2 M. & Rob. 122.

(*w*) Holdsworth *v.* The Mayor of Dartmouth, 2 M. & Rob. 153. His Lordship said, he never had any doubt but that the opinion of Bolland, B., in Wright *v.* Beckett, was right if the fact were asked to in the examination in chief.

of the other Judges on the point, and they are generally of opinion that Mr. B. Parke's decision is right." (*x*)

Farr's case.

Where a witness, called on the part of the prosecution to prove that he received the note, with the forgery of which the prisoner was charged, from the prosecutor, swore on his cross-examination that he went with the prisoner to the house of the prosecutor, with a blank paper, duly stamped, to get a bill accepted by the prosecutor, and that the prosecutor took the paper, and returned it to the prisoner, with his name upon it; but this witness, before the committing magistrate, had merely stated that he received thebill from the prisoner; the counsel for the prosecution stated that he was instructed that the fresh statement was untrue, and that he had witnesses to prove other statements made by the witness, to show that it was made in order to make the prosecutor pay the bill, and proposed to cross-examine the witness; Patteson, J., said, "I cannot allow you to do that; he is your witness, and you must treat him as such." (*y*) So where a witness, called for the prosecution in a case of robbery, stated on cross-examination that the prosecutor had given her seven shillings, which he had previously denied, it was held that the counsel for the prosecution could not ask whether she had not said to A. B., that the prosecutor had not given her any money. (*z*)

The Judge may put in the deposition of a witness, who gives a contrary statement on the trial.

The following case, however, shows that where a witness for the prosecution gives a different statement on the trial from that which he gave before the magistrate, the Judge is warranted in directing his deposition to be read in order to do away with the effect of the statement made on the trial. Upon an indictment for murder, the counsel for the prosecution at first declined examining the prisoner's mother, but the Judge thought it right to have her examined, (her name being on the back of the indictment as having been examined before the grand jury,) which was accordingly done, and she gave her evidence in favour of the prisoner; the Judge ordered her deposition before the coroner be read, in order to shew its inconsistency with her present testimony. And the twelve Judges afterwards were of opinion, that the Judge had a right to call for the deposition, in order to impeach the witness's credit; and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the same right. (*a*)

(*x*) Winter *v.* Butt, 2 M. & Rob. 357. The same question arose in Allay *v.* Hutchings, 2 M. & Rob. 358, and Wightman, J., ruled the same way.

(*y*) Reg. *v.* Farr, 8 C. & P. 768. The consequence was the prisoner was acquitted. The witness was Wm. Griffiths, and he was himself convicted of forgery, Monmouth Spr. Ass. 1843, *cor.* Wightman, J.

(*z*) Reg. *v.* Clayfield, Gloucester Spr. Ass. 1840, MSS. C. S. G. Gurney, B.

(*a*) Oldroyd's case, Russ. & Ry. 88. See the cases on this subject, *ante*, p. 897.

SECTION IV.

How many Witnesses are necessary.

Single witness generally sufficient.

In general, the testimony of a single witness is a sufficient legal ground for conviction of a crime or misdemeanor, (*a*) even though that single witness may have been the accomplice in guilt of the accused person. (*b*) But there are two exceptions to this rule, *viz.*, the cases of treason and perjury.

In case of perjury.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury: as in such case there would be only one oath against another. (*c*)

High treason.

In high treason, no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason: unless the party indicted shall willingly, without violence, in open Court confess the same. (*d*) The confession contemplated, is a confession in open Court, or pleading guilty: any other confession, whether made to persons in authority or not, is evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, as confessions have in all criminal cases. (*e*)

Two witnesses not necessary in cases of personal attacks on the King.

However, by 39 & 40 Geo. 3, c. 93, "in all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder."

Misprision of treason.

In misprision of treason, as well as high treason, by the 1 Edw. 6, c. 12, s. 22, and 6 Edw. 6, c. 11, s. 12, two witnesses are required, unless the party arraigned shall willingly, without violence, confess the same.

(*a*) 4 Black. Com. 357. 2 Hawk. c. 46, s. 3.

(*b*) *Post*, p. 960.

(*c*) *Ante*, p. 649.

(*d*) By the 1 Edw. 6, c. 12, s. 22. 6 Edw. 6, c. 11, s. 12. 7 & 8 Wm. 3, c. 3. In high treason concerning the coin, or the King's seals, or sign manual, one witness was sufficient, as at common law before the reign of Edward the Sixth; by the 1 & 2 Ph. & M. c. 10, s. 12, and 1 & 2 Ph. & M. c. 11, s. 3, (now repealed.) It was agreed by all the Judges, that these statutes extended to all offences touching the impairing of coin, which should afterwards be made treason. Gahagan's case, 1 Leach, 42. 1 East, P. C. 129, S. C.

(*e*) 1 East, P. C. 131. Foster's Crown Law, 240, &c. 1 Phill. Ev. 415, 416.

SECTION V.

How the Attendance of Witnesses is to be compelled and remunerated.

There are two methods in which the attendance of witnesses in criminal cases may be compelled: 1st, which is the more ordinary and effectual means, the justice or coroner that takes the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear. (*a*) 2ndly, by process of subpœna. Attendance of witnesses; how compelled.

1st. If a witness does not appear, according to the terms of the recognizance in which he is bound, at the Court at which the trial is intended to be, to give evidence against the party accused, the recognizance may be estreated, and the penalty levied. Justices have authority by the 7 Geo. 4, c. 64, s. 3, to bind all persons by recognizance to give evidence in cases of misdemeanors, in like manner as in cases of felony. If a witness who has been examined before a justice of the peace refuses to be bound over, the justice may commit him. (*b*) And where the witness was a married woman, and therefore under a legal disability to enter into a recognizance, the justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance. (*c*) By recognizance. Misdemeanors. 7 Geo. 4, c. 64. Witness committed for refusing to enter into recognizance.

2nd. The attendance of witnesses, if they have not entered into recognizances, may be compelled by process of subpœna, which may either be issued from the Crown Office, (*d*) or may be made out by the clerk of the peace of the sessions, or the clerk of assize. (*e*) And by the 45 Geo. 3, c. 92, s. 3, the service of a subpœna on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear. By subpœna. 45 Geo. 3, c. 92, s. 3.

The prosecutor ought not to include more than four persons in one subpœna. (*f*) And as soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shown him. (*g*) The service must be personal, and made a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order, that their attendance on the Court may be of as little prejudice to themselves as possible. (*h*) Service of subpœna.

(*a*) 2 Hale, P. C. 282. 7 Geo. 4, c. 64, ss. 2, 3, 4.

(*b*) 2 Hale, P. C. 282. Bennet *v.* Watson, 3 M. & S. 1.

(*c*) Bennet *v.* Watson, *supra.*

(*d*) Rex *v.* Ring, 8 T. R. 585.

(*e*) 1 Chit. C. L. 606. It is more prudent to sue it out of the crown office, if an application for an attachment for non-attendance is likely to become necessary. See *post*, p. 947.

(*f*) Doe *v.* Andrews, Cowp. 845. Tidd. 855.

(*g*) In order to save expense, it is settled that service of a ticket, containing the substance of a writ, will be as effectual as service of the writ itself. 2 Phill. Ev. 373.

(*h*) 2 Phill. Ev. 373.

Subpœna *duces tecum.*

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the subpœna, called a *duces tecum*, commanding the witness to bring them with him. (*i*) The writ of *subpœna duces tecum* is the regular and established process of the Court; and though it was formerly doubted, yet it is now settled, that this process is of compulsory obligation on the witness, to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the Court, and not the witness, is to judge. (*j*) And a person in possession of any paper, who is served with a *subpœna duces tecum*, is bound to produce it, whether the paper belong to him or not, or though there be a regular way prescribed by law for obtaining it. (*k*) The Court, however, in all such cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. (*l*) A person bringing papers under a *subpœna duces tecum* may be compelled to produce them without being sworn. (*m*) If a witness who is sworn to give evidence has a document in his possession in Court, he may be compelled to produce it; for he is just as much under the control of the Court as if he had brought the document under a *subpœna duces tecum.* (*n*)

Person present in Court.

In a criminal case, if a person is in Court, he may be compelled to be examined as a witness, although he has neither been bound by recognizance nor served with a subpœna to give evidence, and an indictment for the obstruction of a public footway is considered as a criminal prosecution for this purpose. (*o*)

Habeas corpus ad testificandum.

When a witness is in custody, or on board a ship under the command of an officer who refuses to permit his attendance, the subpœna is ineffectual, and a *habeas corpus ad testificandum* is necessary to bring him up; for which an application may be made to any one of the Judges or Barons of the Courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, who have discretionary power to grant it to any part of the United Kingdom, to bring a witness before any Court of record, to be examined before such Court, or any grand, petit, or other jury, in any cause or matter, civil or criminal. (*p*) And every justice of great session in Wales, and in the county palatine of Chester, has the like authority within the limits of his jurisdiction. (*q*) The application for this writ must be made upon an affidavit sworn to

(*i*) 2 Phill. Ev. 371.

(*j*) Amey *v.* Long, 9 East, 473. 2 Phill. Ev. 371.

(*k*) Tidd, 856. Corsen *v.* Dubois, Holt, N. P. C. 239.

(*l*) Tidd, 856. 2 Phill. Ev. 371. It will be observed, that there is a distinction between the obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a subpœna. See *ante*, p. 916. If a *subpœna duces tecum* be served, the party must bring his deeds in obedience to the subpœna; but if he states them to be his title deeds, no Judge will ever compel him to produce them. Pickering *v.* Noyes, 1 B. & C. 263, Rex *v.* Hunter, 3 C. & P. 591, and MSS. C. S. G.

(*m*) Davis *v.* Dale, M. & Malk. 514, Tindal, C. J. Rex *v.* Murlis, ibid., note, Gaselee, J., and Taunton, J.

(*n*) Snelgrove *v.* Stevens, 1 C. & Mars. 508, Cresswell, J.

(*o*) Rex *v.* Sadler, 4 C. & P. 218, Littledale, J.

(*p*) 43 Geo. 3, c. 140. 44 Geo. 3, c. 102. 2 Phill. Ev. 374, 375.

(*q*) Ibid.

by the party applying, stating that the party is a material witness' and willing to attend; (r) and if he be at a distance, it should be shown how he is material. (s) The writ being sued out, should be left with the sheriff, or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges. (t) If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the secretary of state must be obtained. (u)

Subpœna for prisoner.

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses without the special order of the Court; (v) although in misdemeanors the defendant has always been allowed to take out subpœnas. (w) But the 7 Wm. 3, c. 3, s. 7, provided, that in cases of high treason, where corruption of blood might be worked, the persons indicted shall have the like process of the Court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them: and since the 1 Anne, st. 2, c. 9, s. 3, by which it is provided that witnesses for the prisoner, in case of treason or felony, shall be sworn in the same manner as witnesses for the crown, and be subject to the same punishment for perjury, the process by subpœna is allowed to defendants in cases of felony as well as in other instances. (x)

Remedy against person neglecting to appear on subpœna.

If a party having been served with a subpœna, neglect to appear in obedience to it, an application may be made to the Court of Queen's Bench, if the subpœna issued from the Crown Office, for an attachment against him; (y) and where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the Court issuing the same may, upon proof to their satisfaction of the due service of the subpœna, transmit a certiorari of the default of the witness, under the seal of the Court, or under the hand of one of the justices thereof, to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland if in Ireland; which Courts are empowered to punish the witness in the same way as if he had disobeyed a subpœna issued out of those Courts, provided the expenses have been tendered. (z)

Expenses need not be tendered.

It has been doubted whether in all cases, as well as in those within the last mentioned statute, a witness may not lawfully refuse to obey a subpœna in a criminal prosecution, as well as a civil suit, unless he has a tender of his reasonable expenses; but the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on

(r) Rex v. Roddam Cowp. 672. 2 Phill. Ev. 374

(s) Tidd. 858. It is said in 1 Chitt. C. L. 610, that the affidavit of readiness to attend only applies when the party is on board ship, and not then in all cases.

(t) 2 Phill. Ev. 375.

(u) Furly v. Newnham, 2 Dougl. 419.

(v) 4 Black. Com. 359. 2 Hawk. c. 46, s. 170. If they had attended they could not have been sworn before the 1 Ann. st. 2, c. 9, s. 3.

(w) 2 Hawk. P. C. c. 46, s. 170.

(x) 2 Hawk. P. C. c. 46, s. 172.

(y) Rex v. Ring, 8 T. R. 585. And a witness who refuses, after being subpœnaed, to attend to give evidence for a defendant, is liable to an attachment as in the case of being subpœnaed by a prosecutor. 1 Stark. Ev. 86.

(z) 43 Geo. 3, c. 92, ss. 3, 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether the justices at sessions, &c., have authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment. Archb. Cr. L. 161.

the ground that their expenses were not tendered at the time of the service of the subpœna; although the Court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. (*a*)

Attendance of witnesses, how remunerated.

Formerly the law provided no means for reimbursing the witnesses on criminal prosecutions. At length, by the 27 Geo. 2, c. 3, 18 Geo. 3, c. 19, and 58 Geo. 3, c. 70, in cases of felony, certain provisions were made for that purpose. These, however, did not extend to cases of misdemeanors; but now by the 7 Geo. 4, c. 64, s. 22, (repealing the above mentioned statutes) it is enacted, "that the Court, before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person, who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses, which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate, or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall, in the opinion of the Court, *bonâ fide* have attended the Court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person, for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in Court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the Court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned."

Courts may order payment of the expenses in all cases of felony.

(*a*) 2 Phil. Ev. 383; but see 1 Chit. Cr. L. 613. At York Summer Assizes, 1820, Bayley, J., ruled that an unwilling witness, who required to be *paid* before he gave evidence, could not demand it. He said, "I fear I have not the power to order you your expenses." And on asking the bar if any one recollected an instance, Scarlett answered, "It is not done in criminal cases." MS. 1 Chetw. Burn. 1001. In Reg. *v.* Cousens, Gloucester Spr. Ass. 1843, Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpœna duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. In Rex *v.* Cooke, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant stated before he was examined, that at the time he was served with a subpœna, no money was paid him; he therefore asked that the Judge would order the defendant to pay him his expenses before he was examined. Park, J. A. J., having consulted with Garrow, B., said they were of opinion that the Judge had no power in a criminal case to order a defendant to pay a witness his expenses although subpœnaed,

And by sec. 23, after reciting that for want of power in the Court to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, it is further enacted, "that where any prosecutor or other person shall appear before any Court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, or wilful and corrupt perjury, or of subornation of perjury; every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have *bonâ fide* attended the Court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony; provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate." (*a*)

In certain cases of misdemeanor.

The Central Criminal Court Act, 4 & 5 Wm. 4, c. 36, s. 12, enacts, that "it shall be lawful for any two of the said Justices and Judges of oyer and terminer and of gaol delivery to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to

4 & 5 Wm. 4, c. 36, s. 12.

and though the indictment came to be tried as a civil record. 1 C. & P. 321.

(*a*) Sec. 24, provides that the order for the payment of the expenses shall be made out by the clerk of the assizes, &c., and paid by the county treasurer; and sec. 25, provides how the expenses shall be paid in places not contributing to the county rate. Sec. 26, empowers the Courts of Quarter Sessions to make regulations as to the rate of costs and expenses. Sec. 27, empowers the Judge of the Court of Admiralty in felonies and misdemeanors of the denominations before mentioned, committed upon the high seas, "to order the assistant to the counsel for the affairs of the admiralty, to pay such costs, expenses, and compensation to prosecutors and witnesses in like manner as other courts, may order the treasurer of the county to pay the same." The Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 113, provides that all sums directed to be paid by virtue of the 7 Geo. 4, c. 64, in respect of felonies and misdemeanors committed, or supposed to have been committed, in any borough in which a separate Court of Quarter Sessions shall be holden, shall be paid out of the borough fund; and the order of the Court shall be directed to the treasurer of the borough. Sec. 114, provides for the treasurers of counties keeping accounts of the expenses of prosecutions of offenders sent from boroughs for trial at the assizes, and for the payment of them by the boroughs. As to the construction of this section, see Reg. *v.* Johnson, 10 A. & E. 740. The 2 & 3 Vict. c. 82, which provides for the trial of offenders in detached parts of counties, by sec. 2, provides for the treasurers of counties keeping an account of the expenses of prosecutions, in detached parts of counties, and for the payment of the same by the county to which the detached parts belong. The 5 & 6 Vict. c. 98, ss. 18, 19, and 20, contains also provisions for the payment by boroughs of the expenses of the prosecution of borough prisoners, confined in county gaols, and for the manner of paying the expenses of the conveyance and maintenance of such prisoners.

be paid by the treasurer of the county, in which the offence of any person prosecuted would have been tried but for this act; and that every such treasurer, or some known agent, shall attend the said Justices and Judges of oyer and terminer and gaol delivery during the sitting of the Court, to pay all such orders."

1 Vict. c. 44, s. 1. Expenses in cases of indictments for concealing the birth of children.

The 7 Geo. 4, c. 64, contained no provision for the payment of costs in cases of disposing of the dead bodies of children with intent to conceal their birth; but now by the 1 Vict. c. 44, s. 1, it is enacted, "that where any prosecutor or other person shall appear before any Court, on recognizance or subpœna, to prosecute or give evidence against any person upon any charge of having so endeavoured to conceal the birth of any child, every such Court is hereby authorized and empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are now by law authorized and empowered to order the same in cases of prosecutions for felony." And by sec. 2, "every order for the payment of any money by virtue of this act, shall be made out and delivered by the proper officer of the Court unto such prosecutor or other person, upon the same terms and in the same manner in all respects as orders for the payment of costs are now made in cases of felony; and the treasurer or other person, when any such order shall be made, shall be and he is hereby required, upon sight of such order, forthwith to pay to the person therein named, or to any one duly authorized in that behalf, the money in such order mentioned; and such treasurer or other person shall be allowed the same in passing his accounts."

The following cases, relative to the allowance of costs under these statutory provisions, may properly be introduced in this place.

A binding by the sessions is sufficient.

A party bound over by the sessions to prosecute at a superior Court is entitled to his expenses under the 7 Geo. 4, c. 64. The prosecutor was bound over by the Court of Quarter Sessions for Surrey, to prosecute for a burglary at the Central Criminal Court, and it was held that he was entitled to his expenses. (*b*)

Cases in which the costs have been allowed.

Where the prosecutor and his witnesses had been bound by recognizance to prosecute and give evidence at the assizes, but by a mistake, the prisoner had been discharged by proclamation at the adjourned sessions, which preceded the assizes; and the prosecutor and his witnesses had appeared at the assizes and preferred an indictment, which had been found by the grand jury; Taunton, J., held, that as the bill had been preferred and found, he might, under the word "prosecuted," in sec. 22, order the expenses; but if the witnesses had merely appeared at the assizes according to their recognizances, and no bill had been preferred, he should have had no authority. (*c*)

Where a prisoner, who was committed on a charge of felony during the assizes, did not reach the assize town until after the grand jury were discharged; Hullock, B., after reference to the statute, allowed their expenses. (*d*)

(*b*) Rex *v.* Paine, 7 C. & P. 135, Lord Denman, C. J., Park, J. A. J., and Bolland, B.

(*c*) Rex *v.* Robey, 5 C. & P. 552.

(*d*) Anonymous, 1 Lew. 128.

Where an indictment for a riot was found at one assizes, and the trial took place at the subsequent assizes, but no person was bound over to prosecute at these assizes, but the witnesses were subpœnaed to appear at both the assizes; the Court of King's Bench were clearly of opinion that the Judge had authority to order the costs of the witnesses to be paid; but it was doubted whether the Judge had authority to grant the prosecutor his costs. (*e*) But where the prosecutor, in a case of perjury, was not bound over to prosecute by any magistrate, but he had included his own name in a subpœna, which he had caused to be issued, the Court were of opinion that the words of the act did not limit the allowance of the expenses of the prosecutor to those which he incurred as a witness, but that he was entitled to receive them in his character of prosecutor; and they made an order accordingly. (*f*)

Where the prosecutor was not bound by recognizance.

Sheering's case.

Where the prisoner had been apprehended by a bench warrant, and the prosecutor was under no recognizance to prosecute, and none of the witnesses were under recognizances, but one of them had been subpœnaed; on a motion for the costs of the prosecution, Parke, B., at first, thought that he could only grant the costs of the witness who had been subpœnaed, but said he would consider the point; and on the following day his Lordship said, that on comparing the words of the 7 Geo. 4, c. 64, s. 22, (relating to felonies,) with those of the subsequent section (relating to misdemeanors,) it appeared to him that the Court had authority, in prosecutions, for the former class of offences, to award the prosecutor his costs, even though he is not under any recognizance; and his Lordship accordingly granted the costs of the prosecution generally, including the witnesses. (*g*)

Butterwick's case.

An indictment charging that the defendant assaulted J. S., and unlawfully and indecently (not saying publicly) exposed his person to J. S., with intent to incite J. S. to commit an unnatural offence with the defendant, is not an offence within the 7 Geo. 4, c. 64, s. 23, and, therefore, the Court cannot allow the prosecutor his expenses under that clause. (*h*)

Where not allowed.

Where an indictment for riot was found at the quarter sessions, and removed by the prosecutor into the Court of King's Bench by *certiorari*, and the record sent down for trial at Nisi Prius, made a *remanet*, and again entered at the following assizes, when the defendants were convicted. No recognizance had been returned to the crown office, and the prosecutor was not bound by recognizance to prosecute in the Court of King's Bench. The witnesses were subpœnaed, but their expenses were not prayed by them, but by the prosecutor, as having been defrayed by him; the prosecutor also had caused himself to be subpœnaed. The consideration of

Johnson's case. Indictment for riot removed by the prosecutor by *certiorari*.

(*e*) Rex *v.* Jeyes, 3 A. & E. 416. It was contended that the words must be read *reddendo singula singulis;* and the statute therefore applied where the prosecutor appeared on recognizance or the witness on subpœna. Littledale, J., said, "there is much doubt in my mind as to the expenses of the prosecutor. At present I think that he is not entitled to them; it seems likely that the Legislature meant to give the expenses to the prosecutor only where he goes before a magistrate, who binds him over. A magistrate on hearing the complaint frequently dismisses it: if the prosecutor then goes to the grand jury, I think he ought not to be paid by the treasurer."

(*f*) Rex *v.* Sheering, 7 C. & P. 440, *cor.* Park, J. A. J., and Coleridge, J.

(*g*) Reg. *v.* Butterwick, 2 M. & Rob. 196.

(*h*) Reg. *v.*———— 8 A. & E. 589.

the Judges was desired, whether, in such cases, of an indictment for a misdemeanor, removed by the prosecutor himself from the quarter sessions into the King's Bench, an order of Nisi Prius might legally be made for any and what costs, or whether the application must not be elsewhere; and the Judges determined that no costs were allowable under the statute. (*i*)

Rex *v.* the Treasurer of Exeter.

Where six indictments for felony were removed by the prisoner, one of which only was tried, and at the trial the Judge doubted whether he had any power to give the prosecutor his costs; the Court of King's Bench refused to order the treasurer of the county of the city of Exeter to pay the prosecutor the expenses of the prosecution; as, if the costs of the prosecution could be granted at all, they ought to be granted by the Judge who tried the prisoner. (*k*)

Rex *v.* Richards.

Where, in pursuance of a recognizance, the prosecutor at the quarter sessions preferred an indictment for a riot, and he afterwards removed it into the Court of King's Bench, it was held that the prosecutor was not entitled to his costs; and Lord Tenterden, C. J., said, that the matter had been considered by the twelve Judges, who were all of opinion that the act did not apply to cases where the indictment had been removed into the Court of King's Bench by *certiorari*. (*l*)

Quære, whether costs can be granted after a removal by *certiorari* by the defendant.

But where an indictment was found at the Middlesex quarter sessions, and removed by the defendant by *certiorari* into the Queen's Bench, and tried at the sittings after term, when Lord Denman, C. J., made an order for the payment to the prosecutor or his attorney of the expenses of the prosecution and the witnesses, and that order was afterwards made a rule of Court; upon showing cause against a rule to shew cause why that rule should not be discharged, it was contended that the words of the statute applied to any Court, and that the reason of the decision in *Rex* v. *Jeyes*, (*m*) was, that the statute was passed to indemnify persons unable to bear the expense, and that inability was not likely to exist where the party voluntarily removed the indictment to the superior Court, and that the view taken by Littledale, J., in *Rex* v. *The Treasurer of Exeter*, (*n*) was incorrect. In support of the rule, it was contended, that the statute ceased to apply after a removal by *certiorari*, and that there was no distinction as to the party removing the indictment; the Court, however, did not express any opinion upon this point. (*o*)

(*i*) Rex *v.* Johnson, R. & M. C. C. R. 173. The same point was decided by the Judges in Rex *v.* Oates, mentioned in R. & M. C. C. R. 175. In Rex *v.* Ellis, convicted at Nisi Prius, at Exeter, in 1826, for a felony committed before the 7 Geo. 4, c. 64, was in operation, and whilst the 58 Geo. 3, c. 70, was in force, the Court of King's Bench made a rule absolute, ordering the city and county of Exeter to pay the expenses. The 7 Geo. 4, c. 64, was in force at the time of the trial. R. & M. C. C. R. 175. See Rex *v.* The Treasurer of the County of the City of Exeter, *infra*, where the Court seem to have been of opinion that the costs had been improperly allowed in this instance and to have overruled this case.

(*k*) Rex *v.* The Treasurer of Exeter, 5 M. & Ry. 167. Littledale, J., added, "even the Judge has no power where the case has been removed by *certiorari*. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor." "The act only applies to indictments tried before the Courts in which they were found."

(*l*) Rex *v.* Richards. 8 B. & C. 420. It is not stated that the prosecutor or the witnesses attended the *trial* under subpœna or recognizance.

(*m*) *Supra.*

(*n*) *Supra.*

(*o*) Reg. *v.* ——— 8 A. & E. 589. See this case, *ante*, p. 951.

Under the 7 Geo. 4, c. 64, s. 22, the Court, upon a trial for murder or manslaughter, has no power to allow the costs of the attendance of witnesses at the inquest held upon the body of the deceased; (*p*) or of a surgeon for examining the body by order of the coroner. (*q*)

No costs of attending a coroner's inquest.

Where a witness was brought to bed during her attendance under a recognizance at the assizes, Parke, J., allowed her the difference between the expenses, which would have been incurred had she been at home, and those actually incurred at the assize town; (*r*) and so where a witness, who had come to the assizes at York, under a recognizance to give evidence in a case of forgery, became insane, and it was thought necessary to convey him to the lunatic asylum at Wakefield; Patteson, J., upon the authority of the preceding case, ordered a similar allowance as to the expenses of medical attendance during the time the witness remained at York, after he was attacked; and also for the expenses of conveying him to the asylum at Wakefield. (*s*)

Extra expenses allowed under particular circumstances.

Where, in a case of murder, it appeared that the offence was committed in a small township, the inhabitants of which were a small community, and extremely poor, and had shown great zeal and activity in getting up the case, and had been put to considerable expense in so doing, which they were but ill able to afford, the Court was applied to, that certain expenses might be allowed over and above those usually allowed by the officer of the Court, and it was submitted that the words "in otherwise carrying on the prosecution" were sufficiently large to include the expenses applied for; Lord Denman, C. J., after time taken to consider, granted the application, and the clerk of assize made out the order for all the expenses incurred, except the attendance of the witnesses before the coroner. (*t*)

Expenses of "otherwise carrying on the prosecution."

(*p*) Rex *v.* Rees, 5 C. & P. 302.

(*q*) Rex *v.* Taylor, 5 C. & P. 301. The 6 & 7 Wm. 4, c. 89, however, after by sec. 1, providing that the coroner may summon medical witnesses, and by sec. 2, that a majority of the jury may require the coroner to summon additional medical witnesses, if the first are not satisfactory, enacted by sec. 3, that legally qualified practitioners attending in obedience to such summons, should receive such remuneration and fees as were specified in the schedule to that act, which were in Great Britain, to be paid out of the funds collected for the relief of the poor; but by sec. 4, no fee is to be paid if the examination takes place without the order of the coroner; or by sec. 5, where the death was in any hospital, infirmary, &c. By the 1 Vict. c. 68, s. 1, the justices of the peace at quarter sessions, and the town council of any borough having a coroner, are to make a schedule of the fees to be paid by the coroner holding an inquest (other than the fees payable to medical witnesses under the 6 & 7 Wm. 4, c. 89.) Sec. 2 repeals so much of the 6 & 7 Wm. 4, c. 89, as relates to the payment of the fees to medical witnesses out of the funds raised for the relief of the poor, and provides that the coroner shall pay them; and by sec. 3, the coroners of counties are to lay their accounts before the quarter sessions, and the coroners of boroughs to lay them before the town council, and the coroner is to be repaid in the former case out of the county rates, and in the latter out of the borough fund. It may be proper to observe that it is the bounden duty of a coroner wherever the death has arisen under such circumstances as lead to the conclusion that the party has died from the criminal acts of another to cause a *post mortem* examination of the body to be made by some medical practitioner. In Reg. *v.* Webb, Hereford Spr. Ass. 1843, on an indictment for murder by violence inflicted upon the head, no *post mortem* examination had taken place, and Wightman, J., commented in strong terms on the great impropriety of neglecting such a course, and observed, that it was clearly the duty of a coroner to order such an examination to take place. A bill is now pending in Parliament for the better allowance of expenses incurred upon holding inquisitions before coroners. C. S. G.

(*r*) Anonymous, cited, 1 Lew. 133.

(*s*) In Re Mallison, 1 Lew. 132.

(*t*) Lewen's case, 2 Lew. 161. The depositions taken before the coroner were allowed for.

Cases where the trial has been postponed.

In one case it was said that when a trial for felony is postponed, the practice is not to allow the prosecutor his expenses, till the assize at which the trial comes on, and the expenses were in that case refused at the assizes at which the trial was postponed. (*u*) But where the coroner had bound over the prosecutor and witnesses to appear at the assizes to give evidence in a case of manslaughter; but the prisoner who had neither been apprehended, nor was under recognizance, did not appear at the assizes; Alderson, B., after ordering him to be called, and directing the trial to be put off till the next assizes, allowed the expenses of the prosecutor and witnesses. (*v*) So in a case of murder, which was postponed until the following assizes, on the application of the prisoner, and in which the costs of the prosecution were very heavy; Alderson, B., made an order for their payment. (*w*)

7 Geo. 4, c. 64, s. 28. Courts may order compensation to those who have been active in the apprehension of certain offenders.

The 7 Geo. 4, c. 64, s. 28, "for the better remuneration of persons who have been active in the apprehension of certain offenders," enacts, that "where any person shall appear to any Court of oyer and terminer, gaol delivery, superior criminal Court of a county palatine, or Court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire arms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen: every such Court is hereby authorized and empowered in any of the cases aforesaid, to order the sheriff of the county, in which the offence shall have been committed, to pay to the person or persons, who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any Court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such Court shall have power to order compensation to such person in the same manner as the other Courts hereinbefore mentioned; provided always, that nothing herein contained shall prevent any of the said Courts from also allowing to any such persons, if prosecutors, or witnesses, such costs, expenses, and compensation, as Courts are by this act empowered to allow to prosecutors and witnesses respectively." (*x*)

If any man is killed in attempting to take certain

By sec. 30, "if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the Court

(*u*) Rex *v.* Hunter, 3 C. & P. 591, Park, J. A. J.

(*v*) Flannery's case, 1 Lew. 133, and in a similar case, Gurney, B., allowed the costs, ibid., note.

(*w*) Bolam's case, Rosc. Cr. Ev. 226.

(*x*) Sec. 29 provides that such orders shall be paid by the sheriff, who may obtain immediate re-payment on application to the treasury.

before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the Court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the Court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the Court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned."

offenders, the Court may order compensation to his family.

The 7 Geo. 4, c. 64, s. 28, does not authorize the Court to award compensation to persons who have been active in and towards the apprehension of a person guilty of sacrilege. (*y*) And upon the authority of this case, Bolland, B., refused to allow compensation in a similar case; though, in the absence of such authority, both he and Parke, J., would have been disposed to put a different construction upon the statute. (*z*) But it has been held that a person who has been active in the apprehension of a prisoner charged with stealing a cow is entitled to a reward under this section, as the words bullock-stealing, horse-stealing, and sheep-stealing, are intended to describe the kind or class of offences, in connection with which rewards were to be allowed. (*a*) And where a prisoner was indicted for an attempt to murder her child by suffocating it, and an application was made to allow the extra expenses incurred by the constable in apprehending the prisoner, and for his loss of time, and the attention of the Court was directed to the case not being one within the words of sec. 28; Patteson, J., was of opinion that it was within the spirit and intention of the act, though not within the words; and therefore allowed the expenses. (*b*) And where on a trial for robbery it appeared that the prosecutor had displayed great courage in apprehending the prisoner; Parke, B., ordered him to be paid a reward, under the word 'exertions.' (*c*)

Sacrilege.

Bullock-stealing.

Attempt to murder.

"Exertions."

The rewards, which may be given under this section, are not confined to cases where the party has been put to expense or loss of time; but have been ordered to be paid to persons who have displayed great courage in the apprehension of offenders, although they have neither been put to expense nor loss of time. Thus they have been granted where the person has apprehended the prisoner in the actual commission of a burglary; (*d*) and also where the party came down stairs when a burglary was committed, but did not apprehend the prisoners, who were three in number, but was able to give such a description of them as caused their apprehension. (*e*)

Where no expense or loss of time.

Where it does not appear upon the evidence given on the trial that the party has been active in the apprehension, an affidavit is

(*y*) Robinson's case, 1 Lew. 129, Hullock, B., who said that "the word 'sacrilege,' if used alone in a statute, would not be construed to come within the words 'burglary,' or 'housebreaking;' and that wherever, in a penal statute, churches are intended to be included, the word 'sacrilege' is introduced."

(*z*) Anonymous, 1 Lew. 130.

(*a*) Rex *v.* Gilbrass, 7 C. & P. 444, Law, Recorder.

(*b*) Durkin's case, 2 Lew. 163.

(*c*) Womersly's case, 2 Lew. 162.

(*a*) Rex *v.* Barnes, 7 C. & P. 166, Coleridge, J.

(*e*) Rex *v.* Blake, 7 C. & P. 166, Williams, J. And rewards were ordered in a similar way at the Bristol Special Commission. See 7 C. & P. 167.

necessary to be laid before the Judge, in order to induce him to grant a reward. (*f*)

Protection of witness from arrest.

A person subpœnaed as a witness, or bound over by recognizance, either to prosecute or give evidence, or attending voluntarily for the *bonâ fide* purpose of giving evidence, is privileged from arrest during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place. (*g*) And in allowing witnesses time sufficient for these purposes, the Courts are always disposed to be liberal. (*h*) If a witness under these circumstances be arrested, the Court out of which the subpœna issued, or the Judge of the Court in which the cause has been or is to be tried, will, upon application, order him to be discharged. (*i*)

Evidence of witnesses resident abroad.

When any offence has arisen in India, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by the 13 Geo. 3, c. 63, ss. 40, 44. (*j*) And in case of a prosecution for any offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by the 42 Geo. 3, c. 85.

SECTION VI.

Of Accomplices.

It will appear in the investigation of the law relating to incompetency from infamy, that though it be shown by a witness's own admission, that he has been guilty of an infamous crime, he will not be deemed incompetent without other proper proof that he has been convicted of it: (*jj*) from which it necessarily follows, that the testimony of an avowed accomplice with the prisoner at the bar is not to be excluded from being given against him; and accordingly it has been long a settled rule, that an accomplice may give evidence against his associates, provided he has not been already convicted: (*k*) so he may, indeed, even after a conviction, if judgment has not passed, for it is not the conviction, but the judgment that creates the disability. (*l*) And not only if two or more persons are accomplices, may one, who is not indicted, be a witness against the others; but he may also be so, it seems, when he is indicted jointly with his

Evidence against prisoner.

(*f*) Rex *v.* Jones, 7 C. & P. 167, Park, J. A. J.

(*g*) Meekins *v.* Smith, 1 H. Bl. 636. Lightfoot *v.* Cameron, 2 Bl. 1113. Childerston *v.* Barrett, 11 East, 439. Arding *v.* Flower, 8 T. R. 536. But this privilege does not extend to arrests by his bail, for the purpose of being surrendered; for he is supposed to be in their custody even while attending as a witness. *Ex parte* Lyne, 3 Stark. C. 132.

(*h*) 1 Phil. Ev. 4.

(*i*) Archb. Cr. Pl. 108.

(*j*) See *ante*, p. 901, as to depositions or interrogatories by consent.

(*jj*) *Post*, p. 974.

(*k*) 2 Hawk. P. C. c. 46, ss. 94, 95. Tong's case, Kel. 17, 18. 1 Hale, P. C. 303, 304.

(*l*) 1 Phil. Ev. 28. And the information of a dead accomplice, taken by a justice of the peace, may be read in evidence against the prisoner. Rex *v.* Westbeer, 1 Leach, 12. Rex *v.* Russell, R. & M. C. C. R. 356.

partners in guilt, (*m*) (although it is not usual or proper to include him in the indictment, (*n*)) provided he has not been put on his trial at the same time with the others. (*o*) It was formerly thought that an accomplice *separately* indicted for the same offence, could not be a witness against his associate, unless he had first pleaded guilty to his indictment; (*p*) but the rule is now otherwise. (*q*) It is also now perfectly settled, though contrary to one great authority, (*r*) that no promise of pardon or reward, whether absolute or conditional, will render an accomplice incompetent, (*s*) although the circumstances under which his evidence is given ought to have great weight with a jury in considering the credit to which such evidence is entitled. The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement, which Lord Hale, in his Pleas of the Crown, speaks of as having been already long disused. (*t*) Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon. (*u*) He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information. (*v*) It was purely in the discretion of the Court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ:* (*w*) if he was acquitted, the approver received judgment of death upon his own confession of the indictment. (*x*)

Indicted separately.

Promise of pardon or reward.

Approvement.

All the good that could be expected from this method of approvement is now more fully provided for and secured by one of the following methods: (*y*) 1st, By special proclamation in the Gazette or otherwise, pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* to pardon. (*z*) 2ndly, By

(*m*) 1 Hale, P. C. 305. If A., B. and C. be indicted of perjury on three several indictments concerning the same matter, A. pleads not guilty, B. and C. may be examined as witnesses for A., for yet they stand unconvicted, although they are indicted. Bilmore's case, 1 Hale, 305. Rex *v.* Clark, ibid., note.

(*n*) Ibid.

(*o*) 2 Stark. Ev. 13. The learned author adds a *quære*. And see Reg. *v.* Lyons, 9 C. & P. 555.

(*p*) Sir Percy Cresby's case, 1 Hale, P. C. 303.

(*q*) 1 Phil. Ev. 28.

(*r*) Lord Hale, 2 P. C. 280.

(*s*) Tong's case, Kel. 17. Layer's case, 6 St. Tr. 259. 2 Hawk. P. C. c. 46, s. 135. 1 Hale, P. C. 304. 1 Phil. Ev. 27.

(*t*) 2 Hale, 226.

(*u*) 4 Black. Com. 330.

(*v*) 2 Hale, P. C. 227.

(*w*) 4 Black. Com. 330.

(*x*) Ibid.

(*y*) In the case of offences relating to coining and uttering counterfeit money, the 6 & 7 Wm. 3, c. 17, s. 12, and 15 Geo. 2, c. 28, s. 8, enacted, that if any such offender, being out of prison, should discover two or more persons who had committed the like offences, so as they might be convicted thereof, he should be entitled to a pardon; but these statutes were repealed by the 2 Wm. 4, c. 34, s. 1.

(*z*) Rex *v.* Rudd, Cowp. 334, by Lord Mansfield, in giving judgment. S. P. S. C. 1 Leach, 118, 4th ed. But the promise of a pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. Where, therefore, a prisoner convicted of murder was brought up to the Court of King's Bench, and asked why execution should not be awarded against him, and pleaded that the King, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be convicted, and that he, not being the actual murderer, had given such information, and thereby entitled himself to a pardon, the plea was held insufficient. Rex *v.* Garside, 2 Ad. & E. 266. The proper course in such a case seems to be to apply to the Judge to postpone the execution, in order to make an application to the Secretary of State for a pardon. C. S. G.

the practice most usually adopted, accomplices are admitted to give evidence for the crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth. (*a*) On a strict and ample performance of this condition, to the satisfaction of the Judge presiding at the trial, (although they are not of right entitled to pardon,) they have an equitable title to a recommendation for the Queen's mercy. (*b*) They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time for an application in another quarter. (*c*) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction. (*d*) It is not a matter of course to admit an of-

(*a*) Rex *v.* Rudd, *supra*, n. (*z*). 1 Phil. Ev. 82.

(*b*) Ibid. The equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner, but it is entirely in the discretion of the Judge whether he will recommend the prisoner to mercy. Rex *v.* Lee, Russ. & Ry. C. C. R. 361. Rex *v.* Brunton, ibid., 454. S. C. MS. Burn's Just. by Chetwynd, tit. *Approver.* With respect to such offences, therefore, he is not bound to answer on his cross-examination. West's case, MS. 1 Phil. Ev. 28. If, however, the prisoner having been admitted as an accomplice as to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property, which was the subject matter of a different robbery by the same parties, under the impression that by the information he had previously given as to the robbery of other property, he had delivered himself from the consequences of having the property he so disclosed in his possession; Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property. Garside's case, 2 Lew. 38. The Judges will not in general admit an accomplice as King's evidence, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. This was stated by Park, J. A. J., in several cases on the Oxford Spring circuit, 1826, Carr. Crim. L. 67. It has been held in America that if an accomplice appears to have been the principal offender, he will be rejected. The People *v.* Whipple, 9 Cowen, 707, Greenl. Ev. 426; but in England principals have frequently been allowed to become witnesses against accessories See Wild's case, *post*, p. 960, note (*m*). And cases frequently occur where the accessory is far the more guilty party; as where young persons have been induced to commit crimes by the procurement of old offenders, and in such cases the young persons are not unfrequently admitted as witnesses for the Crown. C. S. G.

(*c*) 1 Phil. Ev. 28.

(*d*) Ibid. Moore's case, 2 Lew. 37. In one instance, a prisoner who had made a confession after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. Rex *v.* Burley, *cor.* Garrow, B., Leicester Lent Assizes, 1818. And the conviction was afterwards approved of by all the Judges. MS. 2 Stark. Ev. 13. So where an accomplice when sworn pretended that he knew nothing of the stealing of a sheep, Coleridge, J., committed him for trial at the next assizes, when he was convicted and transported, upon proof of his statement made to a policeman, before he was called as a witness. Reg. *v.* Smith, Gloucester Spr. and Sum. Ass. 1841. So where an accomplice, who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried for the robbery. Rex *v.* Stokes and others, Stafford Spr. Ass. 1837. It has been held in America, that if an accomplice, having made a private confession, upon a promise of pardon made by the Attorney General, should afterwards refuse to testify, he may be convicted upon the evidence of that confession. Commonwealth *v.* Knapp, 10 Pick 477, as cited Greenl. Ev. 426. And where an accomplice, who had made a full disclosure of the facts attending the commission of a burglary when before the committing magis-

fender as witness on the trial of his associates, not even after he has been so allowed by the committing magistrate. The practice is, (where the accomplice is in custody,) for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential. (*e*) And it is in the discretion of the Court, under all the circumstances of the case, whether the application be granted or refused. (*f*)

Mode of admitting an accomplice as a witness.

This application is usually made before the bill is taken before the grand jury, and if the application is granted, the accomplice is not included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness with the consent of the Court. (*g*) Upon an indictment for conspiracy the Court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. (*h*) And the same course may be adopted, with the permission of the Court, in a case of felony. (*i*) Upon an indictment for rape, as soon as the jury were sworn, it was proposed, on the part of the prosecution, that one of the prisoners should be acquitted before the case was gone into, as he was intended to be called as a witness against the other prisoners, and upon this being objected to, on behalf of the other prisoners; Williams, J., (having conferred with Alderson, B.,) said, "I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the Court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel who conduct the prosecution. I shall, therefore, in this case, intrust it to the discre-

Where he is jointly indicted.

trate, refused before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. Reg. *v.* Holtham and five others, Stafford Spr. Ass. 1843.

(*e*) 2 Stark. Ev. 2. If, however, the accomplice be carried before the grand jury, by means of a surreptitious and illegal order, the indictment so found is good. Doctor Dodd's case, 1 Leach, 155. It is not usual to admit more than one accomplice. Barnsley Rioters' case, 1 Lewin, 5, Parke, J. But under peculiar circumstances three have been admitted. Scott's case, 2 Lew. 36, Lord Denman, C. J. In this case the accomplices spoke to different facts, and no one could prove the whole. See Rex *v.* Noakes, 5 C. & P. 326.

(*f*) 1 Phill. Ev. 29. The Court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the Court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the Court will refuse to admit him as a witness. Thus where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. Rex *v.* Mellor and others, Stafford Sum. Ass. 1833. So in Reg. *v.* Saunders and others, Worcester Spr. Ass. 1842, on a motion to admit an accomplice, Patteson, J., said, "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do." And in Reg. *v.* Salt and others, Stafford Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness. C. S. G.

(*g*) 1 Phill. Ev. 29.

(*h*) Rex *v.* Rowland, R. & M. N. P. R. 401. So if an accomplice jointly indicted with others, plead guilty, and is fined by the Court, and pays the fine (in a case where such fine may be imposed by way of punishment, and where the suffering the punishment restores the competency) he may be called as a witness by the other prisoners. 1 Phil. Ev. 29, citing Rex *v.* Fletcher, 1 Str. 633. See also Rex *v.* Sherman, C. T. H. 303.

(*i*) 1 Phil. Ev. 29.

tion of the counsel whether he will have the prisoner acquitted before the case is gone into or not. I think it almost of course." (*j*)

It may be proper to observe that it is the duty of magistrates in all cases where there may be an intention to call an accomplice as a witness for the prosecution, to commit and not to bail him. (*k*)

Principal felon a witness.

In prosecutions for a misdemeanor in receiving stolen goods, on the repealed statute 22 Geo. 3, c. 58, the principal felon, though not convicted or pardoned, was a competent witness against the receiver. (*l*) So the principal felon may be a witness under the 4 Geo. 1, c. 10, s. 4, against a party indicted for taking a reward to help to stolen goods. (*m*) So on an information under 2 Geo. 2, c. 24, (*n*) for bribery at an election, a person who has received a bribe may be a witness against the defendant, though in case of a conviction he would be indemnified from the penalties of the act. (*o*)

Information for bribery.

Accomplice's evidence alone sufficient in point of law, but in practice corroboration is always deemed essential.

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness. (*p*) And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated. (*q*) But from a consideration of the situation of an accomplice, this doctrine has been greatly modified in practice; and it has long been considered as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that unless it be corroborated in some material part by unimpeachable evidence, the presiding Judge ought to advise the jury to acquit the prisoner. (*qq*) It has been laid down that this practice of requiring some confirmation of an accomplice's evidence, must be considered in strictness as resting only upon the discretion of the Judge. (*r*) And this, indeed, appears to be the only mode in which it can be made reconcileable with the doctrine already stated, that a legal conviction may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority,

(*j*) Reg. *v.* Owen, 9 C. & P. 83. At the conclusion of the opening, the prisoner was asked whether he would give evidence, and refused, and the case proceeded against all the prisoners. See 2 Hawk. P. C. c. 46, s. 95.

(*k*) Rex *v.* Beardmore, 7 C. & P. 497, Patteson, J.

(*l*) *Ante*, p. 253.

(*m*) See *ante*, p. 262. Jonathan Wild's case, 1 Leach, 17, note (*a*).

(*n*) *Ante*, vol. 1, p. 155.

(*o*) Bush *v.* Rawlins, cited by Lord Mansfield in Clarke *v.* Shee, Cowp. 199. Mead *v.* Robinson, Willes, 422.

(*p*) By Lord Ellenborough in Rex *v.* Jones, 2 Campb. 133. Rex *v.* Hastings, 7 C. & P. 152, Lord Denman, C. J., Park, J., and Alderson, B.

(*q*) Rex *v.* Atwood, 1 Leach, 464, also cited by Grose, J., in Jordaine *v.* Lashbrooke, 7 T. R. 609. Rex *v.* Durham, 1 Leach, 478.

(*qq*) 1 Phill. Ev. 31. Smith and Davis's case, 1 Leach, 479, in note (*a*) to Durham's case. They were tried for robbing George Hunter. During the night the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but during the scuffle he had torn a piece of the coat which one of them had on, who on being discovered by this means turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place on his unsupported testimony, and the prisoners were acquitted. See per Lord Abinger, C. B., in Reg. *v.* Farler, *post*, p. 964.

(*r*) 1 Phill. Ev. 32. By Lord Ellenborough, Rex *v.* Jones, 2 Campb. 132. Rex *v.* Durham, *supra*, note (*q*)

that it "deserves all the reverence of law," (*s*) and a deviation from it in any particular case, would be justly considered of questionable propriety. (*t*) This confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all as a witness, if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts, as to which there is no confirmation. (*u*) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony which ought to be confirmed. (*v*)

Corroboration as to some, but not as to all the prisoners, considered sufficient formerly.

In some cases it seems to have been considered that if the accomplice was confirmed as to some of the prisoners, though not as to all, it was sufficient to entitle the accomplice to credit, and to warrant the Judge in leaving the case to the jury without a recommendation to acquit those prisoners as to whom there was no confirmation. Accordingly, where an accomplice was examined on the part of the prosecution, who was confirmed in the testimony which he gave as to some of the prisoners, but not as to the rest; Bayley, J., told the jury, that if they were satisfied by the confirmatory evidence which had been given, that the accomplice was a credible witness, they might act upon that testimony with respect to others of the prisoners, although as far as his evidence affected them, it had received no confirmation; and all the prisoners were convicted. (*w*) To the same effect is a case mentioned by Lord Ellenborough, in *Rex* v. *Jones*, (*x*) as having been within a few years referred to the twelve Judges, where four men were convicted of burglary on the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion, that the conviction of all four was legal, and upon that opinion they all suffered the sentence of the law. (*y*) So in the report of the York trials under a special commission, it was laid down by Thompson, C. B., that "confirmation need not be of circumstances, which go to prove that the accomplice speaks truth

(*s*) Per Lord Abinger, C. B., in Reg. *v.* Farler, *post*, p. 964.

(*t*) 1 Phill. Ev. 32. In Greenl. Ev. 426, the learned author observes, that it is now so generally the practice to advise juries not to convict without corroboration of the accomplice, "that its omission would be regarded as an omission of duty on the part of the Judge." It is well observed that "the substantial result appears to be the same as if the practice had depended upon a rule of law, instead of being only the exercise of the discretion of the Judge. The only distinction appears to be that if the Judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued; or if a jury were to convict in opposition to the recommendation of the Judge, it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal." 1 Phill. Ev. 32.

(*u*) 1 Phill. Ev. 34. 2 Stark. Ev. 14.

(*v*) 1 Phill. Ev. 34.

(*w*) Rex *v.* Dawber, 3 Stark. N. P. C. 34; in note (*a*) to which the learned reporter remarks, that in judging of the credit due to the testimony of an accomplice, it seems to be a necessary principle, that his testimony must be wholly received as that of a credible witness, or wholly rejected.

(*x*) 2 Campb. 133.

(*y*) So in Birkett's case, Russ. & Ry. C. C. R. 251, the Judges were of opinion "that an accomplice did not require confirmation as to the person he charged, if he was confirmed in the particulars of his story." This is the whole statement in the report. C. S. G.

with respect to all the prisoners, when several are tried, and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the other prisoners, as to whom there may be no confirmation." (z) Upon these cases it has been well observed, that "it would be difficult to assign a satisfactory ground for requiring confirmation as to a prisoner indicted alone, and dispensing with confirmation as to prisoners jointly indicted; the same reasons, which render confirmation necessary in the former case, appear to require it in the latter: if a distinction between the two cases were to be allowed, a prisoner's acquittal or conviction upon an accomplice's testimony might depend upon the mere accident of his being indicted alone or jointly with others." (a)

Hastings' case.

Upon an indictment for larceny, the counsel for the prosecution, in stating the case, said that he should call an accomplice as a witness, and admitted that he should not, according to the depositions, be able to confirm his testimony as to the particular prisoners charged; yet he could confirm him as to the general circumstances of the case, and as to the mode in which the robbery had been committed. Lord Denman, C. J., said, in the presence of Park, J. A., and Alderson, B., "I consider, and I believe my learned Brothers agree with me, that it is altogether for the jury, and they may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But one would not, of course, be inclined to give any great degree of credit to a person so situated." The accomplice was examined and several other witnesses, but the other witnesses rather contradicted than confirmed him in anything, and the prisoners were acquitted. (b)

But the rule now is that where there is one prisoner there must be confirmation as to him, and where there are several as to each.

But it is now well established by the current of recent authorities, that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged. And where several prisoners are jointly indicted, and the accomplice is corroborated as to some of them, although the jury may give credit to him as those to whom the corroboration applies, they ought to be directed to pay no attention to the evidence of the accomplice as to those, against whom there is no corroboration.

Webb's case. Corroboration as to the circumstances of the case insufficient.

Upon an indictment for breaking into a warehouse and stealing a quantity of cheese, an accomplice proved that the thieves took a ladder from certain premises, and it was proved by a witness that the ladder was so taken away, and it was proposed to call other

(z) Rex *v.* Swallow, report of the trials at York, in 1814, cited 1 Phill. Ev. 35.

(a) 1 Phill. Ev. 37, 8th ed.

(b) Rex *v.* Hastings, 7 C. & P. 152. This case is stated to be "a distinct decision" to the extent "that it is not necessary to have *any* confirmation of an accomplice," note 7 C. & P. 153. It is submitted that all that the learned Chief Justice intended to say was that *in point of law* the jury might act upon the unconfirmed testimony of an accomplice, but that in point of fact the jury, as reasonable persons, ought not to give credit to a person so situated. It must be presumed that this was the meaning of the observation, as it was made in the presence of the two learned Judges, who have so often expressed opinions to that effect. In this view the observation is in perfect harmony with all the more recent authorities. The report does not state in what way the case was left to the jury. C. S. G.

witnesses to confirm the accomplice, as to the mode in which the felony was committed. Williams, J., "You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the roberry was committed in the way described by the accomplice, is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for, at least, knowing how the felony was committed. It has been always my opinion, that confirmation of this kind is of no use whatsoever." (*c*) So where the prisoner was indicted for stealing a lamb, and an accomplice proved that he assisted the prisoner in stealing the lamb, but the only evidence to confirm his statement was that of a witness, who found the skin of the lamb in the field where the lamb had been kept; it was held that the confirmation was insufficient; and upon its being submitted that there was evidence to go to the jury, and *Rex* v. *Hastings*, (*d*) being cited as showing that the confirmation of the accomplice need not be as to the party accused; Gurney, B., said, "Although, in some instances, it has been so held, you will find that in the majority of recent cases, it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused." (*dd*)

Dyke's case.

The corroboration ought to be as to some fact or facts, the truth or falsehood of which go to prove or disprove the offence charged against the prisoner. Upon an indictment for murder, it appeared that a party of poachers were found in the night in a wood, and that the deceased, who was an assistant keeper, and others pursued them, and tried to apprehend them; upon which one of the poachers turned round and shot the deceased; and an accomplice was called to prove that the prisoner was the person who shot the deceased; and other witnesses were called who corroborated him as to collateral facts; but none of those facts went to connect either the prisoner and the accomplice together, or the prisoner with the transaction. Patteson, J., "The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner." (*e*)

Addis' case. The corroboration should go to prove the offence against the prisoner.

The corroboration must not only connect the prisoner and the accomplice together, but must be such as to show that the prisoner was engaged in the transaction, which forms the subject-matter of the charge under investigation. Upon an indictment on the 9 Geo. 4, c. 69, s. 9, for night poaching, it was proved that three persons were found in a wood by night in the pursuit of game, and an accomplice, who was taken on the spot, swore to the prisoner being one of the persons in the wood, but the only corroboration of his statement was, that the prisoner had been seen on the night in question, drinking with the accomplice at a public-house, which was

Farlet's case. The corroboration ought to affect the identity of the party accused, and connect him with the crime charged.

(*c*) Rex *v.* Webb, 6 C. & P. 595. The prisoners were acquitted.

(*d*) *Ante*, p. 962.

(*dd*) Reg. *v.* Dyke, 8 C. & P. 261.

(*e*) Rex *v.* Addis, 6 C. & P. 388. The prisoner was acquitted. In Kelsey's case, 2 Lew. 45, Patteson, J., said, "I think an approver should be confirmed not only in some facts generally, but in some particularly, which affect the prisoner."

four miles from the preserve, and that they were there till the public house shut up, when they left together; but it also appeared that the prisoner was in the habit of drinking at the same public-house, and lived within one hundred and fifty yards of it. Upon the opening of the case, Lord Abinger, C. B., said, "I am clearly and decidedly of opinion, and always have been, and always shall be, that there must be a corroboration as to the particular prisoner;" and in summing up, the very learned Chief Baron said, "I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice, which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to show that the party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. It is perfectly natural that he should have been there, and have left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a-week, and there the case ends against him; all the rest depends on the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." (*f*)

Wilkes' case. The distinction is between confirmations as to the circumstances of the offence, and those which go to fix the person charged.

"There is a great difference between confirmations as to the circumstances of the felony and those which apply to the individuals charged; the former only prove that the accomplice was present at the offence; the latter show that the prisoner was connected with it. This distinction ought always to be attended to." (*g*) Wilkes and Edwards were charged with stealing a lamb, and an accomplice proved the case against both the prisoners, and stated that they threw the skin of the lamb into a whirley hole, the situation of which he described; and a constable proved that he found the skin in the whirley hole. A quantity of meat was found of a kind corresponding with that of the

(*f*) Reg. *v.* Farler, MSS. C. S. G. 8 C. & P. 106.

(*g*) Per Alderson, B., Rex *v.* Wilkes, *infra*.

stolen lamb in the house of Edwards, but could not be positively identified, and a witness proved that Wilkes had come to him to borrow a pair of shears, and had then made a statement to him to the same effect as the evidence of the accomplice. Alderson, B., said, in summing up, "The confirmation of the accomplice as to the commission of the felony is really no confirmation at all; because it would be a confirmation as much if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation, which I always advise juries to require, is a confirmation of some fact, which goes to fix the guilt upon the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely upon his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular prisoner, who is charged with the offence. With respect to Edwards it is proved that meat of a similar kind was found in his house. The meat cannot be identified; but it is similar: that is therefore some confirmation of the accomplice as to Edwards, more than any one else. It is also proved that the skin was found in a whirley hole; that is no confirmation, because it does not affect the prisoners more than it affects any other persons. With respect to Wilkes, it is proved by the witness, that he told him nearly the same story as the accomplice has told you to-day. If you believe that witness there is confirmation as to Wilkes. You will say whether, with these confirmations you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither you will acquit both: and if you think that he is confirmed as to both, you will find both guilty." (*h*)

Birkett's case. Finding mutton in the prisoner's house corresponding in size with that which was lost.

Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one a large, the other a small one, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived; and the accomplice stated where the skins were hid; on the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen; and the skins were found in the place named by the accomplice. Patteson, J. "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding the skins at the place at which the accomplice said they were, would have been no confirmation of the evidence against the prisoner, because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury." (*i*)

Confirmation by the wife of an accomplice.

It has been held that confirmation by the wife of an accomplice is no confirmation at all. Upon an indictment for stealing a sheet it appeared that the sheet was found in the house of the accomplice,

(*h*) Rex *v.* Wilkes, 7 C. & P. 272.

(*i*) Reg. *v.* Birkett, 8 C. & P. 732. The prisoner was acquitted. Assuming that the confirmation in this case showed the prisoner to have been connected with the transaction, the fact of his being the receiver and not the principal seems to have been wholly uncorroborated. C. S. G.

who gave evidence to prove that the prisoners stole the sheet, and the wife of the accomplice was the only person to confirm the accomplice's statement; Park, J. A. J., "Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted." (*j*)

Confirmation as to principal, but none as to the receiver.

Where a principal and receiver are jointly indicted, and an accomplice is confirmed as against the principal, but not as against the receiver, this is not sufficient to support the case against the receiver. The two Moores were indicted for stealing, and Spindlo for receiving some ducks, and an accomplice proved that the Moores and himself went to the house of Spindlo, at Wantage, and sold him the stolen ducks, at the same time telling him from whom they had been stolen, and a witness proved that he saw the accomplice at Wantage in company with the Moores. Alderson, B. "The corroboration you should have is a corroboration affecting Spindlo. Confirming the evidence of the accomplice as against the Moores does not advance the case as against Spindlo." (*k*) So confirmation as to the receivers, without confirmation against the principal is insufficient. One prisoner was indicted for stealing, and two other prisoners for receiving, several pairs of shoes, knowing them to have been stolen, and the only witness to prove the felony was an accomplice, and she also proved the case against the receivers; she was confirmed as to the latter, but there was no confirmation whatever as to her testimony against the principal; it was objected that even as to the receivers the confirmation was not sufficient in itself; but if it was, it would still be necessary to confirm the witness as against the principal; for if the case failed against her, the receivers would be entitled to an acquittal. Littledale, J., "The confirmation as to the receivers is slight; but as there is no confirmation against the principal felon, I think the case fails altogether; there ought to be confirmation on that point before the jury can be asked to believe the witness's testimony." (*l*)

Confirmation as to receivers, but none as to principal.

Where there are several accomplices.

The practice of requiring confirmation where the case for the prosecution is supported by one accomplice, applies equally when two or more accomplices are brought forward against a prisoner. (*m*) Upon an indictment for assisting in the illegal landing of uncustomed goods, some part of the evidence depended upon the testimony of two accomplices, and Littledale, J., in summing up, said, "Then was the prisoner there? Two of his accomplices speak distinctly to him. If these statements were the only evidence against

(*j*) Rex *v.* Neal, 7 C. & P. 168. Mr. Phillipps, 1 vol. 33, observes, that in this case "the circumstances of the case might have been such as to warrant this decision. But it may often happen that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation."

(*k*) Rex *v.* Moores, 7 C. & P. 270.

(*l*) Rex *v.* Wells, M. & M. 326. All the prisoners were acquitted. It is not stated what the form of the indictment was, but it is conceived it must have alleged the receipt to be of the shoes "so stolen as aforesaid," so that an acquittal of the principal necessarily caused an acquittal of the receivers. See Rex *v.* Woolford, 1 M. & Rob. 384, *ante*, p. 249. If there had been counts charging the receivers with a substantive felony, there seems no reason why the receivers might not have been convicted, though the principal was acquitted. See *ante*, p. 249, and Rex *v.* Field, *post*, p. 969. C. S. G.

(*m*) 1 Phil. Ev. 33.

him, I should not advise you to convict upon their testimony. It is not usual to convict upon the evidence of one accomplice without confirmation; and in my opinion it makes no difference that there are more than one." (*n*)

A married woman who consents to her husband committing an unnatural offence with her is an accomplice in the felony, and as such her evidence requires confirmation. (*o*) And the same would be the case if the party with whom the offence was committed was a male, and consented. (*p*)

Cases where confirmation is not required.

There are some persons, who, although themselves in point of law participators with the prisoner in the crime with which he is charged, have been considered as not in such a situation as to make it requisite that their evidence should be confirmed. Thus, although all persons, who are present aiding and assisting at a prize-fight, are in point of law principals in the second degree in manslaughter if death ensues, yet they have been holden not to be such accomplices as to require any evidence to confirm their testimony. (*q*)

Jarvis' case.

And where upon an indictment against two prisoners for maliciously shooting, and against a third as an accessory after the fact, a person proved that he had been employed by the accessory to remove the principals out of the way; and for this he had received money, and had hidden the principals in an outhouse, and there was no corroboration by any other witness as to these facts; and it was contended, that as the witness was an accomplice, he ought to be corroborated; Gurney, B., observed, in summing up, that "with regard to the necessity of confirming an accomplice much might depend upon the nature of the crime in question; it was for the jury to consider whether there was anything in the witness's conduct to warrant their disbelieving him." (*r*)

Where the accomplice has been summarily convicted.

It has been holden that the fact of a party having been summarily convicted for poaching in the night under the 9 Geo. 4, c. 69, s. 1, does not dispense with the necessity of producing confirmatory evidence of his testimony when produced as a witness against his companions upon an indictment, under the 9th section of the same statute, founded upon the same transaction. (*s*)

In cases of misdemeanor.

The practice of requiring confirmation has been stated not to extend to misdemeanors, (*t*) but it has been well observed that there appears to be no sound reason for such a distinction, (*u*) and the case of *Reg.* v. *Farler* (*v*) is a distinct authority that the practice does extend to misdemeanors.

Result of the cases.

Upon a review of the cases the utmost that can properly be deduced from them, seems to be, that on the trial of a prisoner,

(*n*) Rex *v.* Noakes, 5 C. & P. 326, *cor.* Littledale, J., Bolland, B., and Alderson, J.

(*o*) Reg. *v.* Jellyman, 8 C. & P. 604.

(*p*) Per Patteson, J., ibid.

(*q*) Rex *v.* Hargrave, 5 C. & P. 170, Patteson, J.

(*r*) Rex *v.* Jarvis, 2 M. & Rob. 40. In Rex *v.* Durham, 1 Leach, 478, where a receiver was admitted as a witness against the principal, and was uncorroborated, the Court observed, that the receiver was to be considered rather as an accessory after the fact than as an accomplice in the facts; but this distinction seems never to have been acted upon in any case; and the case in which it was taken was decided on the authority of Rex *v.* Atwood, *ante*, p. 960, on the ground that the circumstance of his being an accomplice went to his credit only, and that his evidence might be left to the jury, although it was entirely uncorroborated. C. S. G.

(*s*) Reg. *v.* Farler, 8 C. & P. 106, *ante*, p. 963.

(*t*) Per Gibbs, Attorney-General, in Rex *v.* Jones, 31 How. St. Tr. 315.

(*u*) 1 Phill. Ev. 32, note.

(*v*) *Supra*, note (*s*).

against whom an accomplice appears as a witness, there should be (for warranting a Judge in advising the jury to give credit to such a witness, and to warrant the jury in convicting) some confirmatory evidence, that is, some proof independent of the evidence of the accomplice, from which it may be reasonably inferred that the prisoner was concerned with the accomplice in the commission of the crime. And on the trial of several prisoners charged as being jointly concerned in a crime, there should be some unimpeachable independent evidence, from which the jury may reasonably be satisfied that the accomplice speaks truly as to all the prisoners, and that they were all jointly concerned with him. But it would be going much too far to bind the discretion either of a Judge or jury by any fixed rigid rule as to the quantity or kind of confirmatory evidence which ought to be given. This, however, is settled that the confirmation required should not be a confirmation merely of those parts of the narrative which implicate the accomplice alone, and which may be true without involving the prisoners in any share in the transaction; but such a corroboration by unimpeached evidence, as may satisfy the jury, that those persons whom he charges with a participation of the crime, were, in truth, as he represents, his confederates and associates in guilt. (*w*)

Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation, is a question which the jury are to determine. (*x*)

The jury may convict some and acquit others upon the evidence of the same accomplice.

Where an accomplice is confirmed as to some of the prisoners, but not as to all, the jury may be recommended not to rely on his testimony as to the latter, but to give it credence as to the former. In a case of great importance where an accomplice swearing positively to several prisoners was confirmed as to some and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed. (*y*)

Accomplice evidence for prisoner.

An accomplice is a competent witness for his associates as well as against them, even when they are severally indicted for the same offence, whether he is convicted or not, provided he be not disqualified by a judgment. (*z*) Where there is not any or very slight evidence against one of several prisoners indicted and tried together, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him admit his testimony for the others. (*a*) In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine, Pratt, C. J., allowed him to be a witness for the other, considering the trial at an end with respect to him. (*b*) But on a joint indictment against several for a misdemeanor, a defendant who suffered judgment by default has been held not to be a witness for the other defendants. (*c*)

(*w*) 1 Phill. Ev. 37, 38.

(*x*) 1 Phill. Ev. 38.

(*y*) Rex *v.* Field Dick. Q. S. 520. See per Alderson, B., in Rex *v* Wilkes, *ante*, p. 965.

(*z*) 2 Stark. Ev. 13. 2 Hale, P. C. 280, citing the case of Bilmore, Gray, and Harbin, 2 Roll. Abr. 685, pl. 3. Bath and Montague's case, cited in Lock *v.* Hayton, Fortesc. 246.

(*a*) 2 Hawk. P. C. c. 46, s 98. Rex *v.* Bedder, 1 Sid. 237. 2 Stark. Ev. 13.

(*b*) Rex *v.* Fletcher, 1 Str. 633. Rex *v.* Sherman, Cas. temp. Hardw. 303. 1 Phil. Ev. 68.

(*c*) Rex *v.* Lafone and others, 5 Esp. N. P. C. 155, but this case has been doubted, and as it should seem, on very good grounds. 1 Phill. Ev. 68.

Where however, one of two prisoners charged with house-breaking pleaded guilty; Coltman, J., held that this prisoner might be called as a witness by the other prisoner to prove that he was not present at the committing of the offence. (*d*)

SECTION VII.

What Witnesses are Competent.

Of the competency of witnesses.

By the competency of a witness is meant his admissibility to give evidence; if he is incompetent, (of which the Court is to judge,) (*e*) he is to be totally excluded from giving his testimony; if he is competent, it will then be for the jury to decide whether his evidence, when given, is entitled to credit.

All persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath; who have not been convicted of any infamous crime; and who are not influenced by interest. (*f*) The causes of incompetency, therefore, to be considered are, 1. Defect of understanding. 2. Defect of religious belief. 3. Infamy. 4. Interest; and therewith of the incompetency of husband and wife.

Want of understanding. Idiots. Deaf and dumb. Lunatics. Children.

1. Persons incompetent from want of understanding. Idiots (*g*) are not admissible to give evidence. By the word 'idiot' is meant a fool or madman from his nativity, who never has any lucid intervals. (*h*) A person deaf and dumb from his nativity (though in presumption of law an idiot), (*i*) if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an intepreter. (*j*) So lunatics are incompetent; that is, persons usually mad, but having intervals of reason; (*k*) during which times they are competent. (*l*) With respect to children, the rule now seems to be, that their competency does not depend on their age; but that a child of any age may be examined, if capable of distinguishing between good and evil; (*m*) but whatever be its age, it cannot be examined without being sworn. (*n*) Whether the infant be competent or not is a question for the discretion of the Court. (*o*) Before a child is examined the Judge must be

(*d*) Reg. *v.* George, 1 C. & Mars. 111.

(*e*) 2 Hale, P. C. 277.

(*f*) Per Lawrence, J., in Jordaine *v.* Lashbrooke, 7 T. R. 610. 1 Phil. Ev. 3.

(*g*) Com. Dig. Testmoign, A. 1.

(*h*) See *ante*, vol. 1, p. 6.

(*i*) Ibid.

(*j*) 1 Phil. Ev. 4. Ruston's case, 1 Leach, C. C. 408.

(*k*) *Ante*, vol. 1, p. 7.

(*l*) Com. Dig. Testmoign, A. 1.

(*m*) *Ante*, vol. 1, p. 695. By such capability must be understood a belief in God, or in a future state of rewards and punishments; from which the Court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood, ibid. "It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a Judge would allow him to be sworn." Per Alderson, B. Reg. *v.* Perkins, 2 Moo. C. C. R. 135.

(*n*) See further on this subject, *ante*, vol. 1, p. 695.

(*o*) 1 Stark. Ev. 94.

satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial. Where, therefore, on an indictment for murder, it appeared that previous to the happening of the circumstances, to which a child came to speak, she had no religious education whatever, and had never heard of a future state, and she had been twice visited by a clergyman who had given her some instruction as to the nature and obligation of an oath; but she had no intelligence as to religion or a future state, at the time of the trial; her testimony was rejected. (*p*) There is no difference in respect of the competency of children between capital cases and misdemeanors. (*q*) Where the child has appeared not sufficiently to understand the nature and obligation of an oath, Judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. (*r*) But an application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury, or, at all events, before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the Judge cannot discharge the jury, but should direct an acquittal. (*s*) When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible. (*t*)

Postponing the trial in order that a child may be instructed.

Defect of religious belief.

2. Of incompetency from defect of religious belief. The rule as now settled, appears to be, that, as far as regards this kind of incompetency, infidels of this and all other countries, who yet believe in a God, the avenger of falsehood, are admissible as witnesses; and the only persons incompetent are those who do not believe in a God, the dispenser of future rewards and punishments; (*u*) and it should seem that it makes no difference whether the belief is that such dispensation is to take place in a present or in a future state of existence. "Such infidels," says Lord C. J. Willes, in the case of *Omichund* and *Barker*, (*v*) "who either do not believe a God, or if they do, do not think that he will either reward or punish them *in this world or in the next*, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation to them."

Method of administering the oath.

The proper method, however, of administering the oath must vary according to that which the proposed witness himself considers most obligatory; (*w*) for, "as the purpose is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most." (*x*) Therefore, a Mahometan should be sworn on the Alcoran; (*y*) a

(*p*) Rex *v.* Williams, 7 C. & P. 321, Patteson, J.

(*q*) Rex *v.* Travers, 2 Stra. 700.

(*r*) *Ante*, vol. 1, 695. 1 Phill. Ev. 5. But this must not be done in order that an *adult* may become capable, ibid. *post*, p. 972.

(*s*) 1 Phill. Ev. 5, citing Rex *v.* Wade, *post*, p. 972.

(*t*) 1 Phill. Ev. 5.

(*u*) 1 Phill. Ev. 10.

(*v*) Willes's Rep. 549.

(*w*) Ibid.

(*x*) By Lord Mansfield, in Atcheson *v.* Everitt, Cowp. 389.

(*y*) Morgan's case, 1 Leach, 54.

Jew on the Pentateuch, with his head covered; (z) a Gentoo according to his peculiar forms. (a) So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn on the Old Testament, upon stating, that he should consider such oath binding on his conscience. (b) But although it is highly desirable that a witness should be sworn according to the form, which he considers *most* binding on himself, yet, if he has taken the oath in the usual form administered in our Courts of law, without objecting to it, and upon being questioned whether he considers the oath he has taken as binding on his conscience, he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding on his conscience than that he has already used. (c) For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath, he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head, if what he shall afterwards say is false; and having done that, it is perfectly unnecessary and irrelevant to ask any further questions. (d)

1 & 2 Vict. c. 105. All persons bound by the oath taken.

The 1 & 2 Vict. c. 105, enacts, that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered; provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

Proper mode of examination as to opinions.

The proper method of examining a witness, if the examination tends merely to try his *competency* in respect to religious principle, is not to question him as to his particular opinions, (as whether he believes in Jesus Christ,) but to inquire whether he believes in the existence of a God, the obligation of an oath, and a future state of rewards and punishments: (e) but if the examination be previous to swearing the witness, for the purpose of ascertaining what form of administering the oath will be most proper, as most binding on the witness's conscience, it is said to be not irregular to examine him as to his opinions; as, whether he believes in the Gospels on which he is about to be sworn. (f) If a material witness, who is an

(z) Willes, 543. 1 Phill. Ev. 9.

(a) 1 Phill. Ev. 9. 1 Chit. Crim. L. 591.

(b) Edmonds v. Rowe, R. & M. N. P. R. 77, *cor.* Bosanquet, Serjt.

(c) The Queen's case, 2 Brod. & Bing. 285.

(d) Ibid. See also Sells v. Hoare, 3 Brod. & Bing. 232, where, on an application for a new trial, it appeared that a witness who had been sworn as a Christian, on the Gospels, was a Jew; and the Court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and Richardson, J., observed, that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

(e) Rex v. Taylor, Peake, N. P. C. 11, by Buller, J., 1 Phill. Ev. 11; and according to the judgment of Willes, C. J., in Omichund v. Barker, Willes, 541, *ante*, p. 970, it seems sufficient if the witness believes in such a state either in this world or the next.

(f) 1 Phill. Ev. 11.

Trial cannot be postponed until an adult is instructed.

adult, and of sufficient intellect, has no idea of a future state of rewards and punishments, it is not proper to discharge the jury, and postpone the trial, in order that the witness may have an opportunity of being instructed upon that subject before the next assizes; as may be done in the case of a child. (*g*)

Quakers.

Quakers were formerly excluded from giving evidence, not indeed from defect of religious principle, but owing to their refusal, upon religious scruples, to take any oath at all. (*h*) But this disability is now entirely removed.

9 Geo. 4, c. 32, s. 1. Quakers and Moravians.

The 9 Geo. 4, c. 32, s. 1, reciting that "it is expedient that Quakers and Moravians should be allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil," enacts, that "every Quaker or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration in the words following, that is to say: 'I, A. B., do solemnly, sincerely, and truly declare and affirm;' which said affirmation or declaration shall be of the same force and effect in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form." (*i*)

3 & 4 Wm. 4, c. 49. Quakers and Moravians.

The 3 & 4 Wm. 4, c. 49, s. 1, enacts, that "every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever, where an oath is or shall be required either by the common law, or by any act of Parliament already made, or hereafter to be made." (*j*)

3 & 4 Wm. 4, c. 82. Separatists.

The 3 & 4 Wm. 4, c. 82, reciting, that "there are in various places in Ireland, and in some parts of England and elsewhere, certain dissenters from the United Church of England and Ireland, and from the Church of Scotland, commonly called Separatists," enacts, that "every person for the time being belonging to the said sect called Separatists, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration. (*k*) Which said solemn

(*g*) Rex *v.* Wade, R. & M. C. C. R. 86.

(*h*) Their solemn affirmation, by the 7 & 8 Wm. 3, c. 34, 8 Geo. 1, c. 6, and 26 Geo. 2, c. 46, s. 36, was admitted in Courts of justice to have the same effect as an oath in all civil, but not in criminal cases. It was, however, receivable in cases which are only technically criminal, as in penal actions, Atcheson *v.* Everett, Cowp. 382, but excluded in all proceedings substantially criminal, as on a motion for an information for a misdemeanor. Rex *v.* Wych, 2 Str. 872. Rex *v.* Gardner, 2 Burr. 1117. But where the application to the Court was against a Quaker, his affirmation might be received in his own defence, though the proceedings were of a criminal nature. Rex *v.* Gardner, *supra.*

(*i*) In Rex *v.* Channens, R. & M. C. C. R. 374, it was held that a Quaker, notwithstanding this statute, was not a good juryman upon his affirmation. And it seems that an indictment stated to be found upon the oath or affirmation of A., B., and C., then and there sworn, or charged as jurors, without saying who were sworn and who affirmed, and that the latter were entitled to serve on their affirmation, is bad since the 3 & 4 Wm. 4, c. 49. Rex *v.* Dann, R. & M. C. C. R. 424.

(*j*) The form of affirmation given by this statute is, "I, A. B, being one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be] do solemnly, sincerely, and truly declare and affirm."

(*k*) The form of affirmation given by the statute is, "I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary

affirmation or declaration shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice and other places whatsoever, where by law an oath is or may be required, as if such Separatists had taken an oath in the usual form."

1 & 2 Vict. c. 77. Persons who have been Quakers and Moravians.

The 1 & 2 Vict. c. 77, enacts, that "it shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians." (*l*)

Excommunicated persons.

Previous to the 53 Geo. 3, c. 127, there was great doubt whether persons excommunicated by the ecclesiastical courts were competent witnesses: (*m*) but by that statute, excommunication is not to be pronounced, except in certain cases; and by sec. 3, in those cases, parties excommunicated shall incur no civil disabilities.

Infamy. What offences create incompetency.

3. Of incompetency from infamy. There are certain offences of which if a person be convicted, he becomes incompetent to give evidence. Such are treason, felony, (*n*) and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and other offences of the same description, which involve the charge of falsehood and affect the public administration of justice. (*o*) So a conviction of bribing a witness to absent himself and not give evidence, (*p*) barratry, (*q*) or præmunire. (*r*) And a witness is disqualified by attaint of conspiracy at the suit of the King; (*s*) that is, of a conspiracy to accuse another of a capital offence; for then he is to have a villainous judgment, and lose the freedom of the law; (*t*) but it is otherwise when he is attainted of conspiracy at the suit of the party; (*u*) and it has been held, that a conviction for a conspiracy to raise the funds by spreading false rumours, would not render an affidavit of the party convicted inadmissible. (*v*)

to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare."

(*l*) The form of affirmation given by the statute is, "I, A. B., having been one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm." This statute was passed in consequence of Reg. *v.* Doran, 2 Moo. C. C. R. 37, where it was held that a person, formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refusing to affirm under the 3 & 4 Wm. 4, c. 49, and the 3 & 4 Wm. 4, c. 82, was not admissible in criminal cases upon making the affirmation according to the 9 Geo. 4, c. 32.

(*m*) Gilb. Ev. 130.

(*n*) By the 31 Geo. 3, c. 35, it was enacted, that no person should be incompetent by reason of a conviction for petit larceny. But this act is repealed by the 7 & 8 Geo. 4, c. 27. And by the 7 & 8 Geo. 4, c. 29, every larceny shall be deemed to be of the same nature, and subject to the same incidents in all respects as grand larceny was before the commencement of that act.

(*o*) 2 Hale P. C. 277. Com. Dig. Testm. A. 3, 4. Co. Lit. 6 b. 1 Phill. Ev. 17.

(*p*) Clancey's case, Fortesc. 208, and Bushel *v.* Barrett, R. & M. N. P. R. 434.

(*q*) Rex *v.* Ford, 2 Salk. 690.

(*r*) Com. Dig. Testm. A. 5. Co. Lit. 6 b.

(*s*) Co. Lit. 6 b. Com. Dig. Testm. A. 5.

(*t*) 1 Phill. Ev. 17. 2 Hale P. C. 277.

(*u*) 1 Phill. Ev. 17. 2 Hale P. C. 277. Saville *v.* Roberts, Carth. 416.

(*v*) Case of Ville de Varsovie, 2 Dods. 174, *ante*, p. 705. Abbott, C. J., in Crowther *v.* Hopwood, 3 Stark. 22, admitted a witness under the same circumstances, and said, "I believe Sir W. Scott came to that decision in the case of Ville de Varsovie, after much deliberation; and if I mistake not, he conferred with some of the Judges upon the point, before he pronounced his judgment:" but his Lordship reserved the point as one deserving the greatest consideration. It never came before the Court, as the verdict rendered the decision of it immaterial to the case.

But a conviction for a conspiracy to bribe a person, (summoned as a witness on an information against the revenue laws,) not to appear before the justices of the peace, renders the convict incompetent. (*w*) A conviction for keeping a public gaming-house, has been held not to make a witness incompetent; (*x*) though a person convicted of winning by fraud or ill practice in certain games, seems rendered incompetent by the 9 Ann. c. 14, s. 5; for besides inflicting a penalty, that statute enacts that he shall be deemed infamous. (*y*) Outlawry in a personal action, does not create incompetency: (*z*) but it is otherwise of outlawry for treason or felony; for a judgment of outlawry for treason or felony, appearing on the record by the sheriff's return of the exigent, has the same effect as judgment after verdict or confession. (*a*) It follows, therefore, that such an outlaw cannot be a competent witness. (*b*)

The nature of the punishment immaterial.

It was formerly thought that incompetency on the ground of infamy might arise, not only from conviction of the offences already mentioned, but from the infliction of certain infamous punishments, as the pillory; (*c*) but it is now clearly settled, that it is the nature of the crime, and not the species of the punishment which renders the party infamous, and disqualifies him from giving evidence. (*d*) Therefore a person convicted of barratry, and merely fined, is incapacitated from being a witness, though subjected to no infamous punishment: (*e*) while a person who has been in the pillory for a libel on government, is competent. (*f*)

Proof of judgment necessary to exclude.

In order to exclude a witness on the ground of his being infamous, it is necessary to prove him convicted by the production of the record, (*g*) not only of his conviction, but of the judgment thereon; (*h*) for the conviction may possibly have been quashed on a motion in arrest of judgment, (*i*) or the judgment reversed upon error. (*ii*) And the record must have a caption. (*j*) And even an admission by the witness himself, that he had been convicted of grand larceny, and was then under sentence upon such conviction, was held insufficient to remove the necessity of producing the record. (*k*) And an admission by a witness, that he has been guilty of perjury on another occasion, affords no objection to his competency, whatever effect it may have on his credit. (*l*)

Incompetency from infamy how removed.

The incompetency arising from infamy may be removed: 1st. By endurance of punishment. 2dly. By pardon. 3dly. By reversal of the judgment.

(*w*) Bushel *v.* Barrett, R. & M. N. P. C. 434, Littledale and Gaselee, J.

(*x*) Rex *v.* Grant, R. & M. N. P. C. 270, Abbott, C. J.

(*y*) 1 Phill. Ev. 18.

(*z*) Co. Lit. 6 b. Com. Dig. Testm. A. 5.

(*a*) 3 Inst. 212. Hawk. P. C. b. 2, c. 48, s. 22.

(*b*) Celier's case, Sir T. Raym. 369. 1 Phill. Ev. 18.

(*c*) Gilb. 127. 2 Hale P. C. 277. The punishment by the pillory is abolished, in all cases, and that of fine or imprisonment, or both, substituted, by the 56 Geo. 3, c. 138, and 1 Vict. c. 23.

(*d*) Gilb. 127. Bull. N. P. 292. 2 Hawk. P. C. c. 46, s. 102.

(*e*) Rex *v.* Ford, 2 Salk. 690. Pendock *v.* Mackender, 2 Wils. 18. Bull. N. P. 292. 2 Hawk. P. C. c. 46, s. 102.

(*f*) Gilb. 127.

(*g*) Rex *v.* Castell Careinion, 8 East, 77. Com. Dig. Testm. A. 5. Bull N. P. 292. 2 Hawk. P. C. c. 46, s. 104.

(*h*) Gilb. 128. Com. Dig. Testm. A. 5.

(*i*) Gilb. 129.

(*ii*) Reg. *v.* Meek, 9 C. & P. 513.

(*j*) Cooke *v.* Maxwell, 2 Stark. R. 183, *cor.* Bayley, J.

(*k*) 8 East, 78.

(*l*) Rex *v.* Teal, 11 East, 307. Rands *v.* Thomas, 5 M. & S. 244.

1st. The restoration of competency by suffering the punishment awarded to the offence, depends at the present day upon the provisions of the 9 Geo. 4, c. 32. Before the passing of this act, the endurance of the punishment in many cases operated to restore the competency, but the law upon this subject was involved in some confusion, in consequence of the recent extensive changes effected in the criminal law. (*m*)

1. By endurance of punishment.

The 9 Geo. 4, c. 32, s. 3, reciting that "it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged," enacts, that "where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted; provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

Every punishment for felony after it shall have been endured shall have the effect of a pardon under the great seal.

Sec. 4, reciting that "there are certain misdemeanors which render the parties convicted thereof incompetent witnesses," enacts that "where any offender hath been or shall be convicted of any such misdemeanor, (except perjury or subornation of perjury,) and hath endured or shall endure the punishment, to which such offender hath been or shall be adjudged for the same, such offender shall not, after the punishment so endured, be deemed to be by reason of such misdemeanor, an incompetent witness in any court or proceeding, civil or criminal."

No misdemeanor except perjury to render incompetent after punishment suffered.

Where a man was convicted of larceny, sentenced to transportation for seven years, and confined in the hulks for that time and then discharged, it was held, that his suffering seven years aboard the hulks, in execution of sentence of seven years' transportation, operated as a statute pardon; and that his having escaped twice during such confinement, for a few hours each time, did not destroy the effect of it. (*n*)

What is a sufficient endurance of the punishment awarded.

2dly. It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved. (*o*) But it is now settled, that a pardon, whether by the King or by an act of Parliament, removes not only the punishment, but all the legal disabilities consequent on the crime. (*p*) This effect will be produced by a pardon in misdemeanors as well as felonies, wherever the disability is a consequence of the judgment; but where it is declared by an act of Parliament

2. By pardon.

(*m*) 1 Phill. Ev. 23.

(*n*) Rex *v.* Badcock, Russ. & Ryan. 248.

(*o*) Gilb. Ev. 128. Browne *v.* Crashaw, 2 Bulstr. 154. Harris *v.* White, Palm. 412. Wicks *v.* Smallbrooke, 1 Sid. 51. It was said, "*Pœna potest tolli, culpa perennis erit.*"

(*p*) Cuddington *v.* Wilkins, Hob. 67, 81. 2 Hale P. C. 278. Crosby's case, Salk. 689. S. C., 1 Lord Raym. 39. Rookwood's case, 4 State Trials, 681. S. C. Cas. temp. Holt, 683. By Treby, C. J., in Lord Warwick's case, 5 State Trials, 171. Rex *v.* Ford, 2 Salk. 690. Bentley *v.* Bishop of Ely, Fitzg. 107. And a pardon by which the King remits the burning in the hand will have the same effect. Rookwood's case, Lord Warwick's case, *ubi supra.*

e part of the punishment, as in the case of perjury or suborna- of perjury on the 5 Eliz. c. 9, (*q*) the King's pardon will not e the witness competent. (*r*)

the pardon be conditional, the performance of the condition ought to be shewn, for on that depends all its validity. (*s*) Thus where the pardon is on condition of transportation for a number of years, the witness is not competent before the expiration of the term, or other lawful determination. (*t*)

Proof of pardon.

Before the 6 Geo. 4, c. 25, and 7 & 8 Geo. 4, c. 28, in order to prove that a witness after conviction had been restored to his competency by pardon, the general rule was, that it was necessary to produce the pardon itself under the great seal: the privy seal, or sign manual, being held only warrants, and countermandable. (*u*)

6 Geo. 4, c. 25, s. 1.

But now by the former of these statutes, (sec. 1) it is enacted, that in all cases, in which the King shall be pleased to extend his royal mercy to any offender convicted of *any felony whereby the offender is excluded from benefit of clergy*, and by warrant under sign manual, countersigned by one of the secretaries of state, shall grant to the offender either a free pardon or a pardon upon condition of transportation, imprisonment, or other punishment, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony of which he has been convicted. And by the latter of these statutes, (sec. 13) this enactment is enlarged to cases where the royal mercy is extended "to any offender convicted of any felony punishable with death *or otherwise*." These statutes it will be observed do not extend to misdemeanors.

7 & 8 Geo. 4, c. 28, s. 13.

3. Reversal of judgment.

3dly. The incompetency may be removed by a reversal of the judgment or outlawry, which must be proved by producing the record.

In *Lord Lovat's case*, (*v*) where it was objected that the witness had been attainted by an act of Parliament, which subjected him to all the penalties of an attainder, unless he surrendered before a certain day, it was allowed to be shewn that the witness surrendered conformably to the act; and the record of the proceeding, commenced on the part of the crown, and defended on the part of the witness by a plea of surrender, which the Attorney-General confessed to be true, was allowed to be conclusive evidence of the fact of his surrender within the limited time. (*w*)

Consequence of incompetency from infamy.

The consequence of incompetency from infamy is, that as the party cannot be a witness, so he cannot make affidavits to support a complaint against others, (*x*) but he may to exculpate or defend

(*q*) This statute provides, that the person convicted shall never be admitted to give evidence in courts of justice, until the judgment be reversed.

(*r*) Rex *v.* Griepe, 1 Lord Raym. 256. Rex *v.* Ford, 2 Salk. 690. Gilb. Ev. 128. Bull. N. P. 292. Dover *v.* Maestaer, 5 Esp. 94, by Lord Ellenborough. The authorities on the effect of the King's pardon, as to the restoration of competency, are all collected and commented upon with great learning by Mr. Hargrave, in the second volume of his Juridical Arguments, p. 221.

(*s*) Hawk. P. C. b. 2, c. 37, s. 45.

(*t*) Rex *v.* Burridge, 3 P. Wms. 439. 1 Phill. Ev. 22.

(*u*) Lord Warwick's case, 5 Hargr. State Trials, 4th ed. 171, by Treby, C. J. Rex *v.* Miller, 2 W. Black. 798. Gully's case, 1 Leach, 98.

(*v*) 9 St. Tr. 652, 665.

(*w*) 1 Phill. Ev. 20.

(*x*) Davis's case, 2 Salk. 461. Walker *v.* Kearney, 2 Stra. 1148. 2 Hawk. c. 46, s. 103.

himself. (*y*). Thus he is not disabled from making an affidavit in relation to the irregularity of a judgment to which he is a party; (*z*) for otherwise he must suffer all injustice, and could have no way to help himself. (*a*) He is for some purposes of evidence considered as dead. Thus, if he be the subscribing witness to a bond, his handwriting may be proved, as if he were dead. (*b*)

Incompetency from interest.

4. Of incompetency from interest.—All witnesses interested in the event of a suit are to be excluded from being witnesses in favour of that party to which their interest inclines them. They are excluded from a supposed want of integrity, and not as some have supposed that they may be saved from the temptation to commit perjury. (*c*) It becomes necessary therefore to consider what is and what is not such a disqualifying interest. The rule at present completely established, (though at variance with several old decisions,) is, that the interest to disqualify must be some *legal, certain, and immediate* interest in the event of the suit, or in the record as an instrument of evidence available on future occasions in support of the witness's own interest. (*d*) But it is no objection to the competency of a witness, that he may have wishes or a strong bias on the subject matter of the proceeding, or that he may expect some benefit from the result of the trial. Such circumstances may influence his mind and affect his *credibility;* they are therefore always open to observation and ought to be carefully weighed by the jury who are to determine what dependence they can have on his testimony; but they will not render him incompetent. (*e*) Thus no tie of relationship (except that of husband and wife to be hereafter noticed) will create a disqualifying interest. A father may give evidence for his son, or the son for his father, for though his consanguinity may influence his testimony and affect his credit, it will not make him incompetent. So a witness is not to be excluded because he stands in the same situation as the party for whom it is proposed he should give evidence; (*f*) nor because he believes himself interested in the result of the proceedings; (*g*) nor because he believes himself under an honorary obligation to pay the costs. (*h*) It is not thought necessary to cite any of the *civil* cases supporting these rules; they will be found ably and clearly stated and applied, in the treatises already referred to on this subject: but it may be expedient to notice some of the most striking *criminal* cases, particularly those which on the ground of necessity, or by statutory

What interest disqualifies.

What interest does not disqualify.

(*y*) Davis's case, 2 Salk. 461. Charlesworth's case, cited 2 Stra. 1148.

(*z*) 2 Salk. 461.

(*a*) 2 Hawk. c. 46, s. 103.

(*b*) Jones *v.* Mason, 2 Stra. 833.

(*c*) 1 Phil. Ev. 45, 7th ed. If a witness is interested in the event of a suit, he cannot give any evidence of any nature whatever for the party with which his interest sides. Thus on an indictment against a township for not repairing a highway, a person of another township in the parish seems not to be a competent witness for the prosecution, even to prove the road to be a common highway: though it may be said, that to such extent he charges himself and his testimony is against his own interest, 1 Phil. Ev. 64, 6th ed. So in an action of ejectment a witness who admits he is to have a lease of the premises, in case the defendant is turned out of possession by the ejectment, is as incompetent to prove the defendant in possession of the premises as to prove any material fact necessary for the support of the action, ibid.

(*d*) 1 Phil. Ev. 81, 86. 1 Stark. Ev. 103. Smith *v* Prager, 7 T. R. 60.

(*e*) 1 Phil. Ev. 47, 7th ed.

(*f*) Ibid.

(*g*) 1 Phil. Ev. 47, 7th ed. But it has been said that if he thinks he has an actual legal interest he is incompetent, ibid., 54, note (2), 7th ed. Case of L'Amitie, 5 Rob. Adm. Rep. 344. See however Phil. *ubi supra*, and 1 Stark. Ev. 105.

(*h*) 1 Phil. Ev. 128.

Cases of disqualifying interest.

provisions, are at variance with the general principles of evidence. Informers who are entitled to a part of the penalty, are not good witnesses to support a conviction, unless by the particular provisions or policy of several acts of Parliament. (*i*) So it has been held that on an indictment for a forcible entry and detainer under the 5 R. 2, and 21 Jac. 1, the party grieved is not a competent witness, for in case of a conviction he will be entitled to restitution. (*j*) So on a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband. (*k*) A person indicted as accessory before or after the fact would in most cases be incompetent as a witness for the principal, for his acquittal would enure to the accessory's discharge. (*l*) If a man hath the promise of the goods or lands of the party attainted, he is no lawful witness of a treason. (*m*) Inhabitants of a parish, indicted for not repairing a highway, were formerly not competent to give evidence for the defendants. (*n*)

In forgery.

In cases of forgery, a party by whom an instrument purported to be made, was not admitted to prove it forged, if, in case of its being genuine, he would either be liable to be sued upon it or be deprived by it of a legal claim against another. This, however, was an anomaly depending on decided cases rather than upon the principles of the rule above stated. And now by the 9 Geo. 4, c. 32, s. 2, "on any prosecution by indictment or information, either at common law, or by virtue of any statute, against any person for forging any deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to be forged; or for being accessory before or after the fact to any such offence, if the same be a felony; or for aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor; no person shall be deemed to be an incompetent witness in support of any such prosecution, by reason of any interest which such person may have or be supposed to have in respect of such deed, writing, instrument, or other matter."

9 Geo. 4, c. 32, s. 2. Party whose name is forged a competent witness.

Cases of competency.

Party injured.

But with this exception it is a general rule that in criminal prosecutions the party injured may be a witness. (*o*) Thus it is the constant practice on an indictment for robbery, to admit the evidence of the party robbed. (*p*) And the prosecutor is competent notwithstanding he be entitled to a restitution of his property

(*i*) 1 Phil. Ev. 66, *ante*, p. 268. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed, for the statute must not be rendered ineffectual by the impossibility of proof. Gilb. Ev. 114.

(*j*) Rex *v.* Beavan, R. N. P. C. 242, Littledale, J. Rex *v.* Williams, 9 B. & C. 549, *ante*, vol. 1, p. 313.

(*k*) *Ante*, p. 696. But where a woman was called to give evidence for the Crown, whose husband lay under sentence of death, and she said she supposed and hoped that the conviction of the prisoner would be the means of procuring her husband's pardon, she was admitted as a witness, and the objection held to go to her credit and not to her competency. Rudd's case, 1 Leach, 127.

(*l*) 2 Stark. Ev. 764, 1st ed.

(*m*) 1 Hale, P. C. 303.

(*n*) *Ante*, vol. 1, p. 370. But see the 3 & 4 Vict. c. 26, s. 1, *post*, p. 980.

(*o*) For it is not to be presumed that a witness in a public prosecution is actuated by revengeful or improper motives, and he has in general no *legal* interest beyond that of any other witness.

(*p*) 1 Phil. Ev. 65. Rudd's case, 1 Leach, 132, *per cur.*

on conviction of the thief, (*q*) or to a reward on conviction, by virtue of particular statutes or by proclamation; (*r*) or in consequence of the voluntary offer of a reward which has been held out in order to ensure the apprehension and conviction of offenders. (*s*) So a witness is competent upon an indictment for tearing a promissory note payable to him, (*t*) or for extorting a bond from him, (*u*) or for usury, although he was the borrower of the money and has not repaid it; (*v*) so for cheating him of money by false pretences; (*w*) or upon an information for fraudulently procuring him to execute a cognovit. (*x*) In the earlier cases, the decisions seem to have proceeded upon the ground of necessity; for it was said that in such private transactions nobody else can be a witness of the circumstances of the fact but he that suffers; and in cases where no such necessity existed, the party defrauded was in most instances considered incompetent, upon the supposition that he might avail himself of the verdict in some future proceeding, so as to entitle himself to a remedy for the injury, or protect himself against the effects of the fraud. (*y*) But it is now held that the party aggrieved cannot avail himself of the record of the conviction in any future suit in order to prove the criminal act. (*z*) And it is also an established rule that a court of equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor. (*a*) Upon these considerations the party injured is allowed to be witness on an indictment for perjury, whether the suit in which the perjury was committed, either at law or in equity, be at an end or not. (*b*) And it has been considered that even if the indictment for perjury proceeds on the 5 Eliz. c. 9, which gives the prosecutor half the forfeiture incurred, there would be no objection to his competency, since in an action to recover his moiety, he would be precluded from giving the conviction in evidence. (*c*)

Certiorari.

Where any indictment has been removed by certiorari from the quarter-sessions to the Court of King's Bench, notwithstanding the prosecutor in that case, if the defendant be convicted, is by the 5 & 6 Wm. & M. c. 11, entitled to his costs, yet he is allowed as a witness; for, as is remarked by Parker, C. J., if the giving of costs should take off the evidence of the prosecutor, that Act of Parliament, which

(*q*) By the 7 & 8 Geo. 4, c. 29, s. 57.

(*r*) 1 Leach, 132. Rioters' case in note to Newland's case, ibid., 314.

(*s*) 1 Phil. Ev. 120, 6th ed. 1 Stark. Ev. 154. 1 Leach, 132, 314, note. So where a prosecutor had laid a wager that he should convict the defendant, he was held competent. Rex *v.* Fox, Stra. 652.

(*t*) Rex *v.* Moise, 1 Stra. 595.

(*u*) 1 Stark. Ev. 153.

(*v*) Reg. *v.* Sewell, 7 Mod. 118. Smith *v.* Prager, 7 T. R. 60.

(*w*) Reg. *v.* Mackartney, 1 Salk. 286.

(*x*) Rex *v.* Parris, 1 Sid. 431.

(*y*) 1 Stark. Ev. 153.

(*z*) 1 Phil. Ev. 65. Bartlet *v.* Pickersgill, 4 East, 577, note (*b*). Rex *v.* Boston, 4 East, 581. Smith *v.* Rummens, 1 Campb. 9. Hathaway *v.* Barrow, 1 Campb. 151. Burdon *v.* Browning, 1 Taunt. 520.

(*a*) Bartlet *v.* Pickersgill, Rex *v.* Boston, *ubi supra.*

(*b*) Rex *v.* Boston, 4 East, 572. *Ante*, p. 654, but see Rex *v.* Hulme, 7 C. & P. 8, *ante*, p. 655. It was once held necessary to show the judgment in the suit satisfied, on the ground that the party might possibly make use of the conviction for the purpose of obtaining relief in equity, *ante*, p. 654.

(*c*) *Ante*, p. 656. But see 1 Stark. Ev. 155, where it is said that where a statute gives a specific remedy to the party injured he is as much disqualified for a witness in a criminal prosecution as if he sought the remedy by a civil action; and therefore that upon an indictment for a perjury upon the statute he is not a good witness, although he would have been a good witness upon an indictment at common law. See also Gilb. Ev. 111. Bull. N. P. 289.

was designed to discountenance the removal of suits by certiorari would give the greatest encouragement to them that is possible. (*d*)

Costs.

It seems also that the prosecutor of an indictment for not repairing a highway, is competent, as he cannot it seems be in the result liable to costs. (*e*)

Inhabitants.

Of county.

In prosecutions against private persons or corporate bodies for not repairing bridges, inhabitants of counties may be witnesses by the 1 Ann. stat. 1, c. 18, s. 13. (*f*)

Of parish.

Even before this statute such evidence had been thought admissible from necessity. (*g*) In all cases relative to the Highway Act, the inhabitants of a parish or place, the surveyor and other officers, are competent witnesses by the 5 & 6 Wm. 4, c. 50, s. 100. (*h*)

Inhabitants, in cases of penalties given to the poor.

Where pecuniary penalties are directed to be applied to the use of the poor, or for the benefit and exoneration of the parish or other place, the inhabitants are rendered competent witnesses on the trial of the offender, by the 27 Geo. 3, c. 29, provided the penalty imposed by the Act of Parliament does not exceed twenty pounds. Before this act, an inhabitant rated to the poor would have been incompetent. (*i*)

In order to provide against the inconvenience of excluding the evidence of the inhabitants at large upon questions affecting the interests of parishes and other districts, the 54 Geo. 3, c. 170, s. 9, provided that no inhabitant rated or liable to be rated, to any rates of any parish, &c., or executing or holding any office therein, should be incompetent for or against such parish, &c., in any matter relating to such rates, or to the boundary of such parish, &c. &c. So much, difficulty, however, arose in the construction of this act that it was considered expedient to pass the following statute. (*j*)

3 & 4 Vict. c. 26, s. 1. Persons not disqualified from giving evidence on account of being assessed to parochial rates.

The 3 & 4 Vict. c. 26, s. 1, reciting, that "it is expedient to remove all doubt whether persons are by law competent to give evidence in cases where they have been formerly held to be disqualified by the liability to pay parochial rates:" enacts, "that from and after the passing of this act, no person called as a witness on any trial in any Court whatever, may and shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for and towards the maintenance of church, chapel, or highways, or for any other purpose whatever."

Nominal parties on any trial not disabled from giving evidence.

By sec. 2, "no churchwarden, overseer, or other officer in and for any parish, township, or union, or any person rated or assessed or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding by reason only of his being a party to such trial, appeal or other proceeding, or of his being liable to costs in respect thereof,

(*d*) Reg. *v.* Muscot, 10 Mod. 193.
(*e*) *Ante*, vol. 1, p. 370.
(*f*) *Ante*, vol. 1, p. 406.
(*g*) Ibid.
(*h*) *Ante*, vol. 1, p. 370.
(*i*) 1 Phil. Ev. 139.
(*j*) The cases upon the construction of the 54 Geo. 3, c. 170, s. 9, are collected, 1 Phil. Ev. 141, *et seq.* In Rex *v.* Hayman, M. & Malk. 401, Tindal, C. J., held on an indictment for the non-repair of a bridge or road, on a liability *ratione tenuræ*, that rated inhabitants of the parish wherein the bridge or road was situated, were rendered competent by the 54 Geo. 3, c. 170. But in Rex *v.* Bishop Auckland, 1 A. & E. 744. 1 M. & Rob. 286, it was held that inhabitants of a district indicted for the non-repair of a highway, were not rendered by that statute competent witnesses for the defence. This decision, however, seems to be overruled by Doe *d.* Boultbee *v.* Adderley, 8 A. & E. 502.

when he shall be only a nominal party to such trial, appeal or other proceeding and shall be only liable to contribute to such costs in common with other the rate-payers of such parish, township, or union."

It has been held that the clause in this statute relating to inhabitants ought to receive the largest construction, and must be extended to owners. Therefore, an owner of lands within a parish is competent to give evidence on a prosecution against such parish for non-repair of a highway, though he be not a rated inhabitant, the lands being occupied by tenants who are rated for them. (*k*)

Removal of incompetency from interest.

Whatever interest a witness may have had, if he is divested of it by release or payment, or by any other means, when he is ready to be sworn, there is no objection to his competency. (*l*)

Husband and wife;

It has been already observed, that no tie of relationship will create an interest disqualifying as a witness, except that of husband and wife. They cannot be admitted to be witnesses either for or against each other; for, since their interests are absolutely the same, they cannot swear for the benefit of each other, any more than a man can attest for himself; (*m*) therefore, the wife of a prisoner cannot give evidence for him, nor for any one of several others indicted with him where a joint offence, as a conspiracy, is charged, and an acquittal of all the others would be a ground of discharge for her husband. (*n*) So also on an indictment against several prisoners, the wife of one of them has been held inadmissible as a witness for the others, if her evidence has a tendency to procure the acquittal of her husband. One of several prisoners, jointly indicted for burglary, proposed to call the wife of another in order to prove an alibi; but, Littledale, J., rejected her, for though she only came to speak as to that prisoner being at one place, which had nothing to do with her husband being concerned in the offence, yet her evidence would go to show that the witness for the prosecution was mistaken as to the prisoner, for whom she was called, and then if she was mistaken as to one it would weaken her evidence altogether, and by that means she might benefit her husband; and upon a case reserved, all the Judges (except Graham, B., and Littledale, J.,) thought the wife was not competent. (*o*)

for each other,

(*k*) Reg. *v.* Doddington, 1 A. & E. (Q. B. R.) 411.

(*l*) 1 Phill. Ev. 156. 1 Stark. Ev. 138, where all the authorities on this subject are collected. The cases which have occurred on the subject of releases in criminal proceedings related to forgery, and as the 9 Geo. 4, c. 32, has done away with incompetency in forgery, it seems unnecessary to introduce those cases here. C. S. G.

(*m*) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70.

(*n*) *Ante*, p. 696. So in the case of an assault, where the cases of the co-defendants cannot be separated. Rex *v.* Frederick, 2 Stra. 1095.

(*o*) Rex *v.* Smith, R. & M. C. C. R. 289. Mr. Phillipps, 1 vol. p. 75, observes on this case, that it "must be understood as having been decided on its own particular circumstances, and not as warranting the conclusion, that where prisoners set up a separate and distinct defence, the wife of one prisoner cannot in any case be a witness for another prisoner." It seems that in this case there was only one witness, who identified the prisoners: see Note, 1 Phill. Ev. 75; but in Rex *v.* Hood, R. & M. C. C. R. 281, there were six persons at least present at the transaction, and yet the wife of one of the prisoners was held incompetent for the other prisoners. The authority of these cases seems open to some doubt, as they infringe the rule that it is only where there is a *certain* interest in the result, that the witness is incompetent, and the utmost that can be said is, that in such cases the evidence has a *tendency* to produce such a result. It is also a great anomaly that a witness should be competent for a prisoner if tried separately, but incompetent for him if tried jointly with the witness's husband. C. S. G.

Against each other.

And they cannot be witnesses against each other, by reason of the dissensions and distrusts that it would occasion, inconsistent with the happiness of married life and the peace of families; (*p*) and therefore, on an indictment for bigamy, the first and true wife cannot be admitted to give evidence against her husband; (*q*) but, after proof of the first marriage, the second wife may be a witness. (*r*) And where upon an indictment against Webb, and three other prisoners for sheep stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B., held that the witness was incompetent. (*s*)

Not competent, even by consent.

And so strictly is this rule preserved, that in a civil case Lord Hardwicke would not suffer a wife to give evidence for her husband, even by consent of the other party. (*t*) And even after a divorce by act of Parliament, the wife is not competent in an action against her husband to give evidence of anything that happened during coverture, (*u*) on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. (*v*) The rule, however, must be understood as applying to cases where the husband or wife are directly accused of a crime, and not as extending in the same degree to collateral suits or proceedings between third persons. It was, indeed, once held, in *Rex* v. *Cliviger*, (*w*) that husband and wife in collateral cases are not to be permitted to give any evidence that might even tend to criminate each each; for though the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. And the principle of that decision would extend to prevent the one from being called to contradict the other; for the tendency of the evidence of the latter witness would be to prove the former guilty of perjury. (*x*) But the rule laid down in the case of *Rex* v. *Cliviger*, was much discussed in the case of *Rex* v. *All Saints, Worcester*, (*y*) in which the Court of King's Bench was of opinion, that it had been expressed in terms too large and general; and held, that where the evidence of the wife did not directly criminate the husband, (as in a proceeding relating to other matters, and not to any criminal charge against him,) and never could be used against him, nor could he ever be affected by the judgment of the Court founded upon such evidence, she was a competent witness.

Collateral cases.

Rex v. All Saints, Worcester.

(*p*) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70. Barker v. Dixie, Cas. temp. Hardw. 264.

(*q*) *Ante*, vol. 1, p. 218.

(*r*) Ibid. Wells v. Fisher, 1 M. & Rob. 99.

(*s*) Rex v. Webb, Bushell, J., and T. Croome, Gloucester, Spr. Ass. 1830. MSS. C. S. G.

(*t*) Cas. temp. Hardw. 264.

(*u*) Monroe v. Twisleton, Peake Ev. Appendix. So a widow cannot be called by the defendant to disclose conversations between herself and her late husband, in an action by his executors. Doker v. Hasler, R. & M. N. P. R. 198, ruled by Best, C. J. But see Beveridge v. Minter, 1 Carr. & P. 364.

(*v*) By Lord Ellenborough, in Aveson v. Kinnaird, 6 East, 192.

(*w*) 2 T. R. 263.

(*x*) 2 T. R. 268.

(*y*) 6 M. & S. 194.

So where upon the trial of an appeal a pauper proved his marriage with E., and M. B. was then called by the other side to prove that she had previously been married to the pauper; it was held that she was competent for this purpose, as nothing that was said by her in this case, nor any decision of the Court of Sessions founded upon her testimony, could afterwards be received in evidence to support an indictment against her husband for bigamy. (*w*)

Rex v. Bathwick.

But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband by causing a charge to be made against him. The two preceding cases were then cited. Taunton, J., "I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale. (*x*) In *Rex* v. *All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately." Having consulted Littledale, J., the learned Judge added, "We both agree in opinion that the witness is incompetent. We think *Rex* v. *All Saints, Worcester*, very distinguishable. There at the time, when the wife was examined, there was nothing in her evidence to criminate her husband. Here the evidence would directly charge the husband with being a principal, and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received." (*y*)

A wife is not competent to prove that a prisoner committed a felony in company with her husband.

Where, however, the husband has either been convicted or acquitted of the same felony, respecting which the wife is called as a witness, she is competent to be examined. Thus, on an indictment for sheep-stealing, the wife of a person, who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution. (*z*) And in *Thurtell's case* Mrs. Probert was examined as a witness against Thurtell after her husband was acquitted. (*a*)

Unless he has been convicted or acquitted of such felony.

And the reasoning, upon which the decision in *Rex* v. *All Saints, Worcester*, was founded, is equally strong to show, that one may be called as a witness to disprove what has been stated by the other, and that either the party who has called the one, or the opposing party, may call the other for the purpose of contradicting. (*b*) The declarations of the husband or wife are subject to the same rule as their evidence. (*c*)

They may be called to contradict each other.

Their declarations.

(*w*) Rex v. Bathwick, 2 B. & Ad. 639. The Court doubted whether the competency of a witness could depend upon the marshalling the evidence, or the stage of the cause at which the witness was called. See Peat's case, *ante*, 1 vol. 218.

(*x*) I am not aware of the passage referred to by the learned Judge, but see 2 Hale, P.C.279, 1 Hale, P. C. 301. C. S. G.

(*y*) Rex v. George Gleed, Gloucester Lent Ass. 1832. MSS. C. S. G.

(*z*) Reg. v. Williams, 8 C. & P. 284. Alderson, B.

(*a*) Per Alderson, B., ibid.

(*b*) 1 Phill. Ev. 80, 7th ed.

(*c*) 1 Phill. Ev. 76.

Exceptions.

Abduction.

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the crown, (*d*) or the prisoner; (*e*) but this is rather a case which does not fall within the general rule, than an exception to it; for she is not legally his wife, a contract obtained by force having no obligation in law. (*f*) Indeed, if the actual marriage is valid, (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace,) or if the marriage has been ratified by subsequent voluntary cohabitation, it has been said she is not competent for or against the prisoner. (*g*) But there are very considerable authorities to the contrary. (*h*) And in a late case where the defendants were indicted for a misdemeanor in conspiring to carry away a young lady, under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; Hullock, B., was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (*i*)

Wakefield's case.

Indictment for personal violence.

The wife is also admitted as a witness against her husband, *ex necessitate*, in a prosecution of him for offences against her person. (*j*) So her dying declarations are admissible against him in the case of murder. (*k*) In an indictment of William Whitehouse, at Stafford, upon Lord Ellenborough's act, for shooting at his wife, she was admitted as a witness for the prosecution by Garrow, B., after consulting Holroyd, J., upon the ground of the necessity of the case; and Mr. J. Holroyd sent Mr. B. Garrow the case of *Rex* v. *Jagger*, Yorkshire Assizes, 1797, where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Mr. J. Rooke afterwards delivered the opinion of the twelve Judges, that the evidence had been rightly admitted. Mr. J. Holroyd, however, said, he thought the wife could only be admitted to prove facts which could not be proved by any other witness. (*l*) So on an indictment against a man for beating his wife, she was held competent. (*m*) And the wife is always permitted to swear the peace against her husband. (*n*) And her affidavit has been permitted to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force

(*d*) Gilb. Ev. 120. 1 Hale P. C. 301, 302. 2 Hawk. c. 46, s. 78.

(*e*) Rex *v.* Perry, at Bristol, 1794, cited by Abbott, C. J., in Rex *v.* Serjeant, R. & M. N. P. C. 354.

(*f*) Gilb. Ev. 120. 1 Hale P. C. 302. Bull. N. P. 286.

(*g*) 1 Hale P. C. 302. 1 Phill. Ev. 84, 7th ed. 2 Stark. Ev. 553.

(*h*) 4 Blac. Com. 209. 1 East P. C. c. 11, s. 5. *Ante*, vol. 1, 710.

(*i*) Rex *v.* Wakefield, see the trial, published by Murray, p. 257. 2 Lewin, 1 and 279.

(*j*) Lord Audley's case, 1 St. Tr. 393. This case has been denied to be law, but is now established by the highest authorities. 1 Hale P. C. 301. 2 Hawk P. C. c. 46, s. 77. Bull. N. P. 287. Rex *v.* Serjeant, R. & M. 354. Reg. *v.* Jellyman, 8 C. & P. 604, *ante*, vol. 1, p. 699.

(*k*) Woodcock's case, 1 Leach, 500. Johns' case, ibid, 504, n. (*a*).

(*l*) See Reg. *v.* Pearce, 9 C. & P. 667. S. P.

(*m*) By Lord Raymond on the authority of Lord Audley's case, Rex *v.* Azire, 1 Stra. 633. Bull. N. P. 287.

(*n*) Bull. N. P. 287.

after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (*o*) And it seems to be now settled, that in all cases of personal injuries committed by the husband and wife against each other, the injured party is an admissible witness against the other. (*p*)

Not competent in cases where there is no personal injury.

But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife. Thus it has been decided, that in an indictment for a conspiracy in procuring a lady, then a ward in Chancery, to marry, the wife was not a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband; (*q*) and since she could not be admitted in favour of her husband, it follows necessarily that she could not be a witness against him. (*r*) So on an indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbott, C. J., refused to admit W. S. as a witness in support of the prosecution. (*s*)

High treason.

In the case of high treason it has been said, that a wife shall be admitted against her husband, because the tie of allegiance is more obligatory than any other: (*t*) but there are high authorities to the contrary. (*u*)

Competency of a woman living as a wife.

Whether a woman who has cohabited with a man as his wife, but who is ready to swear she is not married to him, will be allowed to give evidence on the part of the man, has been considered a doubtful question. (*v*) On a trial for forgery, Lord Kenyon refused to admit a woman as witness for the prisoner, whom in the course of the trial he had frequently alluded to as his wife, but afterwards, on hearing an objection taken to her competency, denied that they were in fact married. (*w*) But it seems now to be settled that the rule relates to persons who have entered into the relation of husband and wife; and does not extend to those who not being married have lived together and cohabited as man and wife. (*x*) Thus, where a woman had been married to a man, whom she had not seen for thirty years, and then married again, but afterwards found that the man she had first married was alive; as the second marriage was a mere nullity, she was held competent to give evidence of statements made by her second husband during the time they cohabited. (*y*) So a kept mistress, who has passed by the name and appeared in the world as the wife of her protector, has been held to be a competent witness for him. (*z*)

(*o*) Lady Lawley's case. Bull. N. P. 287.

(*p*) 1 East, P. C. c. 11, s. 5, p. 455. In the Wakefields' case, p. 257, Hullock, B., said, "I take it, it is quite clear now, that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person."

(*q*) Rex *v.* Locker, 5 Esp. 107.

(*r*) Rex *v.* Serjeant, R. & M. 354.

(*s*) Rex *v.* Serjeant, R. & M. N. P. R. 352. But it is not necessary, it should seem, that there should be *force* employed, in order to make the husband or wife competent. In the case of the Wakefields before mentioned, for abduction, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of Rex *v.* Perry, tried before Gibbs, C. J., as recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

(*t*) Bull. N. P. 286. Gilb. Ev. 120.

(*u*) 1 Hale P. C. 301. 1 Brown. 47.

(*v*) Campbell *v.* Twemlow, 1 Price 81.

(*w*) Per Richards, B., 1 Price, 83.

(*x*) 1 Phill. Ev. 69.

(*y*) Wells *v.* Fletcher, 5 C. & P. 12. S. C. as Wells *v.* Fisher, 1 M. & Rob. 99.

(*z*) Batthews *v.* Galindo, 4 Bingh. R. 610.

A wife competent *against* is so *for* her husband.

In the case of *Rex* v. *Perry*, Gibbs, C. J., stated, that he could see no distinction between admitting a wife for and against her husband. "The *King* v. *Perry*," said Abbott, C. J., in *Rex* v. *Serjeant*, (*a*) "was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained, that a wife was in all cases a competent witness for her husband, when admissible against him."

Objections to competency: when to be taken;

Anciently the rule was, that if there were any objection to the competency of a witness, he should be examined on the *voire dire*, (*b*) and it was too late after he was sworn in chief. (*c*) But for the convenience of the Court, and the furtherance of justice, (as the incompetency may not at first be suspected,) the rule is now so far relaxed, that if it is discovered during any part of the witness's examination, or even after his cross-examination, that he is interested, the objection may be taken, and his evidence will be struck out. (*d*) But it seems that the objection comes too late after the witness has left the box, (*e*) and it has been held that after a witness has been dismissed without any objection to his competency, it is not allowable to call a witness to prove his incompetency. (*f*) With respect, however, to the power of questioning a witness for the purpose of discovering his incompetency, there is still a material difference, which will presently be pointed out, between an examination on the *voire dire*, and one after the witness has been sworn in chief.

how to be supported;

The party against whom a witness is called, may examine him respecting his interest on the *voire dire*, or may call another witness, and produce other evidence in support of the objection. (*g*) The old rule is said to have been, (*h*) that if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of incompetency is satisfactorily proved, the witness will be incompetent,

(*a*) R. & M. N. P. R. 354.

(*b*) The *voire dire* is, when it is prayed upon a trial at law, that a witness may (previously to his giving evidence in the cause) be sworn *to speak the truth*, (in old French, *voire dire*,) whether he shall lose by the matter in controversy. Blount's Law Dictionary.

(*c*) Turner *v.* Pearte, 1 T. R. 719.

(*d*) 1 Phill. Ev. 153. Turner *v.* Pearte, 1 T. R. 720. Howell *v.* Lock, 2 Campb. 15. Stone *v.* Blackburn, 1 Esp. 37. Perigal *v.* Nicholson, Wightw. 64. But where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the 7 Ann. c. 21, s. 14, to be given to the prisoner previous to his trial, the Court would not permit the evidence of the witness to be struck out; but said, the objection ought to have been taken in the first instance; otherwise a party might take the chance of getting evidence which he liked, or if he disliked the testimony, he might then get rid of it on the ground of misdescription. Rex *v.* Watson, 2 Stark. N. P. C. 158. And upon this ground, Mr. Starkie expresses his opinion, that a party who is cognizant of the interest of the witness at the time he is called, is bound to make his objection in the first instance. 1 Stark. Ev. 137; and see 1 Phill. Ev. 154, note (3), and Hartshorne *v.* Watson, 5 Bing. N. C. 477.

(*e*) 1 Phill. Ev. 153. Beeching *v.* Gower, Holt N. P. R. 314.

(*f*) Dewdney *v.* Palmer, 4 M. & W. 664.

(*g*) Per Hullock, B., Wakefield's case, p. 157. 2 Lew. 279.

(*h*) By Lord Hardwicke in Lord Lovat's case, 9 St. Tr. 647. See also the observations of Parker, C. J., in Rex *v.* Muscot, 10 Mod. 193, in which case it was asserted, but overruled, that in criminal cases there could be no examination on the *voire dire*.

how repelled.

although he may have ventured to deny it on the *voire dire.* (*i*) It has been said that if the opposite party raise the objection of interest by independent evidence, and without putting a question to the witness, then the party who has called him cannot be allowed to put a question to him in order to repel the objection, (*k*) but this seems to be incorrect. (*l*)

Mode of examination on *voire doire.*

An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus a witness may be examined as to the contents of a written document without a notice to produce; (*m*) for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. (*n*) And the same relaxation is allowed in removing an objection of incompetency as in raising it. Thus, where in an action brought by a chartered company, a witness for the plaintiffs admitted, on the *voire dire,* that he had been a freeman of the company, but added that he was then disfranchised; Lord Kenyon ruled, that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (*o*) So where a witness was objected to as next of kin in an action by an administrator, but on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (*p*)

But it is only on the *voire dire* that the general rules of evidence are thus relaxed, for although objections to the competency of a witness may now be made at any stage of the trial, yet they are not to be attended with the privileges of an examination upon the *voire dire.* Thus a witness cannot be cross-examined, for the purpose of shewing him incompetent, as to what interest he takes under a will,

(*i*) 1 Phill. Ev. 154. In several cases it seems to have been considered that it is in the discretion of the Judge whether other evidence should be called to support the objection before the witness is examined. And if the Judge refuse to allow it to be then given, it seems that it may be given as part of the case of the party raising the objection, and if it support the objection, then the evidence of the witness objected to may be struck out of the notes. Rex *v.* Wakefield, note (*a*) M. & Malk. 197. Jones *v.* Fort, M. & Malk. 196. In this case the question was whether the defendant's examination taken under a commission of bankrupt was admissible, and Lord Tenterden, C. J., refused to allow evidence to be given tending to show that from the mode of taking it, and the state of the defendant's health, it was inadmissible, before the examination was read, but held that it might be received in the defendant's case, and if the objection was supported, the evidence might be struck out. It certainly, however, is much the more convenient course, as well for the purpose of saving time, as to prevent the jury from being influenced by inadmissible evidence, to receive the evidence before the examination of the witness. C. S. G.

(*k*) 1 Phil. Ev. 123, 6th ed.

(*l*) See Bunter *v.* Warre, 1 B. & C. 689, per Bailey, J., and Hartshorne *v.* Watson, *supra,* note (*d*).

(*m*) Howell *v.* Locke, 2 Campb. 15.

(*n*) But if the witness produces the instrument, on which the objection to his competency rests, it ought to be read. By Abbott, C. J., Butler *v.* Carver, 2 Stark. R. 434.

(*o*) Butchers' Company *v.* Jones, 1 Esp. 162. See also Botham *v.* Swingler, 1 Esp. 164. S. C. Peake N. P. C. 219, where the witness was allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also Rex *v.* Gisburn, 15 East, 57. So where a bankrupt, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees, Park. J. A. J., held him competent, without production of the release. Carlisle *v.* Eady, 1 Carr. & P. 234. See also Bunter *v.* Warre, 1 B. & C. 689.

(*p*) Ingram *v.* Dade, MS., 1 Phill. Ev. 155. Lunniss *v.* Row, 10 A. & E. 606, overruling Goodhay *v.* Hendry, M. & Malk. 319, and a case in a note, ibid., 321. See 1 Phill. Ev. 156.

for the will itself should be produced. (*q*) So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence. Thus where an objection, on the ground of interest, had been raised by the defendant to a witness of the plaintiff, who called another to prove that the former witness had been released, it was held that he could not be allowed to speak of the contents of the release, but the release itself, if not lost or destroyed, must be produced. (*r*) So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence. (*s*)

Judge or jury competent.

It is no exception against a person giving evidence for or against a prisoner, that he is one of the judges or jurors who is to try him. (*t*) And in the case of Hacker, two of the persons in the commission for the trial, came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial. (*u*)

(*q*) Howell *v.* Lock, 2 Camph. 14.
(*r*) Corking *v.* Jarrard, 1 Camph. 37.
(*s*) Botham *v.* Swingler, 1 Esp. N. P. C. 165, by Lord Kenyon.
(*t*) 2 Hawk. P. C. c. 46, s. 83.
(*u*) Ibid.

ADDENDA.

WHERE upon an indictment for larceny, it appeared that the prisoner, who was the servant of the prosecutor, had taken corn to give to his master's horses, under precisely similar circumstances to those which occurred in *Rex* v. *Morfit*, Russ. & Ry. 307; Patteson, J., held that it was larceny, and after consulting Cresswell, J., thought *Rex* v. *Morfit* too recently decided by a large majority of the Judges to take the opinion of the Judges again upon the point. (*Reg.* v. *Handley*, 1 C. & Mars. 547.) Page 3.

Where a wife was indicted for stealing, and her husband for receiving a five pound note, and it appeared that the daughter of the prisoners and another little girl, while walking in a street, saw the five pound note on the ground, and the prisoner's daughter picked it up, and gave it to her companion; and the prisoner's daughter on returning home told her mother of the circumstance, who thereupon went to the house where the other girl lived, and said to her, "Where is that note which our Mary picked up?" and upon its being given to her, she went away with it, and gave it to her husband, who converted it at once into money; and when inquiry was made for the note, both the prisoners denied all knowledge of the circumstances. Coleridge, J., said, "A man who loses anything, does not thereby lose his property in it, and the finder is bound to restore it to the owner if possible; and if he keep it when he thinks it is only lost by the owner, it is larceny in him. If the property be found when it is abandoned by the owner, it is his own who finds it. If the property be lost, but not abandoned, and if the finder find it with intent to restore it, but afterwards appropriate it, he does not commit larceny in the *first instance*. Ignorance of the law cannot excuse any person; but at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as if a person takes what he believes to be his own, it is impossible to say that he is guilty of felony. The wife might think that she had a right to the note, in consequence of her daughter having picked it up; and if she acted openly, you must say that she took the note from the other little girl in ignorance of the continuing rights of the owner. It is impossible almost to think that she supposed the owner to have intentionally abandoned the note, but yet she might have thought that her daughter, having first picked it up, had a right to it, and a right prior to that of the other girl, who first saw it; and thinking so, she might have gone and made the demand for it, as if she had said, "You have Mary's note, give it up." Under these circumstances she could not be guilty of larceny. But then the conduct of the parties subsequently is to be considered." (*Reg.* v. *Reed*, 1 C. & Mars. 306.) In the course of the case, the learned Judge also said, "If the circumstances under which property is found be such that the ownership has been abandoned, the thing is *bonum vacans*, and any one may take it; but if the ownership be not abandoned, the thing is not the property of the finder; if in addition to this, the person who finds it shews no intention to find out the owner, or to return it, that person is guilty of larceny." Page 18.

Note (*b*) add "S. C. 1 C. & Mars. 593." Page 95.

Page 99. Where a knife was stolen from the dead body of R. S. Kington, lying on a road in the diocese of Worcester, and the last place of his residence was at Tewkesbury, in the diocese of Gloucester, but it was stated by his father that he believed that the deceased had left Tewkesbury with a view of coming to live with him, and he did not know, of his own knowledge, whether or not the deceased had given up his lodgings at Tewkesbury; Patteson, J., held that the property in the knife was well laid in the Bishop of Worcester. (*Reg.* v. *Tippin*, 1 C. & Mars. 545.)

Page 105. A clerk of a joint stock banking company, established under the 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company, although he is a shareholder and partner in the company. (*Reg.* v. *Atkinson*, 1 C. & Mars. 525. All the Judges.)

Where an indictment in some counts stated that the prisoner was "employed as clerk to J. T., one of the public officers of the Carlisle and Cumberland *Banking Company*, and in the returns made to the stamp-office under the 7 Geo. 4, c. 46, s. 4, "the true name, title, and firm of the copartnership" was stated to be "The Carlisle and Cumberland Joint Stock Bank;" but the usual and only name employed by the company in their dealings was "The Carlisle and Cumberland Banking Company;" and they were so described in a bond of the prisoner to the Company, which was given in evidence; it was held that there was no variance. (*Reg.* v. *Atkinson*, *supra.*)

Although the 3 & 4 Vict. c. 111, inaccurately recites the title of the 1 & 2 Vict. c. 96, yet the latter act is extended by the former. (*Reg.* v. *Atkinson*, *supra.*)

Where, upon an indictment against the prisoner for stealing a 10*l.* note, the property of William Shildrick, his master, it appeared that Shildrick was the treasurer of a Friendly Society, and that the prisoner was clerk to that society, and also a trustee of it, and that he had been a trustee before he became clerk; and the rules of the society had been re-enrolled, in pursuance of the 10 Geo. 4, c. 56, as amended by the 4 & 5 Wm. 4, c. 40, and a rule of the society provided, that "as soon as 10*l.* more than is necessary for immediate use is in the box, it shall be delivered to the trustees chosen for that purpose, who shall dispose of it as the society shall direct, according to the 10 Geo. 4, c. 56, s. 13," and the prisoner had obtained the note from Shildrick under circumstances which induced the jury to find that he obtained it with intent to steal it. It was held, upon a case reserved, that the property in the note was properly laid in Shildrick, the treasurer, by his proper name, under the 10 Geo. 4, c. 56, s. 21, and that upon this indictment, the prisoner, though one of the trustees of the society, might properly be convicted of larceny in stealing the note. (*Reg.* v. *Cain*, 1 C. & Mars. 309.) Upon the trial, Bosanquet, J., thought it so doubtful whether the prisoner could be considered as the servant of Shildrick, that he directed the jury to find the prisoner guilty of larceny only.

Page 109. The first count charged the prisoner with stealing four warrants and orders for the payment of money (to wit) for 5*l.* each, and of the value of 5*l.* each. The second, four warrants and orders for the payment and of the value of 5*l.* each, commonly called post-office money orders; and the third, four valuable securities, that is to say, four warrants and orders, commonly called post-office money orders. The documents in question were in the following terms:—

"*Post-office, Shrewsbury, September* 18, 1841.

"Credit the person named in my letter of advice the sum of five pounds and debit the same to this office;" and purported to be signed by the postmaster at Shrewsbury, and addressed "To the post-office, London;" and under it was a receipt, which the person receiving the money from the post-office was to sign. It was clearly proved that the prisoner had

stolen the papers. The first objection was, that this was not an order for the payment of money; but, upon a case reserved, the Judges were unanimously of opinion, that it was an order for the payment of money. The next objection was, that it was an order by the postmaster, but was not drawn on any one. But the Judges were of opinion that the designation or address of this order was sufficient authority to the persons who carried on business at the post-office in London. It was next objected, that if the instrument was a money-order it required a stamp. The Judges thought it unnecessary to decide this point; but this being a usage of the post-office, sanctioned by the 3 & 4 Vict. c. 96, the Judges were of opinion that this was a good money-order, notwithstanding the want of a stamp. The next objection was, that the indictment was uncertain, as the second and third counts were for stealing four warrants and orders (not saying how many orders) for the payment of the sum of *5l.* each. But the Judges were of opinion that the instrument was both a warrant and order, and, therefore, the counts of the indictment were not uncertain. And, lastly, that there was no proper proof that this was a regular post-office order, as there was not sufficient proof that the order was signed by the postmaster; but the Judges were of opinion that it was not necessary it should be in the handwriting of the postmaster himself; it was enough that it was in the handwriting of the postmaster, or some person by him authorized to sign. (*Reg.* v. *Gilchrist*, 1 C. & Mars. 224.)

Where a prisoner was indicted for stealing, *inter alia*, two shifts, and the only article identified by the prosecutrix was what she called a shirt. It had been made for a little girl six years of age, and the prosecutrix stated that she called such things shirts while girls were so young. Tindal, C. J., said, "It must be shown that the article is generally known by the name laid in the indictment, and here the prosecutrix says she should call it a shirt. The prisoner, therefore, must be acquitted." (*Reg.* v. *Edward Fox*, Salop. Sum. Ass. 1842, MSS. C. S. G.) Page 109.

To the last note add "A party cannot after plea take any objection to any matter on the record, which is aided by verdict under the 7 Geo. 4, c. 64, s. 21." (*Reg.* v. *Ellis*, 1 C. & Mars. 565, Patteson, J.) Page 115.

Note (*k*) read "*Dann*" for "*Dunn*." Page 118.

The 7 Geo. 4, c. 64, s. 12, where an offence has been committed within 500 yards of the boundary of a county, gives the prosecutor an option of laying *and* trying the offence in either county, but does not enable him to lay it in one county, and try it in another. Where, therefore, an indictment found at the Quarter Sessions, for the borough of Stamford, laid an offence at the parish of M., in the county of N., and being removed by *certiorari* a *venire* was awarded into L., and the defendant found guilty at the assizes for that county, judgment was arrested. (*Reg.* v. *Mitchell*, 2 G. & Dav. 274.) Page 120.

Note (*y*) add "S. C. 1 C. & Mars. 609." Page 127.

Note (*r*) add "S. C. 1 C. & Mars. 611." Page 158.

Where on an indictment for stealing a waistcoat it appeared that the prosecutor gave the prisoner the waistcoat to take to Rose to be washed, and the prisoner took it to Rose, at the same time telling her it was his own, and she washed it and delivered it to the prisoner, who disposed of it; Erskine, J., held that the prisoner's getting back the waistcoat from Rose was no larceny, because he delivered it to her as his own; and he must, therefore, be taken to have converted it to his own use before he delivered it to her. But that it must be left to the jury to say whether the prisoner, at the time when he received the waistcoat from the prosecutor, had an intention of stealing it; for, if at that time he had not an intention of stealing it, he was entitled to be acquitted. (*Reg.* v. *Evans*, 1 C. & Mars. 632.) It may, perhaps, admit of some doubt whether the prisoner was not guilty of larceny in delivering the waistcoat to Rose as Page 159.

his property. He was merely entrusted with the *custody* of the waistcoat to carry to Rose, and not with the *possession*, and if he had given the waistcoat to any other person than Rose, as his property, there seems no reason to doubt that that would have been a larceny, and the delivery to Rose being equally at variance with the purpose for which the waistcoat was delivered to him, there seems no reason why such a delivery should not be a larceny. If he had sold it to Rose it would seem clearly to be a larceny, and delivering it as his own was equally a conversion to his own use. See the next case. C. S. G.

Page 161. Where the prisoner was indicted for stealing a sovereign, and it appeared that the prosecutor engaged the prisoner to take a canal boat on a voyage from Stourbridge to Ellesmere Port, and paid the prisoner 5*l.* for his wages in advance and for the keep of the towing horse, and also a separate sum of three sovereigns to pay tonnage dues on the canal; and the prisoner had paid tonnage dues which amounted to rather under 2*l.*, and had appropriated the remaining sovereign to his own use; and it was objected that this was a mere breach of contract, and that the relation of master and servant did not exist. Patteson, J., said, "Taking that to be so, it does not appear to me to be material to the case. The prosecutor distinctly states that he gave this man three sovereigns to pay the tonnage dues, and it appears that he has made away with one of the sovereigns. To constitute a larceny in this case there is no occasion to show that the relation of master and servant existed. If I give a man money to apply to a particular purpose, and he appropriates it to another purpose, with a felonious intent, he is guilty of larceny." "If a man were to employ another to go somewhere with his horse for a certain price, that other is for that purpose his servant; but if in addition to this he gives him a distinct and separate sum of money to be disbursed in a particular way, and if, instead of so disbursing it, he appropriates it to his own use, that is a felony." (*Reg.* v. *Goode*, 1 C. & Mars. 582.)

Page 161. Note (*w*) add "S. C., 1 C. & Mars. 595."

Page 169. A clerk of a joint-stock banking company is within the statute. (*Reg.* v. *Atkinson*, *supra*, p. 990.)

Page 182. Upon an indictment for embezzlement, it appeared that the prosecutors were owners of a vessel, and the prisoner was in their service as the master. The vessel carried culm from Swansea to Plymouth, which, when weighed at Plymouth, weighed two hundred and fifteen tons, and the prisoner received payment for the freight accordingly. When he was asked for his account by the owner, he delivered a statement, acknowleding the delivery of two hundred and ten tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and at Plymouth, and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight or of the custom. Cresswell, J., held that this did not amount to embezzlement. Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant of his having appropriated the money; if instead of denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage at Swansea and at Plymouth, or that there was no such custom as that set up, it would not amount to embezzlement. (*Reg.* v. *Norman*, 1 C. & Mars. 501.)

Page 188. Note (*m*), "S. C. 1 C. & Mars. 617."

Page 214. Where on an indictment for stealing a post letter, containing a penny,

the property of the postmaster-general, it appeared that a female servant took a letter for her mistress to the post-office, and a penny for the purpose of paying the postage; but finding the shop shut, put the penny inside the letter, and fastened it with a pin, and dropped it into the letter box, intending that the penny should be applied for the payment of the postage; this letter the prisoner got into his possession. Lord Denman, C. J., was of opinion that the letter came within the description in the act of Parliament, *viz.*, a letter containing money; and although the money was not put in for the purpose of its being conveyed in the letter to the country, yet that it was in fact money contained in the letter; and though it was only of small amount, yet the intention of the prisoner, and the breach of trust, and the dishonesty committed by him, were the same as if the money had been of larger amount, and had been inclosed in the letter to be sent into the country. (*Reg.* v. *Mence*, 1 C. & Mars. 234.)

But where an indictment stated that the prisoner, being employed under the post-office, stole a post letter containing a sovereign, and there were counts charging the embezzling the letter and money, and a count for stealing a sovereign, the property of the postmaster-general; and it appeared that the prisoner was a letter carrier, and in consequence of suspicions, an assistant inspector of the letter carriers inclosed a marked sovereign in a letter, and sealed it and marked it as if it had been put into the post-office in the regular way as a paid letter; and while the letters were being sorted at the office, where the prisoner was employed, the letter was placed in a heap of letters which he was about to sort, and which he was about to deliver. The letter was not delivered, and the marked sovereign was found in the prisoner's pocket. The sovereign was one of those that are occasionally found on the floor of the General Post-Office, having fallen out of letters; they are collected and deposited with one of the officers of the post-office, and form a fund, which is carried to the credit of the public, under the direction of the postmaster-general. It was objected that the letter could not be considered as a post letter, and that the sovereign could not be treated as the property of the postmaster-general. Upon a case reserved, the Judges were unanimously of opinion, that the objection, that it was not a post letter or a letter put into the post, must prevail; the statute only applying to letters put into the post in the ordinary way; and secondly, that the sovereign must be considered, in point of law, as the property of the postmaster-general, all the persons in the office being his servants; and therefore the sovereign was correctly described as the sovereign of the postmaster-general; it was his sovereign against all the world, except the owner of it. (*Reg.* v. *Rathbone*, 1 C. & Mars. 220.)

Upon an indictment under the 1 & 2 Vict. c. 110, s. 99, against an insolvent for wilfully and fraudulently omitting sums of money from his schedule, it was opened that the omissions were those of certain sums of money which had been received by him prior to the date of the vesting order, and which in accordance with the 1 & 2 Vict. c. 110, s. 69, should have been inserted in the special balance sheet, which had been filed by the defendant; there, however, they had been omitted. Lord Abinger, C. B., held that the indictment would not lie under the circumstances. The special balance sheet was, as it were, a mere memorandum of the insolvent's receipts and disbursements for the guidance of the Court, and a man should not be held thus criminally responsible for errors therein. The consequence of such an interpretation of sec. 99, as would be necessary for the purpose of this indictment, would be to make a highly penal clause apply to cases possibly of no intentional fraud, and of comparatively trifling inaccuracy. The section applied only to cases where the omission would affect the interests of

Page 236.

creditors, and not where it is a mere omission of money received and subsequently expended by the insolvent. (*Reg.* v. *Warner*, 1 C. & Mars. 628.)

Page 247. Where, upon an indictment for receiving stolen brass, it appeared that the brass having been stolen by a servant lad, and having been taken from him by another servant in the presence of the prosecutors, it was restored to the lad again, in order that he might take it to the house of the prisoner for sale, and the lad took it and sold it to the prisoner; Coleridge, J., held that the evidence was sufficient to support the indictment. (*Reg.* v. *Lyons*, 1 C. & Mars. 217.)

This offence is not punishable with hard labour. (*Reg.* v. *Silversides*, T. T., 1842. 11 Law J. Mag. C. 82.)

Page 267. An indictment, stating that the defendant on, &c., at, &c., had in his possession certain naval stores, describing them, the said defendant "not being a contractor," &c., is sufficient as to the statement of the time when the prisoner was not such contractor.

Page 287. To note (*b*) add, As to hard labour and solitary confinement, see the 7 & 8 Geo. 4, c. 29, s. 4, and the 1 Vict. c. 90, s. 5, *ante*, p. 128.

Page 289. Where the defendant was indicted for obtaining money by falsely pretending, on one occasion, to a pawnbroker, that a certain material, which he produced, was "gold shruff," and on another occasion, that an article he produced was "ribbon gold;" and it appeared that gold shruff and ribbon gold were worth 3*l.* 18*s.* an ounce, but the thing which the prisoner said was gold shruff was worth only 18*s.* an ounce. Both the articles produced were tried by the pawnbroker with *aqua fortis*, and stood the test. But some days after the money was obtained, the pawnbroker filed the ribbon gold, and found it was silver gilded over. Adams, Serjt., was of opinion, that as the defendant had merely stated an untruth with reference to an article which he produced, and not about a fact which the person imposed upon could not detect at the time, the untrue statement did not amount to a false pretence, but was only an untrue assertion. He likened it to the case of a tradesman, who sold a waistcoat or coat as of a particular material, when it was of an inferior sort; and asked whether it could be contended that such a man was liable to transportation? But he left the facts to the jury, who said they were of opinion that the defendant had passed off the articles, well knowing them to be spurious, and he was found guilty. Adams, Serjt., afterwards mentioned the case to several of the Judges, and said they agreed with him that the mere assertion that the article produced was what in fact it was not, was not sufficient to sustain the conviction, and the defendant was fined a shilling and discharged. (*Reg.* v. *Tabram*, cited 1 C. & Mars. 251.)

But where a count stated that the defendant did falsely pretend that eleven thimbles which he then produced were silver, and of the value of five shillings or more, with intent to cheat and defraud, &c., but did not allege that any money was obtained; and it appeared that the defendant went to a pawnbroker's shop and laid down eleven thimbles on the counter, and asked for five shillings on them; and being asked whether they were silver, said they were, but the thimbles were immediately tested and found not to be silver, and nothing advanced upon them. Mirehouse, C. S., told the jury that the pretence must be so false that a man exercising reasonable discretion might still be deceived by it; and the jury having found the prisoner guilty, the facts of the case were mentioned to some of the Judges, who were of opinion that in point of law the evidence was amply sufficient to justify the verdict. (*Reg.* v. *Ball*, 1 C. & Mars. 249.) It is conceived that this case was rightly decided. And it is suggested that the correct distinction in such cases is, that if by ocular inspection the falsity of the defendant's state-

ment be discoverable, it is a mere false assertion, and not a false pretence; but if the article to all appearance be such as it is alleged to be, and it requires something to be done to it, either by the application of tests or otherwise, to ascertain whether it be what it is alleged to be, it is a false pretence. C. S. G.

Where a count stated that the defendant pretended to A. Crellin, a single woman, that he was an unmarried man, and having thereby obtained a promise of marriage from A. Crellin, that she refused to marry the defendant, and that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by means of which he obtained from her 100*l.* Whereas in truth he was not an unmarried man, and not entitled to maintain an action for the breach of promise of marriage against her. The prisoner was a married man, and A. Crellin stated that she being a single woman, and possessed of considerable property, the prisoner had paid his addresses to her, and that she had consented to marry him, she being then ignorant that he was a married man, and afterwards changed her mind, and intimated as much to the defendant, and that he thereupon threatened her with an action at law for breach of promise of marriage, and he added, that, by means of such proceeding, he could take half of her fortune from her; and that she believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, paid him a sum of money, under a written stipulation, that in consideration of such payment he would forego proceedings at law against the prosecutrix for breach of promise of marriage. That but for the prisoner's threat of bringing an action, she would not have paid the money; and that she was induced by such threat to pay the money; and that had she known he was a married man she would not have paid the money. The case was left to the jury to say whether the money was, in fact, obtained by the false pretence that the defendant was single, and they found the prisoner guilty; and Lord Denman, C. J., and Maule, J., were both clearly of opinion that there was evidence to go to the jury, that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and Maule, J., was further of opinion, that there was also evidence of the money having been obtained by the false pretence of the defendant, that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was a sufficient false pretence within the statute. (*Reg.* v. *Copeland*, 1 C. & Mars. 516.) Page 290.

Where an indictment for false pretences alleged that the defendants pretended that one of them was then and there possessed of a certain sum of money, which was a false representation of an existing fact. Parke, B., observed, in the presence of the other Judges: "In *Reg.* v. *Parker*, 7 C. & P. 825, I left it to the jury to say, whether the defendant had falsely represented that he had an account at the bank of Stuckey and Co. The jury found the representation to be false, and the Judges held the conviction right, as it was the false representation of an existing fact. (*Reg.* v. *Henderson*, 1 C. & Mars. 328.) Page 300.

The first count charged that the defendant did unlawfully pretend that he was Mr. Hitchings, who had cured Mrs. Clarke at the Oxford Infirmary, and that he thereby obtained a sovereign from G. Palmer with intent to cheat him of the same. The second count charged the defendant with obtaining by similar pretences a sovereign from the said G. Palmer, with intent to cheat him "of the sum of five shillings, parcel of the value of the said last-mentioned piece of the current gold coin." It appeared that the defendant made the pretence charged, and thereby induced the prosecutor to buy a bottle containing something which he Page 302.

said would cure the eye of the prosecutor's child, for five shillings; the prosecutor gave him a sovereign, and the defendant gave him fifteen shillings in exchange. It was objected, First, that the first count was not proved, as the defendant did not intend to defraud of a sovereign but of five shillings. Secondly, that the second count ought to have charged that the defendant obtained five shillings with intent to defraud Palmer of the same. Thirdly, that this was not an obtaining by false pretences within the statute, as the money was obtained by the sale of the stuff in the bottle. And it was held, first, that it could not be taken that the defendant intended to defraud the prosecutor of a sovereign, and, therefore, the first count was not proved. Secondly, that the allegation in the second count was supported; and lastly, that the case must go to the jury. (*Reg.* v. *Bloomfield*, 1 C. & Mars. 537.) Cresswell, J. A stronger objection, which seems not to have been taken, might have been raised both on the facts and on the face of the second count, the statute provides, that "if any person shall by any false pretence obtain from any person any *chattel*, money, or valuable security, with intent to cheat any person of the *same*," &c. It should seem, therefore, that it might well be contended that obtaining one thing with intent to cheat of another was not within the statute, and that to bring a case within the statute it must be shewn that the party obtained a chattel with intent to cheat and defraud of that *same* identical chattel. The decision in this case was only that the second count was proved, and the question whether that count was good was not raised. C. S. G.

Page 305. In text for (*p*), insert (*q*).

Page 308. Where an indictment for false pretences stated that the defendants, Henderson and Barlow, did falsely pretend to F. Pawson, that he the said J. Barlow was then and there possessed of a certain sum of money, to wit, the sum of 12*l.*, "and that if Pawson would exchange his mare for Henderson's horse, Barlow was ready to purchase the horse of Pawson and pay him 12*l.*; by means of which false pretence, the defendants obtained the mare from Pawson with intent to defraud him of the same; whereas, in truth and in fact, the said J. Barlow was not then and there possessed of the said sum of 12*l.*, and was not then and there ready and willing to purchase the said horse of the said F. Pawson, and was not then and there ready and willing to pay the said F. Pawson the said sum of 12*l.*" And it was held, upon a case reserved, that the indictment was bad, as it did not allege that the defendants or either of them knew that Barlow had not the money, and did even charge that the defendants did knowingly falsely pretend that Barlow had the sum of 12*l.* (*Reg.* v. *Henderson*, 1 C. & Mars. 328, and per Erskine, J. "He might have had the money five minutes before, and have got his pocket picked.") In the same case the defendants pleaded a plea of *auterfois acquit*, which stated that the defendants were indicted for stealing a mare of J. Pawson and were acquitted; and averred the identity of the defendants, of F. Pawson, and the mare, and that the taking of the mare in the former indictment, and the obtaining the mare in the present indictment, were one and the same, and that the larceny to which the obtaining the mare would amount, if, upon the trial, on the indictment now pending, it should be proved that they obtained the mare in such manner as to amount to larceny, and the said larceny of which the defendants had been acquitted, were one and the same, and not other and different larcenies; and upon demurrer to this plea it was held, upon a case reserved, that the plea was bad, as it did not show that the prisoners had been in jeopardy for the misdemeanor charged in this indictment, and the first acquittal might have been on the ground that the offence did not amount to a felony. (*Reg.* v. *Henderson*, *supra*.) It is conceived, that no plea of *auterfois acquit* on an indictment for felony, could be successfully pleaded

to an indictment for obtaining goods by false pretences, unless it could be averred and proved that the facts amounted to a larceny, because unless that were so the defendant could not have been convicted of the larceny. But that an acquittal on an indictment for obtaining goods by false pretences might in all cases be successfully pleaded to an indictment for stealing the same goods, as on such an indictment for obtaining goods, the prisoner might have been convicted, although the facts amounted to a larceny. C. S. G.

Page 389. See as to the jurisdiction of the sessions, 5 & 6 Vict. c. 38, in Appendix of Statutes.

Page 511. Where on an indictment for uttering a forged receipt for the sum of 10*l.*, it appeared that the prisoner pretended that he was authorized by James Reese to settle the debt and costs in an action brought by Reese against Pritchard, and thereby obtained from Pritchard the sum of 10*l.*, for which he produced the following receipt, which was stamped with a 2*s.* 6*d.* stamp.

"Received of Mr. Wm. Pritchard by the hands of Mr. Wm. Griffiths the sum of 10 pounds, being in full for debt and costs due to the said Jas. Reese, having no further claim against the said Wm. Pritchard. As witness my hand this 15 day of October 1842.

"The mark of + James Reese."

And it was clearly proved that Reese had not signed the receipt or authorized it to be signed, or empowered the prisoner to settle the debt and costs. It was objected that the receipt was not properly stamped; that the instrument was not a receipt, but an agreement; and that the statute only applied to cases where a debt was actually due. But Wightman, J., overruled the objections and the prisoner was convicted. (*Reg.* v. *Griffiths*, Monmouth Spr. Ass. 1843. MSS. C.S.G.)

Page 527. Where on an indictment for forging and uttering a request for the delivery of goods with intent to defraud Bradley, it appeared that Bradley was a butty-collier and Jones a grocer, and that the course of dealing between them was for Bradley to write a list of names, with an amount against each name, which denoted that Jones was to supply that person with goods on Bradley's account to the amount set opposite his name; and that the prisoner took a paper to Jones in the following form:

"1841, Oct. 22.	£	s.	d.
Eliz. Bradley	0	12	0
Will. Jones	1	0	0
J. Prise	0	5	0
Jno. Bayley	0	5	0
Peter Stapleton	0	8	0
Simeon Walters . .	0	15	0"

Here followed ten more names and a sum against each, and the sums were cast up 7*l.* 4*s.* 6*d.*, which was the correct casting if the sum opposite the prisoner's name had remained 5*s.* as it originally stood, but he had put the figure 1 before the 5 and made it 15*s.* Opposite the sum 7*l.* 4*s.* 6*d.* was the prosecutor's signature, "John Bradley." Ludlow, Serjt., having consulted Patteson, J., stated that that learned Judge was of opinion that although this was not a request for the delivery of goods on the face of it, yet it might be shewn by evidence that the course of dealing between the parties was that goods should be delivered on the production of such documents as this; and that being shewn, the paper was a request for the delivery of goods, and as such might be the subject of an indictment, if a forged alteration were made in it. (*Reg.* v. *Walters*, 1 C. & Mars. 588.)

Page 549. Upon an indictment for maliciously setting fire to a house it appeared that a small faggot was found lighted and burning on the boarded floor of the kitchen, and a part of the boards of the kitchen floor was scorched

black but not burnt; the faggot was nearly consumed, but no part of the wood of the floor was consumed; and Cresswell, J., after conferring with Patteson, J., held that as the wood of the floor was scorched, but no part of it consumed, the indictment could not be supported. But the learned Judges were of opinion, that it was not essential that the wood should be in a blaze, because some species of wood would burn and entirely consume without blazing at all. (*Reg.* v. *Russell*, 1 C. & Mars. 541.)

Page 590. See the 6 & 7 Vict. c. 56, in Appendix to p. 270, Vol. 1.

Page 592. A person may be convicted under the 1 Vict. c. 89, ss. 6 and 11, as an accessory before the fact to the offence of casting away and destroying a vessel, of which he was at the time part owner. (*Reg.* v. *Wallace*, 1 C. & Mars. 200. All the Judges on a case reserved.) Where it appeared that certain goods which were on board a vessel which was feloniously cast away, were insured, and one count alleged an intent to prejudice the persons who had underwritten the policy which insured them, and there were also three other policies, effected on certain goods specified in such policies, but no part of these goods were put on board the vessel, it was held that evidence was receivable with respect to such three policies, notwithstanding the 1 Vict. c. 89, s. 6. describes one felonious intent to be to prejudice the persons who shall underwrite any policy of insurance upon any goods *on board* the vessel. (*Reg.* v. *Wallace, supra.*)

Page 601. Where an indictment for perjury, alleged to have been committed before commissioners of taxes on an appeal of W. Hewatt against a surcharge for a greyhound used by W. Hewatt on the 24th of November, averred that it was a material question whether a certain receipt produced by the defendant on the hearing of the said appeal was given to him before the 12th day of September then last past, and that the defendant falsely swore that the said receipt was given to him before the 12th day of September aforesaid; and it appeared, that at the commissioners' meeting evidence was given that Hewatt and the defendant were coursing with two greyhounds on the 24th of November, and that one of the dogs had been Hewatt's, who had no certificate; on the 28th of November, he was surcharged for a greyhound, and on appealing against this surcharge, he stated that the dog had been sold to the defendant long before, and called the defendant as a witness, who swore that he bought the dog of Hewatt on the 6th of September, and produced a receipt for the purchase money bearing that date; he was asked by the surveyor whether the receipt was given at the time of the sale, and he said it was not, but a few days after; and, on being pressed, he said that it was given to him before the 12th of September; and, on the surveyor pointing out that the stamp on the receipt bore date the 18th of November, and saying that the defendant must be mistaken, the defendant persisted in his statement, and swore positively that the receipt was given to him before the 12th of September. It was proved that the paper on which the receipt was written was stamped on the 18th of November, and could not have been issued from the Stamp-office before that day. It was objected that the materiality of the question as stated in the indictment had not been proved; the material question was whether the dog was Hewatt's or the defendant's on the 24th of November, the day of the coursing; but Patteson, J., after consulting Parke, B., overruled the objection, and the defendant was convicted; and upon a case reserved, the same objection being urged, Lord Abinger, C. B., said, "The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive." Williams, J.—"The time when this receipt was given, is a step in the proof." Lord Denman,

C. J.—" You cannot dispute that everything that comes out at a trial is material, if it goes to the credit of the witness." Lord Abinger, C. B.—" Every question on cross-examination, which goes to the credit of the witness, is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denies it, that would be material, if it went to his credit. In the present case, if they could not have contradicted the witness by the date of the stamp, the receipt confirming his evidence would have made out the case before the commissioners." And the conviction was held right. (*Reg.* v. *Overton*, 1 C. & Mars. 655.) The judgment was afterwards reversed, on another ground of error. See vol. 2, p. 639.

Page 629. Where an indictment for perjury alleged that the defendant exhibited an affidavit, entitled, in the Court of Chancery, " In a suit therein at the suit of the said Commissioners of Charitable Donations and Bequests," and the affidavit was in fact entitled, " In Chancery, between the Commissioner of Charitable Donations and Bequests, &c.," Lord Denman, C. J., allowed the record to be amended, by striking out the word " entitled." (*Reg.* v. *Christian*, 1 C. & Mars. 388.)

Page 662. Where some counts in an indictment for perjury in an affidavit to set aside a judgment alleged that the defendant " caused to be entered up final judgment in the said action," and a clerk from the judgment office produced a book from that office, in which judgments are entered up, and stated that interlocutory judgment was signed in the action, and that afterwards final judgment was entered up; it was held that this was sufficient evidence to support those counts, without producing the roll or an examined copy of it. (*Reg.* v. *Gordon*, 1 C. & Mars. 410. Lord Denman, C. J.)

Page 665. Where the defendant had stated in an affidavit that he had paid all the debts proved under his bankruptcy, except two, as to which he gave an explanation, and an indictment for perjury alleged to have been committed in this affidavit in one assignment alleged that the creditors were not all, with two exceptions only, paid by the defendant in full; and in another assignment that certain creditors who were named, besides the excepted two, were not paid in full; Tindal, C. J., held that if the first assignment were too general, the defendant should have demurred to it, and that although by the generality of its form the prosecutor was not precluded from proving the non-payment of other creditors besides those named, yet as names were stated in the other assignments, it was reasonable to presume that the defendant would suppose that they were the persons, the non-payment of whose debts was to be relied on, and that in fairness the prosecutor ought not to go into evidence of the non-payment of any other creditors than those named. (*Reg.* v. *Parker*, 1 C. & Mars. 639.)

Page 672. If a party who is registered for a borough as a 10*l.* householder, gives up the house in respect of which he is registered, and takes another of superior value within the same borough after the registration and before the election, he loses his vote, and if before and at the time of the election a new tenant has taken possession of the house that the voter has left, and is paying rent for it, the fact that a few articles of the voter's furniture remain in the house, and that the voter retains one of the two keys of it, will make no difference. (*Reg.* v. *Bowler*, 1 C. & Mars. 559. Patteson, J.)

The " same qualification" in the 2 & 3 Wm. 4, c. 45, s. 58, means the same identical property. (*Reg.* v. *Ellis*, 1 C. & Mars. 564.)

A voter in a borough who is registered as a 10*l.* householder in respect of a house in Eldon Place, loses his vote, if after the registration and before the election, he removes to another house in Eldon Place, although

the house, to which he removes, is in every respect within the description contained in the register. (*Reg.* v. *Ellis, supra.*)

In a register of a borough the word "Penkhull," which denoted a portion of the borough, was put at the head of several names, including that of the defendant, who was on the register in respect of a house in Eldon Place, and it was held that if there was no other Eldon Place in the borough, it was not necessary for the deputy returning officer, in putting the third question under the Reform Act to add the word "Penkhull" as part of the description. (*Reg.* v. *Ellis, supra.*)

Page 672. On an indictment under the 2 & 3 Wm. 4, c. 45, for giving a false answer at the poll at an election of members of Parliament for a borough, it is not necessary that the returning officer should himself put the questions to the voters, under sec. 58. But it is sufficient if the town clerk do it in his presence and by his direction; neither is it necessary to show that the agent, who required the questions to be put, was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate. (*Reg.* v. *Spalding*, 1 C. & Mars. 568. Patteson, J.)

The word "wilfully" in an indictment on the 2 & 3 Wm. 4, c. 45, s. 58, for giving a false answer at the poll, should be construed in the same way, and supported by the same sort of evidence, as in an indictment for perjury. (*Reg.* v. *Ellis*, 1 C. & Mars. 564. Patteson, J.)

An indictment against a voter for giving a false answer at the poll, which stated that at a certain election for a member of Parliament for the borough of Stoke-upon-Trent, the defendant appeared as a voter, and tendered his vote as such, and that he gave a false answer that he had the same qualification for which he was put on the register, whereas in truth he had not, appears to be bad, because it states all the matters by way of recital, and neither states the writ nor the precept in holding the election, nor that the defendant's name was on the register. (*Reg.* v. *Bowler*, 1 C. & Mars. 559, per Patteson, J.) The defendant was acquitted in this case. In *Reg.* v. *Ellis*, 1 C. & Mars. 564, the indictment was in a similar form, the defendant convicted, and the judgment arrested in the Queen's Bench, no cause being shown.

Page 690. In his charge to the grand jury at the Stafford Special Commission, October, 1843, Tindal, C. J., observed, "The first observation that arises is that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent, (if indeed it is to be called by that name) is no more than is recognised as legal by the 6 Geo. 4, c. 129, by which statute also exactly the same right of combination, to the same extent, and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed,—that is a dispute between the masters and the workmen as to the proper amount of wages to be given—it was probably thought by the Legislature that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way, whose pretensions were not founded in reason and justice,—the masters if they offered too little, the workmen if they demanded too much. But unfortunately for themselves and others, those

who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour, if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed, of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence and by threats and intimidation, to compel others, who were perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party; than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right, which beyond all others, the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill, in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow workmen; yet, strange to say, this very right, which the discontented workman claims for himself to the fullest extent, he does, by a blind perversity and unaccountable selfishness entirely refuse to his fellows, who differ in opinion from himself. It is unnecessary to say, that a course of proceeding so entirely unreasonable in itself, so injurious to society, so detrimental to the interests of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment." (1 C. & Mars. 662, 663, note.)

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THE END.

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